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A CONSTITUTIONAL ANALYSIS OF THE COURT'S (LACK OF) DISCRETION IN TERMS OF SECTION 77(6) OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977

by

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TABLE OF CONTENTS

SUMMARY vi

CHAPTER 1: Introduction 1

1.1 Context of the Study 1

1.1.1 Introduction 1

1.1.2 Background of *De Vos NO and Another v Minister of Justice and Constitutional Development and Others* 2015 1 SACR 18 (WCC); *De Vos NO and Others v Minister of Justice and Constitutional Development and Others* 2015 2 SACR 217 (CC) 3

1.2 Purpose of the Study 4

1.3 Methodology 5

1.4 Structure 5

CHAPTER 2: Lack of Judicial Discretion 7

2.1 Introduction 7

2.2 Section 77(6)(a) of the CPA 8

2.3 Evidence Provisos in Section 77(6)(a) of the CPA – Trial of Facts..... 9

2.4 Judicial Discretion 11

2.5 Comparison between Section 77(6) and 78(6) of the CPA 12

2.5.1 The High Court Case of *De Vos* 13

2.5.2 The Constitutional Court Case of *De Vos* 15

2.6 Conclusion 15

CHAPTER 3: Institutionalisation in terms of Section 77(6)(a)(ii) 17

3.1 Introduction 17

3.2 Institutionalisation of an Involuntary Mental Health Care User in terms of the MHCA 18

3.3 Institutionalisation of an Involuntary Mental Health Care User in terms of Section 77(6)(a)(ii) of the CPA 20

3.4 Conclusion 23

CHAPTER 4: The Constitutional Right to Freedom and Security of a Person ... 24

4.1 Introduction 25

4.2 Right to Freedom and Security 26

4.3 Deprivation of Freedom 27

4.3.1 Is Institutionalisation a Deprivation of Freedom? 27
4.3.2 Is Imprisonment a Deprivation of Freedom? 28
4.4 Arbitrary or Without Just Cause 29
4.4.1 Institutionalisation 29
4.4.1.1 Institutionalisation in terms of Section 77(6)(a)(i) 29
4.4.1.2 Institutionalisation in terms of Section 77(6)(a)(ii) 33
4.4.2 Imprisonment in terms of Section 77(6)(a)(i) 34
4.4.2.1 Resource Constraints 36
4.5 Limitation Clause 37
4.6 Conclusion 40
CHAPTER 5: Child Offenders with Mental Illnesses or Mental Defects 43
5.1 Introduction 43
5.2 Process to be Followed for Child Offenders 44
5.3 Process to be Followed for Child Offenders with Mental Illnesses of Mental Defects 45
5.4 Resource Constraints 46
5.5 Limitation Clause 47
5.6 Conclusion 48
CHAPTER 6: Constitutional Remedies 50
6.1 Introduction 50
6.2 Court Findings 50
6.2.1 Section 77(6)(a)(i) 52
6.2.1.1 Institutionalisation 52
6.2.1.2 Imprisonment 53
6.2.2 Section 77(6)(a)(ii) 54
6.2.2.1 Institutionalisation 54
6.2.3 Child Offenders 55
6.3 Conclusion 56

BIBLIOGRAPHY ..... a
7.1 Table of Legislation ..... a
7.1.1 South African Legislation ..... a
7.1.2 International Treaties ..... a
7.2 Table of Case Law ..... b
7.2.1 South African Case Law ..... b
7.2.2 International Case Law c
7.2.3 Foreign Case Law c
7.3 Table of Publications ..... d
7.3.1 Chapters in Loose-leaf Books ..... d
7.3.2 Journal Articles ..... d
7.3.3 Reports and/ or Papers ..... d
7.3.4 Thesis and Dissertations ..... e
7.3.5 Websites ..... e

SUMMARY

Section 77(6)(a) deprives a judicial officer of his or her judicial discretion to consider the accused person's personal circumstances. If an accused person is not fit to stand trial and the court finds that, the accused committed a serious offence as contemplated in section 77(6)(a)(i) of the CPA then the court is obliged, automatically and in every case, to order that the accused to be detained in a psychiatric hospital or prison. If the court finds that the accused committed a less serious offence than one contemplated in subparagraph (i) or that he or she did not committed any offence then the court is obliged, automatically and in every case to, in terms of section 77(6)(a)(ii), order that the accused be institutionalised as an involuntary mental health care user.

In the case of *De Vos No and Another v Minister of Justice and Constitutional Development and Others* 2015 1 SACR 18 (WCC) it was held that this deprivation amounts to the infringement of the constitutional rights of the accused persons, *inter alia*, to equality, dignity, freedom and security of the person as well as certain constitutional rights of children. Griesel J ordered that words be read-in to temporarily remedy this situation. The Constitutional Court did not confirm this order but did confirm that certain aspects of section 77(6) are unconstitutional and need to be addressed.

CHAPTER 1: INTRODUCTION

1.1 CONTEXT OF THE STUDY

1.1.1 INTRODUCTION

1.1.2 BACKGROUND OF *DE VOS NO AND ANOTHER V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS* 2015 1 SACR 18 (WCC); *DE VOS NO AND OTHERS v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS* 2015 2 SACR 217 (CC)

1.2 PURPOSE OF THE STUDY

1.3 METHODOLOGY

1.4 STRUCTURE

1.1 CONTEXT OF THIS STUDY

1.1.1 INTRODUCTION

In the case of *De Vos No and Another v Minister of Justice and Constitutional Development and Others* 2015 1 SACR 18 (WCC) (the High Court case of *De Vos*) Griesel J declared that section 77(6)(a) of the Criminal Procedure Act, 51 of 1977 (CPA) is not permissible with the Constitution of the Republic of South Africa, 1996 (the Constitution) and ordered that words be read-in to temporarily remedy this situation. In the case of *De Vos NO and Others v Minister of Justice and Constitutional Development and Others* 2015 2 SACR 217 (CC) (the Constitutional Court case of *De Vos*) the Constitutional Court did not confirm the High Court's order but did confirm that there were constitutional issues with regards to section 77(6)(a) that needed to be addressed.

Section 77 appears in chapter 13 of the CPA and deals with an accused person's capacity to understand the court proceedings. Section 77(6)(a) is applicable where the accused is suffering from a mental illness or mental defect[1] to the effect that he or she cannot be put on trial. The court is then obliged to order that the accused be detained.

Section 77(6)(a) deprives a judicial officer of his or her judicial discretion by directing a court to detain the accused whom is not fit to stand trial without allowing the court to consider the accused person's personal circumstances. In the High Court case of *De Vos* it was said that this section deprives a judicial officer of his or her judicial discretion by directing a court to detain the accused whom is not fit to stand trial and therefore infringes or threatens to infringe[2] the constitutional rights of the accused persons, *inter alia*, to equality[3], dignity[4], freedom and security of the person[5] as well as certain rights of children[6].[7]

[1] Mental illness is defined in section 1 of the Mental Health Care Act, 17 of 2002 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"*. S Kaliski 'Does the Insanity Defence Lead to an Abuse of Human Rights?' (2012) 15 *African Journal of Psychiatry* 83 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". Down Syndrome South Africa 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.

[2] The words "threaten to infringe" pertains to the issue of ripeness addressed in the case of *De Vos.* It was common cause that in both the Applicants'/accused persons' cases the proceedings in the magistrate's court were incomplete. Griesel J held, *inter alia* that "Where the law threatens constitutional rights, it is not necessary for the applicants to wait until the law has been implemented and the accused person is detained before approaching court." See the High Court case of *De Vos* 29C – 31B.

[3] Sec 9 of the Constitution.

[4] Sec 10 of the Constitution.

[5] Sec 12(1)(a) of the Constitution.

[6] Sec 28(1)(g) and section 28(2) of the Constitution.

[7] This was submitted by the Applicants/accused persons in the case of *De Vos* and accepted by Griesel J.

1.1.2 BACKGROUND OF *DE VOS NO AND ANOTHER V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS* 2015 (1) SACR 18 (WCC); *DE VOS NO AND OTHERS v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS* 2015 2 SACR 217 (CC)

The case of *De Vos* is a consolidation of two applications brought on behalf of two accused persons, Llewellyn Stuurman and Pieter Snyders, respectively, who sought orders declaring section 77(6)(a) of the CPA unconstitutional. Stuurman attacked the constitutionality of section 77(6)(a)(i) and Snyders attacked the constitutionality of section 77(6)(a)(i) and (ii).

Stuurman was charged with murder for allegedly stabbing a 14 year old girl when he, too, was 14 years old in 2005. He was referred by the court *a quo* for observation in terms of section 77(1)[8], 78(2)[9]. The panel of psychiatrists[10] were unanimously of the view that he would be unable to understand basic court proceedings due to the fact that he was severely mentally handicapped after a head injury at the age of five.

Snyders, a thirty-five-year-old man, was arrested and charged with rape of an eleven-year-old girl in 2013. He was referred by the court *a quo* for observation in terms of section 77(1) seeing as he was born with Down Syndrome. The panel unanimously found that Snyders was not fit to stand trial in terms of section 79(4)(c)[11]. The panel further found that Snyders

[8] "*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.*"

[9] "*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.*"

[10] The panel consist of, as listed in sec 79(1)(b), 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, a psychiatrist appointed by the court and who is not in the fulltime service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives issue under subsection (13) by the National Director of Public Prosecutions, a psychiatrist appointed for the accused by the court and a clinical psychologist where the court so directs.

[11] "*The report shall- (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.*"

was not able to appreciate the wrongfulness of the alleged offence and act accordingly in terms of section 79(4)(d).[12]

1.2 PURPOSE OF THE STUDY

The purpose of this study is two-fold. Firstly to examine the process set out in section 77(6)(a) of the CPA with reference to the judgements in the recent High Court and Constitutional Court case of *De Vos* and to determine whether the court's (lack of) judicial discretion amounts to the infringement of the constitutional rights of accused persons with mental illnesses or mental defects.

To reach this purpose the importance of judicial discretion with specific reference to persons with mental illnesses or mental defects must first be considered. The impact that the lack of judicial discretion may have on an accused person with mental illness or mental defect's dignity, the right to freedom and security of a person and the right to equality when compared to other accused persons and/ or child offenders must be determined. It must also be determined whether the lack of judicial discretion is amounting to the infringement on specific constitutional rights of children with regards to, in terms of section 28(2), the court's ability to act in the best interest of the child and, in terms of section 28(1)(g), to only detain the child offender as a manner of last resort and then for the shortest period of time.

With that determined the final purpose of this study will be to, after considering the arguments raised by the Applicants, Respondents and the Amicus Curia in the High Court and Constitutional Court case of *De Vos,* try and find a permanent solution to remedy this situation and prevent this unfair infringement of constitutional rights of accused persons with mental illnesses or mental defects to continue.

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[12] *"The report shall- (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."*

1.3 METHODOLOGY

This study adopts a constitutional approach. The reasons that section 77(6)(a) is inconsistent with the Constitution as argued and addressed in the High Court and Constitutional Court case of *De Vos* will be the framework of this study. The constitutional right to equality, dignity, freedom and security of a person, certain constitutional rights of children as well as the limitation clause as set out in section 36 of the Constitution will be examined. Foreign- and International law will also be considered to give effect to section 39 of the Constitution.

The citation style followed in this study is based on the method used by the *Pretoria University Law Press*. It has been adapted in certain instances: although double quotation marks are used when words or sentences are directly quoted from case law, journals, people in general, etc. the words or sentences will be in italics if it is a direct quote from legislation. As this dissertation deals with a section in the CPA, sections without any reference to an Act should be seen as sections within the CPA. When referring to "mental illness", "mental defect" or "mental disorder" these terms should all be seen as synonyms and inclusive of one another for as far as it relates to accused persons or children unfit to stand trial.

1.4 STRUCTURE

This study consists of six chapters. The chapters following the introduction in Chapter 1 will contain the constitutional issues as raised and addressed in the High Court and Constitutional Court case of *De Vos.*

Chapter 2 will deal with the (lack of) judicial discretion of judicial officers. The reasons for the deprivation of the judicial officer's judicial discretion, as raised and argued in the High Court and Constitutional Court case of *De Vos* will form the focal point of this chapter: the two provisos in section 77(6)(a) relating to the evidence that a court may take into account, the process as prescribed in section 77(6) as well as a comparison thereof with section 78(6) – a

section dealing with accused persons not criminally liable for an act or omission which would otherwise have been punishable as a crime if it was not for his or her mental illness or mental defect.

Chapter 3 will focus on section 77(6)(a)(ii) and consider the prescribed requirements before a mental health care user can be admitted to a health establishment for care, treatment and rehabilitation services without his or her consent on an out-patient or in-patient basis. In terms of section 9(1)(c) and section 32(b) of the Mental Health Care Act, 17 of 2002 (MHCA). A comparison will be drawn between the enquiry prescribed in these sections and the lack of an enquiry in section 77(6)(a)(ii).

In chapter 4 the right to freedom and security of a person as stated in section 12 of the Constitution will form the focal point. It will be considered whether section 77(6)(a) amounts to an infringement of this constitutional right. In this chapter it will also be consider whether other constitutional rights may be infringed upon by section 77(6)(a) such as the right to dignity and equality. Just like in the High Court case and Constitutional Court case of *De Vos* this chapter will examine the possibility of justifying any limitation of any of the rights in the Bill of Rights.

Chapter 5 will deal exclusively with children as accused persons, but more specifically children with mental illnesses or mental defects. This chapter will contain an analysis of the constitutional rights of children, the process to be used when child offenders are accused and the relevant legislation such as the Child Justice Act, 75 of 2008 (CJA). In this chapter the CJA, which is seen to give effect and protect the constitutional rights of children, will be examined as well as the interaction between it and section 77(6) of the CPA.

In chapter 6 the judgement in the High Court and Constitutional Court case of *De Vos* will be used as the starting point. With the background of this case and the constitutional issues discussed throughout the other chapters the two judgements will be compared to each other and analysed. This will be done to determine the most appropriate permanent remedy and/or interim relief.

CHAPTER 2: LACK OF JUDICIAL DISCRETION

2.1 INTRODUCTION
2.2 SECTION 77(6)(a) OF THE CPA
2.3 EVIDENCE PROVISOS IN SECTION 77(6)(a) OF THE CPA – TRIAL OF FACTS
2.4 JUDICIAL DISCRETION
2.5 COMPARISON BETWEEN SECTION 77(6) AND 78(6) OF THE CPA
2.5.1 THE HIGH COURT CASE OF *DE VOS*
2.5.2 THE CONSTITUTIONAL COURT CASE OF *DE VOS*
2.6 CONCLUSION

2.1 INTRODUCTION

In the High Court case of *De Vos,* Griesel J states that section 77(6)(a) deprives a judicial officer of his or her judicial discretion by directing a court to detain the accused whom is not fit to stand trial without allowing the court to consider the accused's personal circumstances.[13] This chapter will focus primarily on that statement, the possible reasoning behind it and the Constitutional Court's judgment with regards to the judicial discretion of a judicial officer.

Chapter 2 will dissect and examine the process prescribed in section 77(6)(a) including the provisos relating to the evidence that a court may take into account. It is important to determine whether judicial discretion is required and/ or the importance of judicial discretion when accepting Griesel J's premises that judicial officers' are deprived of their judicial discretion. This chapter will also deal with Griesel J's comparison between the judicial discretion in terms of section 78(6) – a section dealing with accused persons not criminally liable for an act or omission which would otherwise have been punishable as a crime if it was

[13] The High Court case of *De Vos* 34H.

not for his or her mental illness or mental defect – and the lack of judicial discretion in terms of section 77(6).[14] This statement or comparison will again be compared to the Constitutional Court's finding.

2.2 SECTION 77(6)(a) OF THE CPA

Section 77(6)(a) can be broken down into three stages. During the first stage the court will make a finding with regards to whether an accused is, by virtue of his or her mental condition, capable of understanding the proceedings so as to make a proper defence. This section may become applicable anytime during the court proceedings.[15]

During the second stage the court will determine whether such an accused on a balance of probabilities has committed an offence.[16] It should be noted that when the court determines whether an accused committed an offence or the "*act in question"* it does not carry any connotation of criminal liability and is intended to refer purely to the physical commission of the offence.[17] It would be completely inappropriate for the court to envisage into the nature of the trial or determination in the sense of a verdict or judgment since the person who allegedly committed the act by definition is incapable of understanding the proceedings. Therefore all that appears to be required is for the court to satisfy itself as to what offence, if any, he or she has committed by conducting a "trial of facts"[18].

[14] n 13 above, 24B – 26B.

[15] See sec 77(1) of the CPA.

[16] Sec 77(6)(a) "*… 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 whether the accused has committed the act in question****…"* (Emphasis added).

[17] Du Toit AJ in *S v Sithole* 2005 1 SACR 311 (W) 314G.

[18] A Kruger *Hiemstra's Criminal Procedure* (Service 7, May 2014) 13-8.

During the third stage, if the court finds that the accused committed the act 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, or any other offence involving serious violence, then the court is obliged, automatically and in every case to, in terms of section 77(6)(a)(i) order that the accused be detained in a psychiatric hospital or prison for an indefinite period until otherwise directed by a judge in chambers in terms of section 47 of the MHCA.[19] If the court finds that that the accused committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence then the court is obliged, automatically and in every case, in terms of section 77(6)(a)(ii) to order that the accused 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 MHCA.[20] Chapter 3 will, in addition to this chapter deal exclusively with section 77(6)(a)(ii).

2.3 EVIDENCE PROVISOS IN SECTION 77(6)(a) OF THE CPA – TRAIL OF FACTS

Section 77(6)(a) has two provisos relating to the evidence or information that may be placed before the court to determine whether the accused committed the act in question (stage two). The first proviso states that:

> "[*T]he court may….order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question*."

[19] Any person with stated in sec 47(1) can make an application for discharge of State patients in the prescribed manner stated in sec 47(2). The *curator ad litem* must submit a written report with his or her findings and recommendations to the judge in chambers in terms of sec 47(3). The judge will consider the application with reference to the report and evidence adduced and make an order in terms of sec 49(4) – (6). The judicial officer can order that the patient remain a state patient, be reclassified, be discharged conditionally or unconditionally.

[20] There will be a periodic review and report on the involuntary mental health care user six month after the commencement of care, treatment and rehabilitation purposes and thereafter every 12 months as stated in sec 37(1). The Review Board can decide that the mental health care user be discharged in terms of section 37(5).

According to Du Toit AJ in *S v Sithole*[21] the first proviso assures that the court take the nature of the accused's incapacity and his or her mental illness or mental defect into account. He continues to say that the court must be of the opinion that it is in the accused person's interest that such information be placed before it.[22] Therefore it would seem that this proviso would exclude or tend to exclude and protect the accused from prejudicial information and evidence even where it is highly relevant to a determination or finding.

The second proviso states that the first proviso applies "*unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question*."

The second proviso appears to predict the availability of such proof, or an ability to furnish it, rather than the actual adducing or disclosure thereof to the court.[23] This enables the court to make a finding that the accused committed an act on the strength of a reliability assurance that there is available evidence to justify such a finding on a balance of probabilities. In the case of *S v Sithole,* Du Toit AJ accepted the assurance by the prosecutor, after consulting with the investigating officer, that there was evidence that the accused had committed the acts in question and that a witness was available to testify to such commission.

Du Toit AJ came to the conclusion that these two provisos in effect severely restrict the exercise of the court's discretion to order that information or evidence be placed before it.[24]

[21] n 17 above, 315A - B.

[22] See also Kruger (n 18 above) 13-8: "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."

[23] n 17 above, 315B - D.

[24] n 23 above, 314H - 315G.

Griesel J agreed hereto and further stated that a process that excludes material information cannot be fair as this is contrary to notions of individualised justice.[25]

2.4 JUDICIAL DISCRETION

Taking into account paragraphs 2.2 to 2.3 it is clear as to why Griesel J came to the conclusion that section 77(6)(a) dictates a pre-determined and mandatory outcome and deprives the judicial officer of his or her judicial discretion to consider whether the accused committed the offence and which offence - which does make a difference when it comes to the order the court is obliged to make either in terms of section 77(6)(a)(i) or 77(6)(a)(ii) - with all the relevant evidence before it; whether the accused person continues to be a danger to society; evaluate the individual needs or circumstances of the person; whether other options are more appropriate in the individual circumstances of the accused such as to, in appropriate cases, order the unconditional release, or the release of the person, subject to the conditions as the court may consider appropriate.

The Constitutional Court also determined that section 77(6) was peremptory, with specific reference to the normal meaning of the word "*shall*" in "*the court shall direct*" appearing in section 77(6).[26]

In the Constitutional Court case of *De Vos* the question was posed as to whether it is constitutionally permissible to deny the discretion to a judicial officer in terms of 77(6)(a).[27] The Respondents submitted 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. Chapter 4 will further deal with this question but it is, however, important to already take notice of the following statement:

[25] n 13 above, 35A. See Ngcobo J in *Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) at 268A: "Individualised justice is justice which is appropriate tailored to the needs of the individual case."

[26] The Constitutional Court case of *De Vos* 229G - 230B.

[27] n 26 above, 228A – D.

> "The importance of judicial discretion cannot be gainsaid. Discretion permits judicial officers to take into account the need for tailoring their decisions to the unique facts and circumstances of a particular case. There are many circumstances where the mechanical application of a rule may result in an injustice. What is required is individualised justice, that is, justice which is appropriate tailored to the needs of the individual case. It is only through discretion that the goal of individualised justice can be achieved. Individual justice is essential to the proper administration of justice."[28]

2.5 COMPARISON BETWEEN SECTION 77(6) AND 78(6) OF THE CPA

Section 77 is described as the "now" question: the conditions of the accused persons are considered "now" or at any stage during the proceedings.[29] If it appears to the court at any stage during the proceedings that the accused may be unable to understand the proceedings due to a mental illness or defect, the court must, in terms of section 77(1), direct that the accused be referred for observation in terms of section 79. The conditions of the accused during the time that the offence was committed are not considered.[30]

Section 78 deals with the situation where the accused is found, by reason of mental illness or mental defect, not to be criminally liable for an act or omission which would otherwise have been punishable as a crime. This is a dual question: whether the accused was able to (i) appreciate the wrongfulness of the conduct and (ii) act accordingly.[31] Section 78 is described as the "then" question.[32]

2.5.1 THE HIGH COURT CASE OF *DE VOS*

[28] Ngcobo J in *Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) 267G – 268A.

[29] Kruger (n 18 above) 13-3.

[30] Kruger (n 18 above) 13-3. *S v Mabena* 2007 1 SACR 482 (SCA) 488A - E.

[31] n 30.

[32] Kruger (n 18 above) 13-3.

Griesel J is of the opinion that although these two sections deal with different situations there is a close correlation between them.[33] Section 77(1) to (4) is reproduced verbatim in section 78(2) to (5). Both sections contemplate an enquiry in terms of section 79.[34] In terms of section 79 the qualified medical experts must assess and diagnose the mental condition of the accused and report their findings back to the court. If the experts are unanimous in their findings as to the accused's capacity, and their findings are not contradicted by the prosecutor or the accused, then the court may determine the matter on the basis of their reports without hearing further evidence.[35] Where the findings are not unanimous or, if unanimous but disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence.[36]

Griesel J stated that the absence of a judicial discretion in section 77(6)(a) is accentuated when its provision is compared with the parallel provision of section 78(6). The court in section 78(6) has a fairly wide discretion as to a range of orders that may be made,[37] whereas the court in section 77(6) has no discretion[38].

Therefore the ways in which the court may deal with the accused persons after the section 79 assessment differs even though both sections may be applicable on the same accused. In Snyders' case the panel appointed in terms of section 79 found that he was unable to

[33] n 13 above, 32G – H.

[34] Sec 77(1) and 78(2) of the CPA.

[35] S77(2) and 78(3) of the CPA.

[36] S77(3) and 78(4) of the CPA.

[37] If the accused committed a serious offence as stated in sec 78(6)(i) the accused can be detained in a psychiatric hospital or prison, institutionalised as an involuntary mental health care user, conditionally released or unconditionally released. If the accused committed any other offence he or she may be institutionalised as an involuntary mental health care user, conditionally released or unconditionally released in terms of sec 78(6)(ii).

[38] See para 2.4.

follow the proceedings in terms of section 77(6) and that he was not criminally liable in terms of section 78(6).[39]

If, in Snyders' case he had been dealt with under section 78, the detention would not have been inevitable, because the court would have had a range of options available to it.[40] But because he was unable to follow the proceedings and section 77(6) was applicable to him the court could not consider any of those alternatives stated in section 78(6) and could only act in terms of section 77(6) by ordering the accused to be detained.

Griesel J was unable to find a rational explanation for the difference. He stated that he did not find it "understandable" that a person falling within the ambit of section 77(6)(a)(i) should compulsorily be subject to an order of detention in accordance with section 47 of MHCA.[41] Such an order may give rise to an arbitrary and irrational result, thus amounting to an infringement of a person's constitutional right to freedom and security which includes the right (a) not to be deprived of freedom arbitrarily or without just cause[42].[43] Chapter 4 will deal more specifically with a person's right to freedom and security.

In the High Court case of *De Vos* it was recognised that persons of unsound mind may, in suitable circumstances, be detained involuntarily, but this is invariable done with proper consideration for the rights of the individual and the circumstances of the case.[44] This detainment may be justified either on the ground of the protection of society or for the treatment of the individual patient, or both. But there will be matters where institutionalisation

[39] This was also the position in the case of *S v Sithole* 2005 1 SACR 311 (W).

[40] Set out in sub-section (aa) and (bb).

[41] Unlike in the case of *S v Pedro* 2014 (1) SACR 311 (W). The Respondents did not attempt to explain the difference between sec 77(6) and sec 78(6) or to justify the absence of a similar judicial discretion in sec 77(6) as in sec 78(6).

[42] Sec 12(1)(a) of the Constitution.

[43] This was submitted by the Applicants/accused persons and accepted by Griesel J in the High Court case of *De Vos.*

[44] Griesel J referred to the wealth of international and foreign law to which the parties referred to in their heads of arguments.

is not invariably required or indeed appropriate. Section 77(6)(a) deprives the judicial officer of his or her discretion to consider the accused's circumstances and consider whether the institutionalisation is indeed required or appropriate.

2.5.2 THE CONSTITUTIONAL COURT CASE OF *DE VOS*

The Constitutional Court held that the distinction made between the options provided for under section 77(6)(a)(i) on the one hand, and section 78(6) on the other hand, is not irrational and can be understood as these sections deal with different enquiries, have different purposes and possible outcomes.[45] To strengthen this argument the Constitutional Court gave an example of an accused, dealt with in terms of section 78(6), whom may have no mental illness or mental defect at the time of the court proceedings. In such a case hospitalisation would be patently irrational.

2.6 CONCLUSION

In the High Court case of *De Vos* Griesel J declared that section 77(6) deprives the court of its judicial discretion by dictating to the court the order it has to make in terms of section 77(6)(a)(i) and section 77(6)(a)(ii). The Constitutional Court agreed and found that the section was in fact peremptory. This posed the question of whether judicial discretion is in fact important and necessary.

Griesel J intended on emphasizing the irrational deprivation of a court's judicial discretion in terms of section 77(6) by comparing it to section 78(6), which gives a court judicial discretion. Griesel J took into account that both sections appear in chapter 13, deal with accused persons with possible mental illnesses and both sections may be applicable to the same accused. The Constitutional Court in the case of *De Vos* held that section 77(6)(a)(i) and section 78(6) deal with different situations and purposes and cannot be compared to one another. The Constitutional Court, however, did not elaborate on what the different purposes are.

[45] n 26 above, 236F – G.

The Constitutional Court also made no mention of the situation where the two sections are applicable to the same accused. This can only mean that in addition to finding that the difference in the two section are rational, when both sections are applicable on the same accused it is found rational that the accused be detained as required in section 77(6) without providing the court with judicial discretion.

The Constitutional Court also made no mention of section 77(6)(a)(ii) - which also dictates to the court the order it has to make when dealing with persons not fit to stand trial but accused of committing a less serious offence or no offence – with regards to the comparison Griesel J made. It would appear as if the Constitutional Court, without directly stating so, partially agrees with Griesel J in that the difference between section 77(6)(a)(ii) and section 78(6) is irrational. This corresponds with order made by the Constitutional Court case of *De Vos.* It was ordered that section 77(6)(a)(ii) be amended to read similar to section 78(6) to provide for the same judicial discretion.

CHAPTER 3: INSTITUTIONALISATION IN TERMS OF SECTION 77(6)(a)(ii)

3.1 INTRODUCTION
3.2 INSTITUTIONALISATION OF AN INVOLUNTARY MENTAL HEALTH CARE USER IN TERMS OF THE MHCA
3.3 INSTITUTIONALISATION OF AN INVOLUNTARY MENTAL HEALTH CARE USER IN TERMS OF SECTION 77(6)(a)(ii) OF THE CPA
3.4 CONCLUSION

3.1 INTRODUCTION

Section 77(6)(a)(ii) is applicable when an accused person is found to have committed a less serious offence than one listed in section 77(6)(a)(i)[46] or even where he or she has not committed any offence. This subsection dictates that the court must order that the accused be admitted to and detained in an institution stated in the order as if he or she was an involuntary mental health care user contemplated in section 37 of the MHCA.

Chapter 2 already broadly dealt with the issue regarding the lack of judicial discretion in section 77(6)(a), which includes section 77(6)(a)(ii). Chapter 3 intends on delving deeper and dealing with section 77(6)(a)(ii) more specifically and discussing further issues in addition to those referred to in chapter 2.

[46]A charge of murder, culpable homicide, 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.

Section 1, 9(1)(c) and 32(b) of the MHCA provide for certain requirements to be met before a person may be admitted and detained as an involuntary mental health care user – demanding an enquiry. Chapter 3 will draw a comparison between the enquiry prescribed in terms of MHCA and the lack of an enquiry in terms of section 77(6)(a)(ii).

3.2 INSTITUTIONALISATION OF AN INVOLUNTARY MENTAL HEALTH CARE USER IN TERMS OF THE MHCA

In terms of the MHCA a mental health care user can only be institutionalised if he or she consents to it,[47] if it is authorised by a court order or Review Board,[48] or on an involuntary basis[49].

Section 1 of the MHCA defines an involuntary mental health care user as *a "person receiving involuntary care, treatment and rehabilitation".* Involuntary care, treatment and rehabilitation is again defined to mean:

> "[*T]he provision of health interventions to people incapable of making informed decisions due to their mental health status and who refuse health intervention but require such services for their own protection or for the protection of others…"*[50]

The Constitutional Court referred to and compared the requirements to be met before a person may be admitted as an involuntary mental health care user as set out in section 9 of the MHCA to the lack of requirements as set out in section 77(6)(a)(ii).[51] Section 9(1)(c) of the MHCA states that a person with mental illness can only be committed involuntarily if:

[47] Sec 9(1)(a) of the MHCA.

[48] Sec 9(1)(b) of the MHCA.

[49] Sec 9(1)(c) of the MHCA.

[50] This definition corresponds with sec 32(c) of the MHCA.

[51] n 26 above, 241C – F.

"… [A]ny 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."

Section 32(b) of the MHCA also prescribes requirements before a mental health care user may be admitted to a health establishment for care, treatment and rehabilitation services without his or her consent on an out- or inpatient basis. In the High Court case of *De Vos* the requirements as set out in this section were compared to the lack of requirements as set out in section 77(6)(a)(ii).[52] Section 32(b) of the MHCA requires that, to be established at the time of making the application:

"(b) that there is reasonable belief that the mental health care user has a mental illness of such a nature that-

(i) the user is likely to inflict serious harm to himself or herself or others; or

(ii) care, treatment and rehabilitation of the user is necessary for the protection of the financial interest or reputation of the user"

Taking into account the section 1 definition, section 9(1)(c) and section 32(b) of the MHCA it seems as if the definition in section 1 provides for a broad overall requirement of "*protection"* to be met before a person can be admitted to and detained as an involuntary mental health care user. Section 9(1)(c) and section 32(b) of the MHCA dissect this definition to provide more specific requirements. Section 9(1)(c) and section 32(b) of the MHCA should be read together to determine whether a person may be admitted to and detained as an involuntary mental health care user in terms of the MHCA:

1. If a person is likely to inflict irreversible harm to him- or herself or cause his or her own death;[53] or

[52] n 13 above, 32F – 33B.

[53] Sec 9(1)(c)(i) of the MHCA.

2. if a person is likely to inflict serious harm to him- or herself or to others;[54] or
3. if a person is likely to cause damage to or loss of property belonging to him- or herself or others;[55] or
4. if the care, treatment and rehabilitation of the user is necessary for the protection of the financial interest or reputation of the user;[56]

he or she should be detained.

Therefore if an accused committed a less serious offence than contemplated in section 77(6)(a)(i) or no offence at all and there is no reason to suspect that he will cause his own death or irreversible harm, inflict serious harm to him- or herself or others, damage his or her property or needs to receive care, treatment and rehabilitation to protect his or her financial interest or reputation, institutionalisation cannot follow in terms of the MHCA.

3.3 INSTITUTIONALISATION OF AN INVOLUNTARY MENTAL HEALTH CARE USER IN TERMS OF SECTION 77(6)(a)(ii) OF THE CPA

Section 77(6)(a)(ii) follows a different approach than section 9(1)(c) and section 32(b) of the MHCA with regards to the admission requirements. The requirements of section 9(1)(c) and section 32(b) demand an enquiry into the nature of the mental illness of the user before a person can be detained as an involuntary mental health care user. This detainment can be justified either on the ground of the protection of society or for the treatment of the individual patient, or both. There will, however, be matters where institutionalisation is not invariably required or indeed appropriate.

Griesel J found that no similar enquiry is required before a court must order that an accused person be admitted and detained as an involuntary mental health care user in terms of

[54] Sec 9(1)(c)(ii) and sec 32(b)(i) of the MHCA.

[55] Sec 9(1)(c)(iii) of the MHCA.

[56] Sec 32(b)(ii) of the MHCA.

section 77(6)(a)(ii).[57] Section 77(6)(a) does not provide the judicial officer with the discretion to consider the accused's individual circumstances and consider whether the institutionalisation is indeed required or appropriate.[58]

None of the admission requirements or prerequisites in terms of the MHCA is applicable with regards to an accused dealt with in terms of section 77(6)(a)(ii). An accused must be detained in terms of section 77(6)(a)(ii) even when it is apparent that he or she does not have a mental illness as required in section 32(b) of the MHCA. In the High Court case of *De Vos,* Griesel J referred to and used the example of an accused person who is intellectually disabled due to causes other than mental illness.[59]

Section 77(6)(a)(ii) also does not provide a judicial officer with the discretion to determine whether an accused is a danger to society or him- or herself,[60] as also required in terms of section 9(1)(c) and section 32(b)(i) in the MHCA. The court will simply be obliged to, in terms of section 77(6)(a)(ii) institutionalise the accused person. It would seem as if it is assumed that every person that comes into contact with the criminal procedure system as an accused is a danger to him- or herself or society. This is definitely not the case and should not be treated as if.

> "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."[61]

[57] n 13 above, 32H – I.

[58] n 26 above, 226A – C.

[59] n 13 above, 33A – B.

[60] n 13 above, 33A – B.

[61] n 26 above, 241G – 242A.

It would appear that the possibility will still exist for such accused persons to be reviewed within six months and discharged as stated in section 37 of the MHCA,[62] as referred to in section 77(6)(a)(ii).

Section 77(6)(a)(ii) requires that an accused person must be detained even when the accused's mental condition cannot be treated and/ or his or her condition will not improve. In the High Court case of *De Vos* the one accused, Stuurman was severely mentally handicapped after a head injury at the age of five and had no chance of improving. The other accused, Snyman was born with Down Syndrome. This begs the question of whether such accused persons, when being reviewed in terms of section 37 of the MHCA will ever have the possibility of being discharged. The panel of psychiatrists in Stuurman's case raised similar concerns and stated that:

> "[t]he court should be advised that consequently to declare him a state patient [as contemplated by s77(6)(a)(i)] will consign him to indefinite institutionalisation as his cognition will never improve. Unless there are other reports of inappropriate behaviour committed by him in the community this may not be a fair or appropriate disposal."[63]

It should be noted that although this concern was raised with regards to section 77(6)(a)(i) it will also be applicable to accused persons in terms of section 77(6)(a)(ii). Indefinitely institutionalising an accused person who committed a less serious offence or none at all in terms of section 77(6)(a)(ii) might be an even bigger concern which will be further dealt with in chapter 5.

Griesel J also noted that even though section 32 makes provision for treatments as in- and outpatients, section 77(6)(a)(ii) makes no provision for treatments as an outpatient.[64]

[62] This section correspondence with sec 46 of the MHCA.

[63] n 13 above, 28I – J.

[64] n 13 above, 33A.

3.4 CONCLUSION

To institutionalise a person without his or her consent as an involuntary mental health care user in terms of the MHCA certain requirements need to be met. The section 1 definition, section 9(1)(c) and section 32(b) of the MHCA provide for admission requirements and should be read together to determine whether a person should be detained as an involuntary mental health care user. If a person is likely to inflict irreversible harm to him- or herself or cause his or her own death; or if a person is likely to inflict serious harm to him- or herself or to others; or if a person is likely to cause damage to or loss of property belonging to him- or herself or others; or if the care, treatment and rehabilitation of the user is necessary for the protection of the financial interest or reputation of the user, he or she should be detained.

Section 77(6)(a)(ii) dictates a pre-determined and mandatory outcome and deprives the judicial officer of his or her judicial discretion to consider any of the requirements in terms of the MHCA or the accused person's individual circumstances and to consider whether it would be appropriate to admit and detain an accused as an involuntary mental health care user. The court is also not provided with the discretion to consider whether the accused should be admitted as an in- or outpatient as provided for in the MHCA. A court is obliged to involuntarily institutionalise an accused as an inpatient if he or she is not fit to stand trial and committed a less serious offence than one stated in section 77(6)(a)(i) or no offence at all. Such accused persons are not awarded the same safeguards in terms of the MHCA and are therefore more readily institutionalised under the CPA.

Such accused persons will still be reviewed within six months and may be discharged as stated in section 37 of the MHCA. This is not the case for all of the accused persons institutionalised in terms of section 77(6)(a)(ii). Section 77(6)(a)(ii) requires that an accused person must be detained even when the accused's mental condition cannot be treated and/ or his or her condition will not improve. Such accused persons will still be reviewed within six months but will most likely not be discharged and indefinitely institutionalised.

CHAPTER 4: THE CONSTITUTIONAL RIGHT TO FREEDOM AND SECURITY OF A PERSON

4.1 INTRODUCTION

4.2 RIGHT TO FREEDOM AND SECURITY

4.3 DEPRIVATION OF FREEDOM

4.3.1 IS INSTITUTIONALISATION A DEPRIVATION OF FREEDOM?

4.3.2 IS IMPRISONMENT A DEPRIVATION OF FREEDOM?

4.4 ARBITRARY OR WITHOUT JUST CAUSE

4.4.1 INSTITUTIONALISATION

4.4.1.1 INSTITUTIONALISATION IN TERMS OF SECTION 77(6)(a)(i)

4.4.1.2 INSTITUTIONALISATION IN TERMS OF SECTION 77(6)(a)(ii)

4.4.2 IMPRISONMENT IN TERMS OF SECTION 77(6)(a)(i)

4.4.2.1 RESOURCE CONSTRAINTS

4.5 LIMITATION CLAUSE

4.6 CONCLUSION

4.1 INTRODUCTION

In the High Court case of *De Vos* it was held that section 77(6)(a) infringe or threaten to infringe[65] the constitutional rights of the accused persons, *inter alia*, to equality,[66] dignity,[67] freedom and security of the person[68] as well as certain rights of children[69].[70] Chapter 5 will deal specifically with the rights of children and the right to equality. In this chapter the right to freedom and security of a person in terms of section 12 of the Constitution will form the focal point.

To establish whether section 77(6)(a) amounts to an infringement of section 12 of the Constitution it must first be determined whether there was a deprivation of freedom. Section 77(6)(a) empowers a court to make an order of institutionalisation or imprisonment. Therefore institutionalisation and imprisonment will be separately analysed as they may have different effects on an accused person's right to freedom and security.

Only when the deprivation is arbitrary or without just cause will it be an infringement of section 12 of the Constitution. Imprisonment and Institutionalisation will again be separately analysed. Furthermore a court is empowered to make an order of institutionalisation in terms of section 77(6)(a)(i) and section 77(6)(a)(ii). Seeing as these two sections deal with different accused persons with regards to the offences committed, institutionalisation will be divided to separately analysed section 77(6)(a)(i) and section 77(6)(a)(ii).

[65] n 13 above, 29C – 31B.

[66] Sec 9 of the Constitution.

[67] Sec 10 of the Constitution.

[68] Sec 12(1)(a) of the Constitution.

[69] Sec 28(1)(g) and section 28(2) of the Constitution.

[70] n 13 above, 31C – D.

South Africa is a developing country making it important to take cognisance of possible practical issues. In this chapter the effect resource constraints may have on the accused person's right to freedom will also be examined.

Just like in the High Court case and Constitutional Court case of *De Vos* this chapter will examine the possibility of justifying any limitation to the right of freedom by using section 36 of the Constitution.

4.2 RIGHT TO FREEDOM AND SECURITY

In terms of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), persons with mental illnesses or intellectual disabilities may not be removed from society merely because they have a mental illness or intellectual disability and should be afforded the same protections as other persons.[71] This corresponds with section 9 of the Constitution stating that everyone is equal before the law and has the right to equal protection and benefit of the law. Article 14 of the UNCRPD states that "*the existence of a disability shall in no case justify a deprivation of liberty.*"[72]

[71] n 26 above, 234A – B. The UNCRPD reiterates and reinforces the constitutional obligation to ensure that the rights and freedoms of persons with disabilities are promoted. See Article 4(1) of the UNCRPD.

[72] *Art 14(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.

(emphasis added)

Although the UNCRPD[73] has not been enacted into our law in terms of section 231(4) of the Constitution, section 39(1)(b) of the Constitution still requires a court to consider international law when interpreting the Bill of Rights.[74]

In addition thereto South Africa dictates that each and every person is provided with the right to freedom and security[75] as codified in section 12(1)(a) of the Constitution which is similar to article 14 of the UNCRPD and read as follows:

> *"Everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause."*

Section 77(6)(a) provides for the institutionalisation or imprisonment of an accused person without first determining his or her guilt by a court of law. Therefore according to the Constitutional Court case of *De Vos* such accused persons require the protections guaranteed by section 12 of the Constitution.[76]

4.3 DEPRIVATION OF FREEDOM

4.3.1 IS INSTITUTIONALISATION A DEPRIVATION OF FREEDOM?

Elsje Bonthuys stated the following with regards to institutionalisation:

[73] The United Nations Convention and its Optional Protocol were ratified by Parliament on 30 March 2007.

[74] n 26 above, 232G. See *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC) 376B – D..

[75] See Woolman, S & Bishop, M *Constitutional Law of South Africa* (Original service, April 2014) 40 – 3: "*Freedom*" primarily refers to a person's physical liberty. Also see *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) 1036F: According to Chaskalson P the "*right to freedom and security of the person*" does not constitute a *numerus clausus*.

[76] n 26 above, 230B – C.

> "Confirming a person to a mental health institution results in a serious curtailment of [his or] her civil liabilities. The patient loses [his or] her privacy, [his or] her ability to decide issues of daily routine and [his or] her ability to move about freely, sometimes even to the extent of being physically restrained."[77]

In 2004 the European Court of Human Rights came to a similar conclusion in the case of *H.L. v The United Kingdom*, No 45508/99 ECHR 2004. The Constitutional Court referred hereto and accepted the finding that institutionalisation constitutes deprivation because "the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements"[78].[79]

4.3.2 IS IMPRISONMENT A DEPRIVATION OF FREEDOM?

In terms of section 77(6)(a)(i) a court is also empowered to order that an accused person be imprisoned. It was held that imprisonment is even more far-reaching than detaining the accused in a mental health care institution. It should be noted that such accused person admitted and detained in a mental health care institution may (more readily) have the opportunity to be discharged as explained in chapter 3, than an accused person detained in a prison.[80]

4.4 ARBITRARY OR WITHOUT JUST CAUSE

[77] E Bonthuys 'Involuntary Civil Commitment and the new Mental Health Bill' (2001) 118 *South African Law Journal* 667 671.

[78] *H.L. v The United Kingdom*, No 45508/99 ECHR 2004 para 91.

[79] n 26 above, 230F – G.

[80] n 13 above, 32B. In the case of *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 6 SA 1 (CC) 21C the Court held that a person's freedom is limited when he or she is arrested and detained.

Only when such deprivation, as referred to in paragraph 4.3.1 and 4.3.2, is "*arbitrary*" or "*without just cause*" [81] will it be an infringement of section 12 of the Constitution.

To determine whether the deprivation of freedom was arbitrary or without just cause Ackermann J provided for a two-stage enquiry.[82] Firstly, it should be determined whether there is a rational connection between the deprivation and the purpose thereof. If there is no rational connection, freedom was denied which amounts to the infringement of the constitutional right. Secondly, if there was a rational connection, the purpose, reason or cause for the deprivation must be a just one. O'Regan J held that both of the aspects need to be met before any limitation of freedom will be constitutionally permissible.[83]

4.4.1 INSTITUTIONALISATION

Both section 77(6)(a)(i) and section 77(6)(a)(ii) empowers a court to order that an accused person be admitted and detained in a mental health care institution.

4.4.1.1 INSTITUTIONALISATION IN TERMS OF SECTION 77(6)(a)(i)

In an attempt to provide the High Court with a rational connection between the deprivation and the purpose thereof the Department of Public Protection argued that the drafters of the

[81] The courts have not pinned down what constitutes "just cause" in all cases. In the case of *De Lange v Smuts NO* 1998 3 SA 785 (CC) 779E the court held: "[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"…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."

[82] *De Lange v Smuts NO* 1998 3 SA 785 (CC) 797B – D. The High Court case of *De Vos* 33D and the Constitutional Court case of *De Vos* 232A – C accepted this enquiry. Also see *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC) 815D - E; *Nel v Le Roux NO and Others* 1996 3 SA 562 (CC) 572C – F; S v Coetzee and Others 1997 3 SA 527 (CC) 591G – J.

[83] *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC) 815D – E. See the Constitutional Court case of De Vos 232D – E. Also see *Nel v Le Roux NO and Others* 1996 3 SA 562 (CC) 572C – F; S v Coetzee and Others 1997 3 SA 527 (CC) 591G – J.

MHCA were "painfully aware" of the balancing act between the rights of an accused person and the rights of the broader community.[84] The Respondents further argued, and the Constitutional Court accepted that an accused person with a mental illness, who is found to have committed a serious or violent act, poses a potential danger to him- or herself and/ or the community and needs to be "deprived of freedom" and placed in a system to care, treat and rehabilitate such persons as well as to protect the interests of the broader public.[85] Such accused persons will still have the chance to be discharged in terms of section 47 of the MHCA.[86]

This being the rational connection between the deprivation and purpose thereof we can move to stage two of Ackermann J's two-stage enquiry. The reason for the deprivation, still including the protection of the accused person and the community should be to re-integrate such an accused into the community. This reasoning can be found in the wording of section 8(2) of the MHCA which read as follows:

> *"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."*

The Constitutional Court further held that section 77(6)(a)(i) met all the requirements as set out by the European Court of Human Rights (the ECHR).[87] The ECHR held that a person with mental illness or intellectual disabilities may not be deprived of freedom unless:

> "(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

[84] n 13 above, 34A – D and n 26 above, 235A and 235E – F.

[85] n 26 above, 235B - D.

[86] See chapter 2 and 3.

[87] n 26 above, 236B – F.

(c) the validity of the continued confinement depends on the persistence of the "disorder"."[88]

The first requirement as set out by the ECHR is met by section 77(6)(a)(i) which provides for an extensive evaluation by medical experts in terms of section 79 of the CPA.[89]

With regards to the second requirement as set out by the ECHR the Constitutional Court held that only once the accused person is found to be unable to follow the court proceedings due to his or her mental defect or mental illness and he or she is also found to have committed a serious offence may he or she be admitted to and detained in a mental health care institution.[90] This, however, does not necessarily meet the second requirement as it only refers to the "degree" of the offence committed and not the degree of mental defect or mental illness.

Griesel J held that not every person with a mental illness or mental defect is a danger to society or requires to be detained in an institution as there are various degrees of mental illness and various types of mental disabilities, and institutionalisation is not invariably required or indeed appropriate.[91] But, as already stated in chapter 2 and 3, section 77(6)(a) does not require, or even permit, the court to enquire into *inter alia* the degree of mental illness or mental defect. Although medical experts are required to assess the accused person's mental capacity in terms of section 79, they are not required to provide the court with their expert opinion with regards to *inter alia* the degree of the mental illness or mental defect of the accused.[92]

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

[89] n 26 above, 236D –F.

[90] n 26 above, 236D –F.

[91] n 13 above, 34F and n 26 above, 241G. Also see chapter 2.

[92] The panel in Snyders' matter did however expressed concerns. See chapter 3, para 3.3.

Lanner CJ in the Supreme Court of Canada condemned the lack of judicial discretion in a similar situation with regards to persons with mental illnesses or mental defects.[93]

> "The detention order is automatic, without any rational standard for determining which individual insanity acquittees should be detained and which should be released…The duty of the trail judge to detain is unqualified by any standards whatsoever. **I cannot imagine a detention order on a more arbitrary basis.**
>
> [i]t is the absence of discretion which would, in many cases, **render arbitrary the law's application**…" (Emphasis added)

With regards to the third requirement as set out by the ECHR the Constitutional Court held that any admission into a hospital will subsist no longer than is necessary.[94] The Constitutional Court also referred to circumstances in which a judicial officer may order the particular case to be dealt with expeditiously and require that the discharge application in terms of section 47 of the MHCA be brought before a judge in chambers within a particular time frame. This will only be done in exceptional circumstances where the judicial officer is of the view that a person who has been found to have committed a serious offence on a balance of probabilities, is not necessarily a threat to society.[95]

The Constitutional Court, however, made no mention of the situation where accused persons with mental disabilities or mental defects are of such a nature that they may never improve and will most probably be indefinitely institutionalised.[96]

The Constitutional Court, in this regard, came to a different conclusion than the High Court and held that hospitalisation in terms of section 77(6)(a)(i) is a precautionary measure and

[93] *R v Swain* 1991 1 SCR 993.

[94] n 26 above, 236D –F.

[95] This may be requested by the legal representative on behalf of the family or the Department of Public Prosecution as official *curator ad litem*.

[96] See chapter 3, para 3.3.

constitutionally permissible[97] while the High Court held that hospitalisation in terms of the whole of section 77(6)(a) was arbitrary and without just cause.[98]

4.4.1.2 INSTITUTIONALISATION IN TERMS OF SECTION 77(6)(a)(ii)

The Constitution Court in the case of *De Vos* rightly stated that the deprivation of freedom by ordering an accused in terms on section 77(6)(a)(ii) to be institutionalised happens regardless of whether the accused committed an offence or not.[99] All that seems to be required is for the medical examiners in terms of section 79 to declare the accused dealt with in section 77(6)(a)(ii) not fit to stand trial. Therefore the "trial of facts"[100] - to determine whether the accused committed an offence as stated in section 77(6)(a)(ii) or none at all - as far as it relates to the deprivation of freedom, is redundant and cannot be used to justify the deprivation.

If the person has been found to have committed no offence, the Constitutional Court held that an accused cannot, for the mere fact of coming into contact with the criminal justice system, alone justify institutionalisation.[101] If that is the case the only conclusion to draw is that the accused person in terms of section 77(6)(a)(ii) is being institutionalised because of his or her mental illness or intellectual disability. If this is the case, section 77(6)(a)(ii) infringes more than just the accused person's right to freedom.[102]

There is no ration connection between these automatic deprivations of an accused person's freedom in terms of this subsection and the objective behind the detention. It would therefore not be necessary to continue to the second stage of Ackermann J's two-stage enquiry to

[97] n 26 above, 236D –F.

[98] n 13 above, 36A.

[99] n 26 above, 242E – F.

[100] See chapter 2, para 2.3.

[101] n 26 above, 243B – C.

[102] See para 4.4.2. n 26 above, 242B – D.

determine whether section 77(6)(a)(ii) amounts to an arbitrary deprivation of freedom.[103] Therefore it is understandable that the Constitutional Court, in this regard, agreed with the High Court and held that section 77(6)(a)(ii) is constitutionally invalid.[104]

It is important to note that the Constitutional Court also held that it may in certain circumstances be necessary to institutionalise some accused persons dealt with in terms of section 77(6)(a)(ii). [105] Therefore a judicial officer cannot be deprived of his or her judicial discretion.

4.4.2 IMPRISONMENT IN TERMS OF SECTION 77(6)(a)(i)

The fact that imprisonment is determined to be even more far-reaching than admitting and detaining a person in a mental health care institution[106] and the fact that Griesel J already found an order for institutionalisation or hospitalisation in terms of section 77(6)(a)(i) and section 77(6)(a)(ii) to be arbitrary and without just cause[107] made it unnecessary for Griesel J to also separately analyse the deprivation of freedom by an order of imprisonment. It is therefore understandable that Griesel J merely applied what was already determined by him and found that an order amounting to either imprisonment or hospitalisation in terms of section 77(6)(a) will give rise to an arbitrary and irrational result, thus amounting to an infringement of the accused person's constitutional right to freedom and security.[108] However, the Constitutional Court separately analysed the order of imprisonment in terms of section 77(6)(a)(i).

[103] See para 4.4.

[104] n 13 above, 36A and n 26 above, 242E - 243C.

[105] n 26 above, 242E – 243A.

[106] See para 4.3.2.

[107] See para 4.4.1.1 and 4.4.1.2.

[108] n 13 above, 36A.

The Constitutional Court held that the purpose of imprisonment in terms of section 77(6)(a)(i) cannot be to punish the accused.[109] That would be inappropriate seeing as such and accused has not been convicted and might never be.[110]

In an attempt to provide the Constitutional Court with a rational connection between the deprivation of such an accused person's freedom, amongst other rights, and the purpose thereof – keeping to Ackermann J's two-stage enquiry[111] - the Respondent's argued that the objective of imprisonment in these circumstances were to facilitate therapeutic remedies.[112]

The Cape Mental Health held that the reasons provided to justify this deprivation did not constitute just cause.[113] A person need not be imprisoned to get assistance in care, treatment and rehabilitation. Admitting and detaining such an accused in a mental health care institution will also provide assistance. The Cape Mental Health further held that imprisonment, as oppose to institutionalisation in these circumstances always violates a person's right not to be subjected to cruel, inhuman or degrading punishment.[114]

> "[A]ccused persons with mental illnesses or intellectual disabilities have been historically disadvantaged and unfairly discriminated against. The use of prisons 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

[109] n 26 above, 237D – E.

[110] Sec 77(6)(a) to sec 77(6)(b).

[111] See para 4.4.

[112] n 26 above, 237E – F.

[113] n 26 above, 237C – D.

[114] n 26 above, 237C – D.

> impairs the human dignity of persons with mental illnesses or intellectual disabilities."[115]

The Constitutional Court therefore came to the conclusion that accused persons with mental illnesses or mental defects may only be imprisoned if such accused is likely to cause serious harm to him- or herself or the community.[116] The purpose of imprisonment in these circumstances will be to "serve important public objectives" [117] by protecting the community from such accused persons.

It should be noted that this purpose can also be achieved by admitting and detaining such an accused person in a mental health care institution which is less of a deprivation of freedom and more dignified. Imprisonment should only be seen as a last resort.

4.4.2.1 RESOURCE CONSTRAINTS

The Constitutional Court also considered whether limited resources at mental health care institutions might justify the imprisonment of accused persons with mental illnesses or mental defects.[118]

Section 12 of the Constitution has no internal limitation clause which provides any court to take cognisance of resource constraints with regards to the mental health care institution.[119]

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[115] n 26 above, 238D – F. Also see sec 7 of the Constitution wherein the obligated to promote the right to equality, especially the rights of persons previously disadvantaged by past practices. This includes persons with disabilities. In *Hoffmann v South African Airways* 2001 1 SA 1 (CC) 19E – 20A, 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 equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly."

[116] n 26 above, 238G and 243I.

[117] n 26 above, 237D – E.

[118] n 26 above, 238B.

The state is merely obliged to provide each and every person with the right to freedom and security. Therefore the Constitutional Court came to the conclusion that if an accused is imprisoned only because of a restraint on resources, section 77(6)(a)(i) is not constitutionally permissible.[120]

Even if section 12 of the Constitution had an internal limitation clause imprisonment would still not be justified. Even though prisons are required to provide psychological services to detainees with mental illnesses or intellectual disabilities[121] the prisons do not have the facilities to provide for care, treatment and rehabilitation to all the persons who require it.[122] Without such specialized assistance the accused person will most probably never be able to be re-integrated into the community and runs the risk of being deprived of his or her freedom longer than he or she should have been required.

4.5 LIMITATION CLAUSE

Even when a right in the Bill of Rights, such as section 12 of the Constitution is limited by another law, such as section 77(6)(a) it may still be justified in terms of section 36 of the Constitution (the limitation clause). Any right in the Bill of Rights may only be limited by another law if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[123]

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[119] n 26 above, 238B – C.

[120] n 26 above, 243I.

[121] Sec 16 read with sec 38 and sec 49D of the Correctional Services Act, 111 of 1998.

[122] n 26 above, 237F -238C. Also see the Department of Correctional Services' 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. Also see ML Muntingh 'An Analytical Study of South African Prison Reform After 1994' PhD Thesis, University of the Western Cape, 2011 375-6. Also see www.dcs.gov.za/Services/PsychologicalServices.aspx.

[123] Sec 36(1) of the Constitution.

One of the factors to be taken into account is the nature of the right that is being limited.[124] With regards to the right of freedom and security of a person, Ackermann J stated the following:

> "It is also correct that in the past there has been much unwarranted deprivation of physical freedom in order to achieve particular social and political goals. This all emphasises the great importance to be attached to physical freedom…"[125]

Other factors to be taken into account include the importance of the purpose of the limitation,[126] the nature and extent of the limitation[127] and the relationship between the limitation and its purpose[128]. The arguments considered and conclusion reached with regards to whether the deprivation of freedom in terms of section 77(6)(a) is arbitrary or without just cause already dealt with these factors, albeit not specifically referred to as factors it fell within the two-stage enquiry in paragraph 4.4.

Another factor to be taken into account is whether there are less restrictive means available to achieve the purpose.[129] In the High Court case of *De Vos,* Griesel J stated that in terms of section 77(6)(a)(i) a less restrictive option is to award a court the same judicial discretion as enjoyed by courts in terms of section 78(6)(i). The Constitutional Court however differed from Griesel J in this regard.[130]

According to Ackermann J our courts emphasize that imprisonment should only be resorted to after other appropriate forms of punishment have been considered and excluded.[131] Thus

[124] Sec 36(1)(a) of the Constitution.

[125] *De Lange v Smuts NO* 1998 3 SA 785 (CC) 793A.

[126] Sec 36(1)(b) of the Constitution.

[127] Sec 36(1)(c) of the Constitution.

[128] Sec 36(1)(d) of the Constitution.

[129] Sec 36(1)(e) of the Constitution.

[130] The Constitutional Court of *De Vos* 236F – G and 243G. Also see chapter 2, para 2.5.

[131] *De Lange v Smuts NO* 1998 3 SA (CC) 793A.

it can be noted that although the Constitutional Court found imprisonment to be constitutionally permissible in circumstances where accused persons in terms of section 77(6)(a)(i) will necessarily cause serious harm to him- or herself or the community a less restrictive measure will be to admit and detain such an accused in a mental health care institution.

Griesel J also held that a less restrictive alternative in terms of section 77(6)(a)(ii) would be to utilise the admission requirements in terms of section 32 of MHCA instead of automatically and in every case order the accused to be admitted and detained as an involuntary mental health care user.[132] With reference to the Constitutional Court we can add the requirements as set out in section 9 of the MHCA as well.[133]

Therefore the High Court[134] and Constitutional Court[135] in the case of *De Vos* came to the conclusion that the limitation of section 12 of the Constitution, by section 77(6)(a) could be saved by the limitation clause.

4.6 CONCLUSION

Both section 77(6)(a)(i) and section 77(6)(a)(ii) empowers a court to order that an accused person be admitted and detained in a mental health care institution. This was found to be a deprivation of the accused person's freedom. Imprisonment in terms of section 77(6)(a)(i) was found to be even more far-reaching. It is however not enough to determine that the right has been limited, in terms of section 12 of the Constitution it must also be determined that it was done arbitrary or without just cause before it can amount to an infringement of the accused person's right of freedom.

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[132] n 13 above, 38G – H.

[133] See chapter 3.

[134] n 13 above, 38D – I.

[135] n 26 above, 243D.

Ackermann J provided a two-stage enquiry to assist in determining whether a limitation or deprivation was arbitrary or without just cause. Firstly, there should be a rational connection between the deprivation and the purpose thereof. If there is no rational connection, the deprivation was arbitrary, freedom was denied and there was an infringement of the constitutional right. Secondly, if there was a rational connection, the purpose, reason or cause for the deprivation must be a just one.

With regards to institutionalisation in terms of section 77(6)(a)(i) the Constitutional Court held that an accused person with a mental illness, who is found to have committed a serious or violent act, poses a potential danger to him- or herself and/ or the community and needs to be "deprived of freedom" and placed in a system to care, treat and rehabilitate such persons as well as to protect the interests of the broader public and is therefore not arbitrary. The reasons for the deprivation were also found to be just. Still including the protection of the accused person and the community a further (long-term) reason for the deprivation is to provide the accused with the opportunity to be re-integrated into the community.

Up until here it would seem as if the deprivation of freedom by institutionalising accused persons in terms of section 77(6)(a)(i) does not amount to infringement. However, it should be noted that not every person with a mental illness or mental defect will be a danger to him- or herself or others. Therefore the Judicial officer should not be deprived of his or her judicial discretion, as is the case in section 77(6)(a), so that this can be determine on a case to case basis. The Supreme Court of Canada condemned the lack of judicial discretion with regards to persons with mental illnesses or mental defects and held that such orders were arbitrarily made.

The Constitutional Court further held that section 77(6)(a)(i) met all the requirements as set out by the ECHR. As required by the ECHR the accused person will first be determined to have a mental illness or mental defect by a medical expert in terms of section 79 before the accused can be deprived of his or her freedom by being admitted and detained in a mental health care institution. The second requirement to be met is that the mental illness or mental defect must be of such a degree that it warrants compulsory confinement. The Constitutional Court held that section 77(6)(a)(i) met the second requirement as accused persons in this

sections committed serious offences. However, this does not necessarily meet the second requirement as it only refers to the "degree" of the offence committed and not the degree of mental defect or mental illness. The Constitutional Court held that section 77(6)(a)(i) also met the third requirement as any admission into an mental health care institution will subsist no longer than is necessary. The Constitutional Court however made no mention of the situation where accused persons with mental disabilities or mental defects are of such a nature that they may never improve and will most probably be indefinitely institutionalised without having the opportunity to be re-integrated into society.

Even though the Constitutional Court came to the conclusion that institutionalisation in terms of section 77(6)(a)(i) is a precautionary measure and constitutionally permissible certain aspects, as referred to in the above mentioned, still need to be addressed.

The mere fact that the accused person with a mental illness or mental defect, whom is found to have committed a less serious offence or no offence has come into contact with the criminal justice system, cannot alone justify institutionalisation. That will amount to the infringement of the accused person's right to freedom and dignity. Therefore it is understandable that the Constitutional Court, in this regard held that section 77(6)(a)(ii) was constitutionally invalid. Yet there may be circumstances where it will be necessary for the judicial officer to order an accused person in term of section 77(6)(a)(ii) to be admitted and detained in a mental health care institution. Therefore judicial officer must be provided with judicial discretion.

The Constitutional Court held that accused persons with mental illnesses or mental defects may only be imprisoned in terms of section 77(6)(a)(i) if such accused is likely to cause serious harm to him- or herself or the community. It should however be noted that this purpose can also be achieved by admitting and detaining such an accused person in a mental health care institution which is less of a deprivation of freedom and more dignified. Imprisonment should only be seen as a last resort and therefore I would rather agree with Griesel J in this regard and find that imprisonment of an accused person whom has not been convicted to be constitutionally invalid.

Imprisonment due to limited resources with regards to mental health care institutions was declared not to be constitutionally permissible. Limited resources are a practical problem in South Africa and therefore the Constitutional Court provided a remedy in these situations which will be dealt with in chapter 6.

The limitation of such an accused person's right to freedom could not be saved by the limitation clause. Besides taking into account all the above mentioned and the fact that the right to freedom is a very important right in the Bill of Rights when taking into account South Africa's past and the vulnerable state of mentally ill or mentally defected persons, there are also other less restrictive methods to achieve the purpose of protecting the accused, the community and providing the accused with the possibility to be re-integrated into society such as: providing the judicial officer with judicial discretion with regards to the orders he or she can make; when determined that it is necessary that an accused be detained, detaining the accused in a mental health care institution rather than ordering the accused to be imprisoned, and even then, to first provide the judicial officer with the judicial discretion to consider the requirements as set out in section 9 and section 32(b) of the MHCA before admitting the accused to a mental health care institution.

It should also be noted that every person is equal before the law and has the right to equal protection and benefit of the law.[136] Therefore as soon as accused persons with mental illnesses of mental defects are imprisoned or institutionalised without a constitutional purpose it also amounts to the infringement of such an accused person's right to equality.[137]

[136] Sec 9(1) of the Constitution.

[137] Sec 9(1) read with sec 9(3) and sec 9(4) of the Constitution.

CHAPTER 5: CHILD OFFENDERS WITH MENTAL ILLNESSES OR MENTAL DEFECTS

5.1 INTRODUCTION

5.2 PROCESS TO BE FOLLOWED FOR CHILD OFFENDERS

5.3 PROCESS TO BE FOLLOWED FOR CHILD OFFENDERS WITH MENTAL ILLNESSES OF MENTAL DEFECTS

5.4 RESOURCE CONSTRAINTS

5.5 LIMITATION CLAUSE

5.6 CONCLUSION

5.1 INTRODUCTION

Chapter 5 will deal exclusively with child offenders, but more specifically child offenders with mental illnesses or defects. The process to be followed with regards to child offenders, as prescribed in the CJA will be compared to the process to be followed with regards to child offenders with mental illnesses or mental defects. This chapter will also touch on the practical issues South Africa face with regards to resource constraints and the effect it may have on child offenders.

The constitutional rights of children in terms of, *inter alia,* section 28(1)(g) – which states that every child has the right "*not to be detained except as a manner of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time"* - read with section 28(2) – which provides that "*a child's best interest is of paramount importance in every matter concerning the child"* – will be analysed.

In this chapter the limitation clause in terms of section 36 of the Constitution will be used to determine whether any possible limitation of rights of child offenders with mental illnesses or mental defects can be justified.

5.2 PROCESS TO BE FOLLOWED FOR CHILD OFFENDERS

The CJA demands that preliminary enquiries be held[138] prior to any trial involving a child offender[139] to afford diversion options for such offenders in terms of section 53 of the CJA,[140] even when the child committed an offence which falls within schedule 2 of the CJA[141]. In terms of sec 47(2)(b) of the CJA the judicial officer must ascertain from the child whether he or she acknowledges responsibility for the alleged offence before he or she can proceed with the preliminary enquiry and consider the diversion options.

Section 53 of the CJA affords the court a wide discretion to deal with child offenders and take into account "[the child's] personal situation, and immediate needs, age, gender, disability and level of maturity", [142] thus providing the judicial officer with the opportunity to

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[138] See sec 43(3)*(a)*. According to the short title of the CJA, the CJA aims to provide "*a mechanism for dealing with children who lack criminal capacity outside the criminal justice system".*

[139] 'Child offender' will mean children who can have criminal capacity and therefore any person who is ten years or older but under the age of eighteen. This will include persons older than eighteen years but under the age of twenty-one if that person was ten years or older but under the age of eighteen when he or she was, in terms of sec 4(1)(b)-
(i) handed a written notice in terms of section 18 or 22;
(ii) served with a summons in terms of section 19; or
(iii) arrested in terms of section 20.

[140] The Diversion options include an oral or written apology; a formal caution; placement under a supervision and guidance order; placement under a reporting order; a compulsory school attendance order; a family time order; a peer association order; a good behaviour order; an order prohibiting the child from visiting, frequenting or appearing at a specified place; referral to counselling or therapy; compulsory attendance at a specified centre or place for a specified purpose; symbolic restitution; restitution; community service; provision of some service or benefit by the child; payment of compensation.

[141] Schedule 2 refers to the more serious offences than those referred to in schedule 1.

[142] Ngcobo J in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) 268E – G held that "What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must *be treated in a caring and sensitive manner.* This requires *taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity.*

act in the best interest of the child – in accordance with section 28(2) of the Constitution - and only detain the child as a manner of last resort – giving effect to the child's constitutional right in terms of section 28(1)(g).[143]

5.3 PROCESS TO BE FOLLOWED FOR CHILD OFFENDERS WITH MENTAL ILLNESSES OF MENTAL DEFECTS

The Constitutional Court in the case of *De Vos* held that a child offender with a mental illness or mental defect cannot reasonably be expected to acknowledge responsibility.[144] The result being that the various diversion options available to child offenders without mental illnesses and mental defects cannot be invoked by the court. This can already be seen as a limitation of the child's constitutional right to equality when compared to other child offenders.[145]

Since the matter may not be diverted the child offender will be referred to the Child Justice Court.[146] If the Child Justice Court is of the view that the child is unable to understand the court proceedings, the child must be dealt with in terms of the CPA. The reason being that the CPA is applicable to child offenders *"except in so far as this [Child Justice] Act provides for amended, additional or different provision or procedures"*[147] and in this case the CJA does not provide such. The child will therefore be assessed by medical experts in terms of section 79 to determine whether he or she has a mental illness or mental defect rendering the child offender unfit to stand trial. As soon as the assessment has been concluded the court will be provided with a wide discretion relating to the order it may make in terms of

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In short *every child should be treated as an individual with his or her own individual needs, wishes and feelings.* Sensitivity requires the child's individual needs and views to be taken into account."

[143] n 13 above, 36G –I.

[144] n 26 above, 239C – E.

[145] Sec 9(3) – (4) in the Constitution.

[146] Sec 47(9)(c) of the CJA.

[147] Sec 4(3)(a) of the CJA.

section 79(2)(c).[148] The court can order that the accused be dealt with in terms of section 77(6) as requested by the prosecutor.[149]

Griesel J referred to the situation where the preliminary enquiry may be postponed when "*the child has been referred for a decision relating to mental illness or mental defect in terms of section 77 or 78 of the Criminal Procedure Act"* as provided for in section 48(5)(b) of the CJA.[150] The CJA, however, does not make provision for any process to be followed after such a referral, therefore the CPA will again be applicable.

In both these situations, unlike in section 53 of the CJA, the court will not be provided with the judicial discretion to consider whether the child even committed an offence, the child's individual circumstances, the various diversion options cannot be invoked and the child will have to be admitted and detained in a mental health care institution or in prison.[151] Again amounting to the limitation of a child offender's right to equality when compared to other child offenders and the right not to be detained except as a measure of last resort. Even if it was argued that child offenders with mental illnesses or mental defect are only detained as a manner of last resort it should further be noted that detaining a child offender in a mental health care institution may result in an indefinite institutionalisation in matters where the child's mental illness or mental defect is of such a nature that he or she may never improve.

5.4 RESOURCE CONSTRAINTS

Even if we could get over these "hurdles" stated in paragraph 5.3 we would still have to take into account that the psychiatric hospitals and prisons have inadequate facilities for children

[148] n 26 above, 241G.

[149] Sec 79(2)(c)(iii) of the CPA.

[150] n 13 above, 37C - D.

[151] n 13 above, 37D and n 26 above, 240B – C.

who are mentally handicapped[152] which further limits the rights of children, as protected by section 28(1)(g),[153] read with section 28(2)[154] of the Constitution.[155]

5.5 LIMITATION CLAUSE

This limitation in addition to those referred to in chapter 4 cannot be justified in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[156] It seems as if this was also accepted by the Respondents in the High Court case of *De Vos* as they did not even try to provide the High Court with any justification for the limitation.[157]

When considering the nature of the rights of the child offenders being limited by the application of section 77(6), the vulnerable state of children, even more so when they have a mental illness or mental defect should be taken into account. It should also be noted that the right to equality is one of the cornerstones of South Africa, the value captured in the Constitution and one of the most important rights in the Bill of Rights when taking into account South Africa's past.

[152] This statement is supported by the Cape Mental Health's survey results and the testimony of Professor Kaliski in the Stuurman's criminal trial. "We 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. The only place we have got that can actually accommodate someone like him would be something like a school of industries or comparable sort of things for juveniles. We don't actually have facilities."

[153] In terms of sec 28(1)(g) *every child has the right not to be detained except as a manner of last resort*.

[154] Sec 28(2) provides that *a child's best interest are of paramount importance in every matter concerning the child.*

[155] High Court case of *De Vos* 38A – D.

[156] Sec 36(1) of the Constitution.

[157] n 13 above, 38H – I.

These limitations do not fulfil any purpose and Griesel J rightly held that "in the case of children falling under [section 77(6)(a)], there is no reason why the provisions of section 53(4) of the CJA should not be available".[158]

5.6 CONCLUSION

The CJA demands that preliminary enquiries be held prior to any trial involving a child offender to afford diversion options for such offenders. In this enquiry the judicial officer it awarded a wide discretion when dealing with the child offenders. The Judicial officer must take into account, *inter alia* the child offender's personal circumstances in an attempt to determine whether the matter can be diverted. Thus giving the judicial officer the opportunity to act in the best interest of the child, as stated in section 28(2) of the Constitution and to make sure he or she is only detained as a manner of last resort as required in section 28(1)(g) of the Constitution.

In the event that a child offender has a mental illness or mental defect the procedure prescribed differs. Before a matter involving child offenders can be considered for diversion the child offender must acknowledge responsibility. Child offenders with mental illnesses or mental defect cannot reasonably be expected to acknowledge responsibility and therefore the judicial officer cannot consider any of the diversion options. In such a matter the child offender will be referred to the Child Justice Court but as soon as the court suspects the child is unfit to stand trial the child will be dealt with in terms of section 79 of the CPA, because the CJA does not make provision for this. As soon as the assessment has been concluded the court will be provided with a wide discretion relating to the order it may make in terms of section 79(2)(c), including referring the child offender to be dealt with in terms of section 77(6).

The preliminary enquiry as requested in matters involving child offenders may be postponed when "*the child has been referred for a decision relating to mental illness or mental defect in terms of section 77 or 78 of the Criminal Procedure Act".* However, the CJA does not make

[158] n 13 above, 38H – I.

provision for any process to be followed after such a referral, therefore the CPA will again be applicable.

In both these situations, unlike in section 53 of the CJA, the court will not be provided with the judicial discretion to, *inter alia* consider the child's best interest and right not to be detained unless it is a manner of last resort. The child offender will automatically and in every case be admitted and detained in a mental health care institution or in prison. Furthermore, the child offender's constitutional right to equality, when compared to other child offenders will be limited. In addition thereto the psychiatric hospitals and prisons have inadequate facilities for children who are mentally ill of mentally defected.

These limitations cannot be justified in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors when considering the vulnerable state of children, even more so when they have a mental illness or mental defect, the importance of the right to equality in South Africa and the fact that these limitations serve no rational purpose.

Therefore section 77(6), in addition to the infringements referred to throughout this dissertation, also infringes on children with mental illnesses or mental defects' right to equality and certain specific constitutional rights of children such as the rights in terms of section 28(1)(g) read with section 28(2) and was declared not to be constitutionally permissible as far as it relates to child offenders.[159]

[159] n 13 above, 37E - F and n 26 above, 240B – C.

CHAPTER 6: CONSTITUTIONAL REMEDIES

6.1 INTRODUCTION
6.2 COURT FINDINGS
6.2.1 SECTION 77(6)(a)(i)
6.2.1.1 INSTITUTIONALISATION
6.2.1.2 IMPRISONMENT
6.2.2 SECTION 77(6)(a)(ii)
6.2.2.1 INSTITUTIONALISATION
6.2.3 CHILD OFFENDERS
6.3 CONCLUSION

6.1 INTRODUCTION

This chapter will summarize the High Court and Constitutional Court findings with regards to section 77(6) to bring this dissertation to a conclusion. The findings with regards to child offenders and adult offenders will be dealt with separately. With regards to adult offenders the findings with regards to section 77(6)(a)(i) and section 77(6)(a)(ii) will be examined separately. Section 77(6)(a)(i) will be broken down even further to deal with imprisonment and institutionalisation separately. The remedies provided by the Constitutional Court will be compared to the remedies provided by Griesel J and analysed to try and find the appropriate constitutional remedy.

6.2 COURT FINDINGS

In both the High Court and Constitutional Court case of *De Vos,* it was declared that section 77(6)(a) deprives the judicial officer of his or her judicial discretion by dictating to the court the order it has to make.

Griesel J emphasized the irrational deprivation of a court's judicial discretion by comparing section 77(6) to section 78(6) which also deals with accused persons with possible mental illnesses and allows the judicial officer judicial discretion.

Due to the lack of judicial discretion Griesel J found that section 77(6)(a) amounted to the infringement of the constitutional rights of the accused persons, *inter alia*, to equality , dignity, freedom and security of the person as well as certain rights of children and therefore ordered that it be declared unconstitutional, suspended for 24 months to award the Legislature reasonable time to correct this defect. It was ordered that words be read-in to temporarily remedy the situation so as to prevent that the current unfair detainment of accused persons would not persist and afforded the judicial officer judicial discretion as contemplated in section 78(6). The read-in words of section 77(6)(a)(i)(aa); (bb); (cc) and (dd) were the direct words of section 78(6)(a)(i) and the read-in words of section 77(6)(a)(ii)(bb) and (cc) were the direct words of section 78(6)(a)(ii).[160]

The Constitutional Court differed and held that section 77(6)(a)(i) and section 78(6) deal with different situations and purposes and cannot be compared to one another and concluded that section 78(6) cannot be adopted verbatim.[161] However, no mention was made of situations where the two sections may applicable to the same accused as in the case of Snyders. This can only mean that the Constitutional Court, in addition to finding that the difference in the two sections are rational found that when both sections are applicable to the same accused it is rational that the accused be deprived of his or her freedom (maybe even dignity) by detaining him or her as required in section 77(6) without providing the court with judicial discretion.

[160] n 13 above, 40D.

[161] n 26 above, 243G.

6.2.1 SECTION 77(6)(a)(i)

6.2.1.1 INSTITUTIONALISATION

With regards to institutionalisation in terms of section 77(6)(a)(i) the Constitutional Court held that such an accused person poses a potential danger to him- or herself and/ or the community and needs to be "deprived of freedom" and placed in a system to care, treat and rehabilitate such persons as well as to protect the interests of the broader public and is therefore not an infringement on the accused person's right to freedom. The Constitutional Court didn't take cognisance of the fact that not every person with a mental illness or mental defect will be a danger to him- or herself or others.

The Constitutional Court also analysed the requirements to be met before a person with a mental illness or mental defect may be deprived of his or her freedom, as provided by the ECHR. The accused person will first be determined to have a mental illness or mental defect by a medical expert in terms of section 79 before the accused can be deprived of his or her freedom by being admitted and detained in a mental health care institution. The second requirement to be met is that the mental illness or mental defect must be of such a degree that it warrants compulsory confinement. The Constitutional Court held that section 77(6)(a)(i) met the second requirement as accused persons in this sections committed serious offences. This, however, does not necessarily meet the second requirement as it only refers to the "degree" of the offence committed and not the degree of mental defect or mental illness. The Constitutional Court held that section 77(6)(a)(i) also met the third requirement as any admission into an mental health care institution will subsist no longer than is necessary. The Constitutional Court however made no mention of the situation where accused persons with mental disabilities or mental defects are of such a nature that they may never improve and will most probably be indefinitely institutionalised without having the opportunity to be re-integrated into society, which was held to be the purpose of section 77(6)(a)'s detainment.

Regardless of the High Court's declaration of unconstitutionality the Constitutional Court came to the conclusion that institutionalisation in terms of section 77(6)(a)(i) is a precautionary measure and constitutionally permissible.

6.2.1.2 IMPRISONMENT

The Constitutional Court held that section 77(6)(a)(i) is inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid to the extent that it provides for compulsory imprisonment of an adult accused person. It should first be determined that the accused is likely to cause serious harm to him- or herself or the community. This order was suspended for 24 months to allow the Legislation to correct the defect. The Constitutional Court held that this issue was complex and should be remedied by the Legislature and therefore made no interim order. The Constitutional Court, however, referred to section 49D of the Correctional Service Act 11 of 1998[162] and held that this section would provide support to courts for the interim period.[163]

However, the Constitutional Court stated that imprisonment due to limited resources cannot be justified and such an order will be unconstitutional. Seeing as this is a practical problem the Constitutional Court provided for a practical solution and held that if there are limited beds in the mental health care institution then the presiding officer should be provided with judicial discretion to make an order for the accused person to be treated as an out-patient.[164]

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[162] 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."*

[163] n 26 above, 244E – F.

[164] For example, by extending the bail conditions, or any other appropriate order pending the availability of a bed in a psychiatric hospital. n 26 above, 243I – 244B.

6.2.2 SECTION 77(6)(a)(ii)

6.2.2.1 INSTITUTIONALISATION

It would appear as if the Constitutional Court, without directly stating partially agreed with Griesel J in that the difference between section 77(6)(a)(ii) and 78(8) with regards to judicial discretion is not rational.

To institutionalise a person without his or her consent as an involuntary mental health care user in terms of the MHCA certain requirements need to be met. The section 1 definition, section 9(1)(c) and section 32(b) of the MHCA provides for admission requirements and should be read together to determine whether a person should be detained as an involuntary mental health care user. Unfortunately section 77(6)(a)(ii) dictates a pre-determined and mandatory outcome and deprives the judicial officer of his or her judicial discretion to consider any of these requirements. The court is also not provided with the discretion to consider whether the accused should be admitted as an in- or outpatient as provided for in the MHCA, which, as already stated, may become important taking into account south Africa's limited resources.

Section 77(6)(a)(ii) requires that an accused person must be detained even when the accused's mental condition cannot be treated and/ or his or her condition will not improve. Such accused persons will still be reviewed within six months but will most likely not be discharged and indefinitely institutionalised.

The Constitutional Court held that the mere fact that the accused person with a mental illness or mental defect, whom is found to have committed a less serious offence or no offence has come into contact with the criminal justice system, cannot alone justify institutionalisation. That will amount to the limitation of the accused person's right to freedom, dignity and equality which cannot be saved by the limitation clause. The right to freedom is a very important right in the Bill of Rights when taking into account South Africa's

past and the vulnerable state of mentally ill or mentally defected persons and the alternatives to simply institutionalising an accused person automatically and in every case.

The Constitutional Court held that section 77(6)(a)(ii) is unconstitutional in as far as it dictates that all accused persons 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. With regards to this section, the Constitutional Court confirmed Griesel J's order and held that reading-in would be an appropriate remedy to afford the judicial officer dealing with an accused person in section 77(6)(a)(ii) a judicial discretion.[165]

6.2.3 CHILD OFFENDERS

The CJA demands that preliminary enquiries be held prior to any trial involving a child offender to afford diversion options to such offenders as stated in section 53 of the CJA. In this enquiry the judicial officer is awarded a wide discretion when dealing with the child offenders, giving the judicial officer the opportunity to act in the best interest of the child, as stated in section 28(2) of the Constitution and to make sure that he or she is only detained as a manner of last resort as required in section 28(1)(g) of the Constitution.

When child offenders suffer from a mental illness or mental defect the process to be followed differs in one of two manners: The child offender will be referred to the Child Justice Court due to the fact that the diversion options cannot be considered if a child offender does not acknowledge responsibility and child offenders with mental illnesses or mental defect cannot reasonably be expected to acknowledge responsibility. As soon as the Child Justice Court suspects the child to be unfit to stand trial the child will be dealt with in terms of section 79 of the CPA, because the CJA does not make provision for this. After such an assessment the child may be dealt with in terms of section 77(6) if the judicial officer orders so on request of the prosecutor.

[165] n 26 above, 245B - D.

Another possible process is that the preliminary enquiry as requested in matters involving child offenders may be postponed when the child has been referred for a decision relating to mental illness or mental defect in terms of section 77 or 78 of the CPA. If the child is found unfit he or she will be dealt with in terms of section 77(6).

In both these situations, unlike in section 53 of the CJA, the court will not be provided with the judicial discretion to, *inter alia* consider the child's best interest and right not to be detained unless it is a manner of last resort. The child offender will automatically and in every case be admitted and detained in a mental health care institution or in prison and might even be indefinitely institutionalised. The child offender's constitutional right to equality, when compared to other child offenders will be limited. It should also be noted that the psychiatric hospitals and prisons have inadequate facilities for children who are mentally ill of mentally defected. Without a purpose it is quite clear that these limitations cannot be justified in terms of the limitation clause.

Therefore the Constitutional Court held that a judicial officer must be provided with judicial discretion when dealing with child offender to ensure that detention is ordered only as a last resort and for the shortest period. Section 77(6)(a)(i) was declared unconstitutional in so far as it mandates the detention of children and permits imprisonment based on resource considerations only. The Constitutional Court here, too, referred to section 49D of the Correctional Services Act 111 of 1998 in an attempt to provide support to child offenders imprisoned during the interim period.

6.3 CONCLUSION

The order made by the Constitutional Court did not confirm the order by High Court case of *De Vos* but confirmed that there were constitutional issues with regards to section 77(6)(a) that needed to be address.

Griesel J held that section 77(6)(a) in its entirety was inconsistent with the constitution while the Constitutional Court declared only section 77(6)(a)(i) to be inconsistent and only in as far

as it provides for the compulsory imprisonment of adult accused persons. The Constitutional Court did not have an issue with imprisonment of persons whom committed serious offence as they declared them to be a danger to themselves and or society. With regards to this I would rather align myself with Griesel J and award or call on the legislature to award the judicial officer with judicial discretion in respect of both imprisonment and institutionalisation as not all accused persons whom committed a serious offence can be considered dangerous. This might also prevent indefinite institutionalisation. The Constitutional Court called on the legislature to correct this defect and referred future judicial officers to section 49D of the Correctional Services Act, 111 0f 1998 for the interim period. The issue herewith is that this section, although attempting to cater for imprisoned persons in terms of section 77(6) is subject to the availability of resources, which is a real problem in South Africa.

The Constitutional court held that the legislature should attend to the matter to prevent the compulsory institutionalisation or imprisonment of a child offender with mental illnesses or mental defects. This can be done by bringing the CJA and CPA in line with regards to children with mental illness. They should either amend the CJA to specifically deal with children with mental illnesses and provide for a similar process to section 53 of the CJA to be followed providing the judicial officer with the discretion to consider diversion without requiring the acknowledgement of responsibility, and/ or make provision for that same procedure to be followed after the preliminary enquiry was postponed and the child offender was found to be unfit to stand trial in terms of section 77. The same issue regarding the support provided by section 49D of the Correctional Services Act, 111 of 1998 with regards to adult offenders apply to child offenders.

The Constitutional Court and High court both declared section 77(6)(a)(ii) to be unconstitutional with regards to child and adult offenders and used the parallel section, section 78 to provide the judicial officer with judicial discretion to remedy the situation. It would be appropriate to incorporate the admission requirements as set out in MHCA in this section to bring the CPA in line with the MHCA before institutionalising an accused person.

BIBLIOGRAPHY

7.1 TABLE OF LEGISLATION

7.1.1 SOUTH AFRICAN LEGISLATION

Children's Justice Act, 75 of 2008.

Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

Criminal Procedure Act, 51 of 1977.

Correctional Service Act 11 of 1998.

Mental Health Care Act, 17 of 2002.

The Constitution of the Republic of South Africa, 1996.

7.1.2 INTERNATIONAL TREATIES

United Nations Convention on the Rights of Persons with Disabilities

7.2 TABLE OF CASE LAW

7.2.1 SOUTH AFRICAN CASE LAW

Abahlali baseMjondolo Movement SA v Premier of the Province of KZN 2010 2 BCLR 99 (CC).

Bernstein and Others v Bester and Others NNO 1996 2 SA 751 (CC).

Cf Richter v Minister of Home Affairs 2009 3 SA 615 (CC).

De Lange v Smuts NO 1998 3 SA 785 (CC).

De Vos NO and Others v Minister of Justice and Constitutional Development and Others 2015 2 SACR 217 (CC).

De Vos NO and Another v Minister of Justice and Constitutional Development and Others 2015 1 SACR 18 (WCC).

Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development 2009 (4) SA 222 (CC).

Estate Agency Affairs Board v Auction Alliance 2014 3 SA 106 (CC).

Ex parte G & Six others 2009 JOL 22950 (GNP).

Ferreira v Levin; Vryehoek v Powell No 1996 1 SA 984 (CC).

Gaertner v Minister of Finance 2013 4 SA 87 (WCC).

Geuking v President of RSA 2003 3 SA 34 (CC).

Glenister v President of the Republic of South Africa and Others 2011 3 SA 347 (CC).

Hoffmann v South African Airways 2001 1 SA 1 (CC).

Johncom Media Investments Ltd v M & Others 2009 4 SA 7 (CC).

Malachi v Cape Dance Academy International 2010 6 SA 1 (CC).

Namibian Supreme Court in Alexander v Minister of Justice 2010 1 NR 328 (SC).

Nel v Le Roux NO and Others 1996 3 SA 562 (CC).

Ngcobo J in Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development 2009 4 SA 222 (CC).

S v Coetzee and Others 1997 3 SA 527 (CC).

S v Mabena 2007 1 SACR 482 (SCA).

S v Pedro 2014 4 ALL SA 114 (WCC).

S v Sithole 2005 1 SACR 311 (W).

Zealand v Minister for Justice and Constitutional Development 2008 4 SA 458 (CC).

7.2.2 INTERNATIONAL CASE LAW

H.L. v The United Kingdom, No 45508/99 ECHR 2004.

Winterwerp v Netherlands (1979 - 80) 2 EHRR.

7.2.3 FOREIGN CASE LAW

R v Swain (1991) 1 SCR 993.

7.3 TABLE OF PUBLICATIONS

7.3.1 CHAPTERS IN LOOSE-LEAF BOOKS

Du Toit, E & de Jager, F & Paizes, A & Skeen, ASQ & van der Merwe, S *Commentary on the Criminal Procedure Act* (Service 53, July 2014) 13 – 1.

Kruger, A *Hiemstra's Criminal Procedure* (Service 7, May 2014) 13 – 1; 13 – 3; 13 - 8.

Woolman, S & Bishop, M *Constitutional Law of South Africa* (Original service, April 2014) 40 – 3.

7.3.2 JOURNAL ARTICLES

Bonthuys, E 'Involuntary Civil Commitment and the new Mental Health Bill' (2001) 118 *South African Law Journal* 667.

Kaliski, S 'Does the Insanity Defence Lead to an Abuse of Human Rights?' (2012) 15 *African Journal of Psychiatry* 83.

7.3.3 REPORTS AND/ OR PAPERS

Department of Correctional Services' 2012/2013 Annual Report at 73.

7.3.4 THESIS AND DISSERTATIONS

ML Muntingh 'An Analytical Study of South African Prison Reform after 1994' PhD Thesis, University of the Western Cape, 2011 375-6.

7.3.5 WEBSITES

http://www.dcs.gov.za/Services/PsychologicalServices.aspx (accessed 24 October 2015).