

The unfit accused in the South African criminal justice system: From automatic detention to unconditional release

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ABSTRACT

Section 77 of the Criminal Procedure Act 51 of 1977 sets out the orders that a court can make after finding an accused unfit to stand trial on account of his mental illness or intellectual disability. All the orders result in detention of the unfit accused in prison or a psychiatric institution (depending on the nature of the charges against the accused) in terms of the Mental Health Care Act 17 of 2002. The court could not consider the treatability of the accused's condition or any individual circumstances of the accused before ordering such detention. Section 77 was recently amended by the Criminal Procedure Amendment Act 4 of 2017. The Amendment Act resulted from the Constitutional court's judgment in *De Vos NO v Minister of Justice and Constitutional Development* 2015 (2) SACR 217 (CC) where the court found, *inter alia*, that such limited orders deprive the court of its discretion to craft an order that is suitable for the particular unfit accused. The court ruled on the constitutionality of detaining an unfit accused in prison or a psychiatric institution and found some provisions of s 77 that facilitates such detention, unconstitutional. The Amendment Act brings s 77 in line with the Constitution. This contribution explores the orders available to the court before and after the amendment of s 77 and conveys the crux of the court's judgment in the *De Vos* matter pertaining to the unconstitutionality of certain provisions of s 77. It concludes that the amendment bolsters, in particular, the unfit accused's right to freedom and security of the person as the court may now order the conditional or unconditional release of the unfit accused where appropriate.

1 Introduction

Section 77 of the Criminal Procedure Act 51 of 1977 (hereinafter the 'Criminal Procedure Act') determines the fate of an accused who is unable, because of mental illness or intellectual disability, to follow the criminal proceedings against him. This accused is 'unfit to stand trial' (hereinafter the 'unfit accused').

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Until recently, by default an accused faced detention in prison or an institution under s 77(6) once found unfit to stand trial. The court could not order the release, conditional or otherwise, of an unfit accused regardless of the accused's individual circumstances or nature of the mental illness. The court's lack of discretion under s 77(6) was challenged in the Constitutional Court judgment of *De Vos NO v Minister of Justice and Constitutional Development*.¹ This judgment declared some provisions of the Criminal Procedure Act as they apply to the unfit accused unconstitutional on the basis that they violate the unfit accused's right to freedom and security of the person. The Criminal Procedure Amendment Act 4 of 2017 (hereinafter the Amendment Act) remedies this unconstitutionality. The Amendment Act which came into force on 29 June 2017, enables the court to exercise discretion and to, *inter alia*, order the unconditional release of an unfit accused.

This contribution gives an overview of the orders available to the court after a finding of unfitness and the consequences of such orders under the Criminal Procedure Act prior to its most recent amendment. A discussion of selected aspects of the *De Vos* judgment highlights the challenges with s 77(6) of the Criminal Procedure Act. The orders available to the court under the Amendment Act is explored and contrasted with those previously available to the court. The contribution concludes with comments on the positive impact of these amendments on the unfit accused. The position of children who may be unfit to stand trial is specifically excluded from this contribution as it warrants a separate discussion.

2 Fitness to stand trial under the Criminal Procedure Act prior to 2017 amendment

2.1 Introduction

An accused's ability to follow the court proceedings and to instruct their legal representative is assessed by mental health professionals at a licenced psychiatric facility² before a court makes a finding on fitness.³

¹ 2015 (2) SACR 217 (CC) (hereinafter '*De Vos* CC case')

² Fitness assessments are usually conducted on an in-patient basis at a psychiatric facility licensed to conduct court-ordered assessments: AL Pillay 'Could *S v Pistorius* influence reform in the traditional forensic mental health evaluation format?' (2014) 44 *SA J Psychology* 377. The assessment is conducted by one psychiatrist if the accused is charged with a non-violent crime and by a panel of psychiatrists if the charge against the accused involved violence. See L Pienaar 'Deciphering the composition of section 79-assessment panels in the Criminal Procedure Amendment Act 4 of 2017' (2017) 20 *PELJ* 1-25 for an explanation of how the assessment panels are compiled since the enactment of the Criminal Procedure Amendment Act 4 of 2017.

³ The accused is referred to an assessment of his fitness to stand trial in terms of s 79 of the Criminal Procedure Act 51 of 1977.

A fitness assessment involves various interviews, tests and physical examinations.⁴ Once the assessment is concluded, the mental health professional(s) submits a report to court indicating the accused's diagnosis⁵ and an opinion on whether the accused is fit to stand trial.⁶ The court considers this report in reaching a finding on the fitness of the accused.

2.2 Finding on fitness

The finding on fitness can be made at any point in the criminal proceedings before sentencing.⁷

If the accused is found fit to stand trial, the criminal trial continues.⁸

⁴ FJW Calitz, PHJJ van Rensburg, C Fourie, E Liebenberg, C van den Berg and G Joubert 'Psychiatric evaluation of offenders referred to the Free State Psychiatric Complex according to ss 77 and 78 of the Criminal Procedure Act' (2006) 12 *SA J Psychiatry* 47 at 48. Also see Pillay op cit (n2) 377 at 378, who explains the forensic assessment includes interviews with the accused and family members of the accused, psychometric tests and reports from multidisciplinary teams on the accused person's behaviour generally and interpersonally.

⁵ Section 79(4)(b) of the Criminal Procedure Act 51 of 1977. Also, see JJ Joubert (ed) *Straffprosesreg* 10ed (2011) at 251. See further AL Pillay 'Competency to stand trial and criminal responsibility examinations: Are there solutions to the extensive waiting list?' (2014) 44 *SA J Psychology* 48 at 50, who maintains that it is not the diagnosis in itself that renders a person fit or unfit to stand trial, but that the functional impairment of the individual has to be assessed as well. Mental illness is defined in the Mental Health Care Act 17 of 2002 s 1 as: 'A positive diagnosis of mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorized to make such diagnoses.'

⁶ Section 79(4)(c) of the Criminal Procedure Act 51 of 1977. Also, see E Du Toit, FJ De Jager, A Paizes, A St Q Skeen and SE van der Merwe *Commentary on the Criminal Procedure Act* (2012) 13-5 and 13-6.

⁷ Du Toit op cit (n6) 13-3 indicates that the issue is usually raised and an order on fitness made before the trial commences. The order on fitness can be made even after conviction but prior to sentencing as was the case in *S v April* 1985 (1) SA 639 (NC). See further *S v Van As* 1989 (3) SA 881 (W) where the proceedings were set aside upon review by the high court after it became clear (after conviction) that the accused was not able to conduct a proper defence. Where the proceedings are set aside, the relevant order in terms of s 77(6) of the Criminal Procedure Act is made. A Kruger *Hiemstra Suid-Afrikaanse Straffproses* 7ed (2010) 225. The setting aside of proceedings any time after the accused entered a plea, shall lead to an acquittal. See s 6(b) of the Criminal Procedure Act 51 of 1977. Where the charges are withdrawn prior to a plea being entered, the accused is not entitled to a verdict of acquittal in respect of the particular charges: see s 6(a) of the Criminal Procedure Act 51 of 1977. Also see A Kruger *Mental Health Law in South Africa* (1980) 159 who states that, at the time, the withdrawal of charges against a mentally ill accused was a common occurrence, especially where the charges were for minor offences. Where the prosecution decides to cease prosecution of an accused who entered a plea and whose fitness to stand trial is at issue, such an accused must be found not guilty. Also see *S v M* 1989 (3) SA 887 (W) at 890D-H, 891E. See also Joubert op cit (n5) 251.

⁸ Section 77(5) of the Criminal Procedure Act 51 of 1977.

An accused found unfit to stand trial may not, however, be tried while he is incapable of understanding the proceedings.⁹ A trial on the facts may be held to establish whether the unfit accused committed the crime (act) of which he stands accused.¹⁰ The Criminal Matters Amendment Act 68 of 1998 amended s 77 of the Criminal Procedure Act to provide for this trial on the facts during which the court considers evidence to determine whether an unfit accused actually committed the act in question. The purpose of this trial on the facts is not to reach an official verdict on the guilt of the accused but is rather an inquiry during which the court should satisfy itself as to what *actus reus*, if any, the accused committed.¹¹ The burden of proof for this inquiry is on a balance of probabilities.¹² After a trial on the facts, the accused is not convicted or acquitted, but instead, the court makes an order of detention under s 77(6) of the Criminal Procedure Act.¹³ The seriousness of the charges against the unfit accused, considered with the outcome of the trial on the facts, guide the court to make the most suitable order in terms of s 77(6).¹⁴ The trial on the facts is an additional inquiry that aids the court in making the relevant detention

⁹ *S v Mabena* 2007 (1) SACR 482 (SCA) at para [12]. Also, see Du Toit op cit (n6) 13-3. See further Joubert op cit (n5) 21. Also see Kruger *Mental Health Law in South Africa* op cit (n7) 164, who confirms the criminal law principle that a person who cannot follow the proceedings cannot be tried.

¹⁰ Section 77(6)(a) of the Criminal Procedure Act 51 of 1977. Also see Kruger *Hiemstra Suid-Afrikaanse Straffproses* op cit (n7) 230 and at 219 where it is explained that this amendment was brought about by amending s 77(6)(a) of the Criminal Procedure Act 51 of 1977 by making provision for a trial on the facts of the matter, which does not constitute an official trial for purposes of finding the accused guilty or not guilty.

¹¹ *S v Sithole* 2005 (1) 311 (W) at 314H-315A.

¹² The burden of proof for purposes of guilt is beyond reasonable doubt. The accused's involvement in the act that he stands accused of need only be proved on a balance of probabilities during the trial on the facts as per s 77(6) of the Criminal Procedure Act 51 of 1977. See *S v Sithole* op cit (n11) at 315B. See R Louw 'Principles of criminal law: Pathological and non-pathological criminal incapacity' in S Kaliski (ed) *Psycholegal Assessment in South Africa* (2006) 43. See further Du Toit op cit (n6) 13-6.

¹³ More particularly, an order in terms of s 77(6)(a)(i) or (ii) of the Criminal Procedure Act 51 of 1977. Also see Kruger *Hiemstra Suid-Afrikaanse Straffproses* op cit (n7) 230. See further Du Toit op cit (n6) 13-6.

¹⁴ The orders available to the court in terms of s 77(6) depend on whether violence was involved in the crime with which the mentally ill accused is charged. Only accused persons charged with a violent crime and found to have been involved in it can be declared a state patient, which is the most restrictive order that the court can make with regard to an unfit accused. Louw op cit (n12) 43. Also, see Kruger *Hiemstra Suid-Afrikaanse Straffproses* op cit (n7) 230.

order under s 77(6).¹⁵ A s 77(6) order suspends criminal proceedings. The trial may however proceed should the accused regain his ability to stand trial.¹⁶

Orders available to the court after a finding of unfitness are explored below.

2.3 Orders made after a finding of unfitness

Once an accused is found unfit to stand trial, the court must make an order under s 77(6). Section 77(6) compels the court to order the unfit accused's detention as either a state patient (in prison or a psychiatric hospital) or an involuntary mental health care user (in a psychiatric facility) in terms of the Mental Health Care Act 17 of 2002 (hereinafter the 'Mental Health Care Act').¹⁷ The court may not make any order other than one of those listed under s 77(6).¹⁸ An unfit accused is detained regardless of the outcome of the trial on the facts about whether he committed the act in question.¹⁹

The criteria for and consequences of detention as a state patient and an involuntary mental health care user, respectively, is set out below.

¹⁵ The accused is detained in terms of the Mental Health Care Act 17 of 2002. Kruger *Hiemstra Suid-Afrikaanse Strafproses* op cit (n7) 230. Kruger's view on s 77(6)(a) is supported by Du Toit AJ who expressed the following view on behalf of the court in *S v Sithole* op cit (n11) at 314H-315A: 'the subsection in my view does not envisage any enquiry in the nature of a trial or a "determination" or "finding" in the sense of a verdict or a judgment. Any such procedure would be completely inappropriate since the person who allegedly committed the act by definition is incapable of understanding the proceedings. All that appears to be required is that, before directing that an accused be detained and/or treated in terms of the appropriate provisions of the Mental Health Act the court should satisfy itself as to what *actus reus*, if any, he or she has committed.'

¹⁶ Section 77(7) of the Criminal Procedure Act 51 of 1977. See Louw op cit (n12) 43. See further F Cassim 'The accused person's competency to stand trial – a comparative perspective' (2004) 45 *Codicillus* 17 at 20. Also see Du Toit et al *Commentary* at 13-3 who adds that this does not however often happen.

¹⁷ Section 77(6)(a) of the Criminal Procedure Act 51 of 1977 uses the word 'shall' indicating the lack of discretion in terms of making orders with regard to an unfit accused.

¹⁸ See Kruger *Hiemstra Suid-Afrikaanse Strafproses* op cit (n7) 230. The court will not, however, be obliged to make an order in terms of s 77(6) where the state withdraws the charges. See *S v Kabita* 1983 (4) SA 618 (C). Also see F Khan '*De Vos NO v Minister of Justice and Constitutional Development*' (2017) 59 *SA Crime Q* 39 at 40.

¹⁹ Conditional or unconditional release is not possible. This fact confirms that the purpose of a trial on the facts for an unfit accused is not to determine the guilt of the accused with regard to the offence of which he stands accused, but rather to aid the court in deciding what the most appropriate form of detention under the Mental Health Care Act 17 of 2002 would be.

The consequences of detention also remain relevant for the orders available to the criminal court under s 77(6) post the 2017 Amendment.

2.3.1 Detention as state patient (s 77(6)(a)(i) order)

A state patient is a person so classified by a court directive in terms of s 77(6)(a)(i) or 78(6)(i)(aa) of the Criminal Procedure Act.²⁰ Section 77(6)(a)(i) states that where an unfit accused is charged with murder, culpable homicide, rape or another crime involving violence, and the court finds on a balance of probabilities the accused committed the act in question, the court must order the detention of the unfit accused in prison or a psychiatric hospital.²¹ Such accused is detained as a state patient in terms of the Mental Health Care Act until a judge in chambers orders his discharge.²² A state patient is, therefore, an unfit accused charged with a violent offence and found to have committed the act in question. The order of detention as state patient must be made in the presence of the unfit accused.²³

There is no limit on the period that a state patient should or may be detained since it is uncertain how long it will take to stabilise the illness or whether it will respond to treatment at all.²⁴ The Mental Health Care Act provides for the periodic review of the mental condition of a state patient²⁵ ensuring that a state patient, while at first detained for an

²⁰ Section 1 of the Mental Health Care Act 17 of 2002. The term 'state patient' is not used in the Criminal Procedure Act, but the Mental Health Care Act makes express provision for this category of mental health care treatment and rehabilitation services in Chapter VI (ss 41-48) thereof.

²¹ Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977 states that: '...and the court shall direct that the accused— (i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002'; Also see s 47 of the Mental Health Care Act 17 of 2002.

²² Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977 read with s 47 of the Mental Health Care Act 17 of 2002. Only an accused found unfit to stand trial and charged with a crime involving serious violence can be declared a state patient and detained as such in terms of the Mental Health Care Act. Also see Khan op cit (n18) 40.

²³ *S v Eyden* 1982 (4) SA 141 (T). Also, see Du Toit op cit (n6) 13-22.

²⁴ S Kaliski 'Does the insanity defence lead to an abuse of human rights?' (2012) 15 *Afr J Psychiatry* 83 at 85.

²⁵ Section 46(1) of the Mental Health Care Act 17 of 2002. A review takes place within six months from the detention order and then every 12 months.

unspecified period, is not detained indefinitely.²⁶ A state patient can only be discharged by order of a judge in chambers²⁷ after consideration of a report indicating the prognosis of the accused's mental health status.²⁸ An application for discharge is a laborious process²⁹ and can only be made once every 12 months.³⁰ If the accused regains his ability

²⁶ When the review is conducted as per s 46(1) of the Mental Health Care Act 17 of 2002, the report on the review must contain information on the future treatment of the state patient, the merits of granting leave of absence to the accused (s 45) or the discharge of the state patient. A complete discharge may be granted by a judge in chambers in terms of s 47(6) of the Mental Health Care Act 17 of 2002.

²⁷ Section 47 of the Mental Health Care Act 17 of 2002. Also, see Cassim op cit (n16) 20. See further Louw op cit (n12) 43. A Mental Health Review Board does not have the jurisdiction to order or confirm the release of a state patient as is the case with an assisted or involuntary mental health care user, perhaps leaving state patients vulnerable to unreasonably long periods of detention. The Mental Health Care Act 17 of 2002 (s 19) sets out the functions and powers of the Mental Health Review Board and refers to tasks relating to assisted and involuntary mental health care users as well as mentally ill prisoners, but no mention is made of state patients.

²⁸ Section 47(3)(a) of the Mental Health Care Act 17 of 2002.

²⁹ Section 47 of the Mental Health Care Act 17 of 2002 provides for the applications for discharge of a state patient to be brought by the state patient himself, an official curator ad litem or administrator, if appointed, the superintendent of the facility where the state patient is treated, the medical practitioner administering the mental health care treatment and rehabilitation services, spouse, next of kin or any other person authorised to act on behalf of the state patient. Section 47(1)(a)–(g) of the Mental Health Care Act 17 of 2002. Also see Kruger *Hiemstra Suid-Afrikaanse Straffproes* op cit (n7) 231 who explains that in practice, the head of the health establishment where the state patient receives treatment sends the application for discharge to the Department of Defence, which in turn sends it to the Registrar of the relevant court in order for the application to be considered by a judge in chambers. The Department of Defence is the official curator ad litem of the state patient in this instance. C Bateman 'The insanity of a criminal justice system' (2005) 95 *SA Med J* 208 at 212 explains that it is very difficult to convince a judge that a person that was once found unfit to stand trial is no longer mentally ill or that such a person will now take his medication and will in general 'behave'. Under older mental health legislation the practice was that the Attorney General would only request this release if the superintendent of the institution where the person involved was detained was willing to almost guarantee that the individual if released, would not commit a similar offence again. See J Milton 'Law reform: The Criminal Matters Amendment Act 1998 brings some sanity (but only some) to the defence of insanity' (1999) 12 *SACJ* 41 at 41. Releases were, therefore, few and far between. Also, see *S v Pedro* 2015 (1) SACR 41 (WCC) at para [85].

³⁰ *S v Pedro* op cit (n29) at para [85]. Also, see s 47(4)(a) of the Mental Health Care Act 17 of 2002 which provides that an application for discharge may not be brought within 12 months of a previous application for discharge having been dismissed. Also see *De Vos* CC case op cit (n1) at para [36], footnote 41 where it is confirmed that an application for discharge can only be brought once every 12 months.

to follow the trial proceedings to the extent that he is discharged from treatment as state patient, his trial may resume.³¹

During an application for discharge from treatment as state patient the judge may, rather than granting or denying this application, reclassify the accused and order that his treatment continues on an involuntary mental health care basis. Below, detention as a state patient is contrasted with detention as an involuntary mental health care user.

2.3.2 *Involuntary mental health care user (s 77(6)(a)(ii) order)*

Involuntary mental health care services are rendered to a person who is unable, because of his mental health status, to take an informed decision about the need for treatment and who refuses same, but needs it for their own protection or to protect others.³²

Section 77(6)(a)(ii) provides that an unfit accused found to have committed an act other than the violent acts set out above³³ or found not to have committed the act in question,³⁴ must be detained in an institution as an involuntary mental health care user in terms of the Mental Health Care Act.³⁵

³¹ Section 77(7) of the Criminal Procedure Act 51 of 1977. The only requirement is that the accused must, at the point when the proceedings are resumed, be able to follow the proceedings. See Kruger *Hiemstra Suid-Afrikaanse Strafproses* op cit (n7) 231 and *S v Leeuw* 1987 (3) SA 97 (A). See Louw op cit (n12) 43. Also, see Cassim op cit (n16) 20. See further Du Toit op cit (n6) 13-3, who adds that the trial rarely continues if and when an accused regains his ability to stand trial. Also, see Joubert op cit (n5) 252.

³² Section 1 of the Mental Health Care Act 17 of 2002.

³³ Acts involving serious violence such as murder, culpable homicide or rape. See s 77 (6)(a)(i) of the Criminal Procedure Act 51 of 1977.

³⁴ The finding as to whether the unfit accused committed the act in question, is arrived at during the trial on the facts. See s 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977.

³⁵ Section 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977 reads:

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

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in s 37 of the Mental Health Care Act, and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under s 106(4) to be acquitted or to be convicted in respect of the charge in question.’

Also see s 37 of the Mental Health Care Act 17 of 2002. See further Louw op cit (n12) 43. See further Du Toit op cit (n6) 13-7. These persons cannot be detained as state patients as only accused persons who are found to have committed violent offences can be so detained in terms of the Mental Health Care Act 17 of 2002. Also, see *De Vos NO v Minister of Justice and Constitutional Development*; In Re: *Snyders v Minister of Justice and Constitutional Development* 2015 (1) SACR 18 (WCC) (hereinafter the ‘*De Vos HC case*’) at para [9].

The mental health status of an involuntary mental health care user is reviewed periodically.³⁶ Once it is established that involuntary mental health care is no longer needed, the user may be discharged.³⁷ It is easier to secure the discharge of an involuntary mental health care user than to secure the discharge of a state patient.³⁸ The mental health review board established under the Mental Health Care Act may further order the discharge of involuntary mental health care users.³⁹

An accused who received involuntary care by order of the criminal court, and who is discharged from such care by the mental health facility, will most probably be deemed to have regained his fitness to stand trial. His criminal trial may continue at this stage.⁴⁰

2.4 Conclusion

Section 77(6) of the Criminal Procedure Act leads to the inevitable detention of an unfit accused as either a state patient or an involuntary mental health care user in terms of the Mental Health Care Act.

State patients must be detained in prison or a psychiatric hospital for an unspecified and potentially very long period of time. Imprisoning state patients is concerning as mental health resources in prisons

³⁶ Section 37(1) of the Mental Health Care Act 17 of 2002 provides for a review of the accused's mental health status six months after the commencement of the treatment and thereafter every 12 months.

³⁷ Sections 37 and 38 of the Mental Health Care Act 17 of 2002. Section 37 provides for the discharge of the involuntary mental health care user if, during the periodic review, the Review Board is of the view that the user should be discharged. Section 38 allows for the head of the health establishment to discharge the user if he is of the view that the user no longer suffers from a mental illness. If the user is willing to receive further treatment, the user will forthwith be treated as a voluntary mental health care user. Section 38(2) of the Mental Health Care Act 17 of 2002 read with s 25 thereof. If the user is not willing to receive further treatment and the head of the health establishment is satisfied that this person no longer suffers from a mental illness, such person must be discharged and the high court must be informed of such discharge. Section 38(3) read with s 37(6) of the Mental Health Care Act 17 of 2002.

³⁸ Compare s 37 and s 47 of the Mental Health Care Act 17 of 2002. Also see *S v Siko* 2010 (2) SACR 406 (ECB) at para [8].

³⁹ Section 37(5) of the Mental Health Care Act. The Registrar of the high court must be notified of such discharge. See s 37(6) of the Mental Health Care Act.

⁴⁰ *S v Pedro* op cit (n29) at para [114]. The court, however, expressed concern about the fact that there does not appear to be any legislative procedure which ensures that the Director of Public Prosecutions receives periodic reports as to the mental health status of a person who has been referred for detention in terms of sub-para (ii) of s 77(6)(a) of the Criminal Procedure Act 51 of 1977. In this particular case an accused person ordered by the court to be treated as an involuntary mental health care user was released after two months of being so detained. Also see s 77(7) of the Criminal Procedure Act 51 of 1977.

are scarce⁴¹ making treatment of the unfit accused's mental illness unlikely. With this in mind, the purpose of detention of a state patient in prison, becomes unclear. It is concerning that an unfit accused found not to have committed the act in question, must be detained as an involuntary mental health care user under s 77(6)(a)(ii). No option of conditional or unconditional release exists.

The constitutionality of imprisonment and hospitalisation of a state patient as provided for in s 77(6)(a)(i) and the automatic detention of an unfit accused as an involuntary mental health care user under s 77(6)(a)(ii) has far-reaching consequences and impacts on the accused's right to freedom and security of the person, especially since detention is not the consequence of a finding of guilt.⁴² The court's lack of discretion under s 77(6) means the individual circumstances of the accused, such as the treatability of his mental condition, cannot be considered when deciding on the manner of detention of the accused.⁴³ Such lack of discretion could lead to the arbitrary deprivation of freedom of the unfit accused.⁴⁴

The constitutional validity of s 77(6)(a)(i) and (ii) were challenged in the Constitutional Court in the *De Vos* matter discussed below.

3 The *De Vos* judgment as impetus behind the Criminal Procedure Amendment Act

3.1 Introduction

The judgment deals with important issues that warrant in-depth discussion. For purposes of this contribution, however, the discussion of the Constitutional Court judgment that follows only touches upon selected aspects of the courts finding with regard to the

⁴¹ Evidence was presented to the court that prisons do not have facilities to provide psychological services to detainees with mental illness or intellectual disabilities. This evidence was uncontested by the Minister of Health in the high court. See *De Vos* HC case op cit (n36) at para [43].

⁴² *De Vos* CC case supra (n1) at para [20]. Even though a trial on the facts is held subsequent to a finding of unfitness, such trial is not aimed at proving the guilt or innocence of an unfit accused but aids the court in determining what *actus reus*, if any, they have committed. See *S v Sithole* op cit (n11) at 315I.

⁴³ The high court in the *De Vos* matter expressed concern over the fact that s 77(6)(a) does not allow a court to make an order with due regard to the individual circumstances of the accused, including whether the accused poses a danger to society *De Vos* HC case supra (n36) at para [49]. Also see *De Vos* CC case supra (n1) at para [7].

⁴⁴ Khan op cit (n18) 45.

unconstitutionality of s 77(6)(a)(i) and (ii).⁴⁵ These issues include the peremptory nature of s 77(6)(a) and whether the lack of discretion by the court under s 77(6) leads to a violation of the accused's right to freedom and security of the person as provided for in s 12 of the Constitution.⁴⁶ Though the discussion is focused mainly on the Constitutional Court judgment, reference is made to the finding of the Western Cape High Court where pertinent.

3.2 Facts of the case

This case concerned two accused persons living with intellectual disabilities, one accused of murder and the other of rape.⁴⁷ Both were found unfit to stand trial.⁴⁸ The matters were consolidated because of the similarity in issues in these two cases before the court. According to s 77(6) of the Criminal Procedure Act at the time, both accused had to be detained as state patients in terms of s 47 of the Mental Health Care Act. This is because of the seriousness of the charges against them, provided it was found that they committed the act in question.⁴⁹ Discharge from such detention is only possible by order of a judge in chambers once an improvement in the accused's mental state is observed.⁵⁰ Due to the nature of an intellectual

⁴⁵ For a detailed case discussion on the *De Vos* judgment, see Khan op cit (n18) 39-46. See further D Janse van Rensburg *A Constitutional Analysis of the Court's (lack of) Discretion in Terms of Section 77(6) of the Criminal Procedure Act 51 of 1977* LLM (University of Pretoria) (2015).

⁴⁶ Section 12(1)(a) of the Constitution states that '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'.

⁴⁷ The first accused, Mr Stuurman, was accused of stabbing a 14-year-old girl to death when he himself was only 14 years old. He sustained a head injury at the age of 5, which left him with a severe 'mental' disability. The second accused, Mr Snyders who was born with Down's syndrome and had cognitive impairments, was accused of raping a girl who, at the time of the trial was 11 years old. The rape was alleged to have taken place some 5 to 6 years prior to the trial.

⁴⁸ Mr Stuurman was sent for observation by the Oudtshoorn regional court and the finding was that he was unfit to stand trial – although the three psychiatrists differed in their reasons for this finding, the finding was unanimous. See *De Vos* CC case supra (n1) at para [6]. The second accused, Mr Snyders, was sent for observation by the Blue Downs Magistrates Court and was found unfit to stand trial. The report indicated that he had moderate mental retardation. *De Vos* CC case supra (n1) at para [23].

⁴⁹ Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977. The matter came before the court on special review since concern was raised about proof that the accused was actually involved in the offence of which he stood accused.

⁵⁰ The form used for the application for discharge (form MHCA 30 in the regulations to the Mental Health Care Act R233, GG 24384, 14 February 2003, pp92-96) requires the applicant to indicate the prognosis of the accused. See s 47(3) of the Mental Health Care Act 17 of 2002. Intellectual disability as such is not treatable.

disability, no improvement is possible; therefore, these accused persons faced indefinite detention.⁵¹ The validity of s 77(6)(a)(i) and (ii) was challenged in the Western Cape High Court⁵² and found to be unconstitutional.⁵³ The matter was referred to the Constitutional Court for confirmation of invalidity of s 77(6)(a)(i) and (ii) as required by s 167(5) of the Constitution.⁵⁴ The Constitutional Court did not confirm the declaration of invalidity handed down by the high court but did indeed find s 77(6)(a)(i) and (ii) wanting as discussed below.

3.3 Peremptory nature of s 77(6)

Section 77(6) states that if an accused is found to have committed a serious offence contemplated in s 77(6)(a)(i) 'the court shall direct that the accused...be detained in a psychiatric hospital or prison pending the decision of a judge in chambers'. In terms of s 77(6)(a)(ii), it is stated that if it is established, on a balance of probabilities, that the accused committed a minor offence or did not commit any offence, 'the court shall direct that the accused...be admitted to and detained in an institution'. The applicant argued that the use of the word 'shall' in s 77(6) is indicative of its peremptory nature.⁵⁵ The Constitutional Court, relying on the principle of statutory interpretation that words should be given their ordinary meaning, agreed with the applicant⁵⁶ and found that s 77(6)(a) is indeed peremptory in that it compels the court to order the incarceration (of a state patient) or institutionalisation of an unfit accused regardless of any other

⁵¹ The psychiatrists included this concern in their report after finding Mr Snyders, who was accused of rape, unfit to stand trial: 'As the alleged offence occurred some 5 years ago it does raise the possibility that he may not be dealt with fairly with respect to the facts of the case. The court should be advised that consequently to declare him a state patient [as contemplated by s 77(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.' *De Vos* HC supra (n36) at para [22].

⁵² *De Vos* HC case supra (n36) at para [2].

⁵³ *De Vos* HC case supra (n36) at para [72]. This order was suspended for 24 months to enable the legislature to cure the invalidity.

⁵⁴ See *De Vos* CC case supra (n1).

⁵⁵ *De Vos* CC case supra (n1) at para [16].

⁵⁶ *De Vos* CC case supra (n1) at para [18].

fact or circumstance.⁵⁷ The Constitutional Court found that s 77(6)(a) deprived the court of exercising judicial discretion.⁵⁸

Having found that s 77(6) is peremptory, the court had to consider whether the detention of mentally ill accused persons in terms of s 77(6)(a) was arbitrary and without just cause so as to constitute a violation of the constitutional right to freedom and security of the person.⁵⁹

3.4 The accused's right to freedom and security of the person

The Constitutional Court emphasised that deprivation of liberty has to be justifiable from both a substantive and a procedural point of view.⁶⁰ The substantive element entails that detention must not be arbitrary and that the purpose or reason for the deprivation of liberty must be just.⁶¹

Whether deprivation is 'just' depends on the circumstances of each case.⁶² With regard to the procedural element, the procedure followed to achieve the deprivation of liberty has to be fair⁶³ with satisfactory safeguards built into the process. Substantive fairness does not presuppose procedural fairness.⁶⁴

In order to determine whether the deprivation of liberty is just, it has to be established whether there is a connection between the

⁵⁷ The Constitutional Court confirmed in *De Vos* CC case supra (n1) at para [19] that the wording of s 77(6) cannot be interpreted in any way other than that it is peremptory and does not leave the court with a discretion to make appropriate orders in a particular case. Also, see *De Vos* HC case supra (n36) at para [11] where the lack of discretion for orders pertaining to the unfit accused is indicated.

⁵⁸ *De Vos* CC case supra (n1) at para [19].

⁵⁹ Section 12 of the Constitution. Also, see *De Vos* HC case supra (n36) at para [38]. It was argued on behalf of the accused that these provisions violated a mentally ill accused person's right to equality, dignity as well as freedom and security of person. These rights are protected in ss 9, 10 and 12, respectively, of the Constitution. See *De Vos* HC case supra (n36) at para [33]. It was also contested because it violates the rights of children in terms of s 28(2) of the Constitution. As already stated, the position of children and thus the part of the judgment dealing with the position of children will not be discussed here. For a discussion on the issues relating to children, see Janse van Rensburg op cit (n45) 43-48.

⁶⁰ *De Vos* CC case supra (n1) at paras [23]-[25].

⁶¹ *De Vos* CC case supra (n1) at para [25]. The court, at para [26], referring to the matter of *De Lange v Smuts NO* 1998 (3) SA (CC) 785, stated that there must be a rational connection between the deprivation of the liberty on the one hand and some subjectively determinable purpose. If no such link exists, then deprivation of freedom is not just. Even where such a link does exist, however, it is important to ensure that the reason for the deprivation must be just.

⁶² *De Vos* CC case supra (n1) at para [28].

⁶³ *De Vos* CC case supra (n1) at paras [24], [25].

⁶⁴ *De Vos* CC case supra (n1) at para [24].

deprivation of liberty and the objective of such detention, namely to provide treatment to the accused, alternatively to secure the safety of the accused or the community.⁶⁵ The state argued that the objective of detaining the unfit accused is to prevent the accused from harming himself or the public, to prevent stigmatisation by other members of the community and further to provide treatment, care and rehabilitation to the accused.⁶⁶ Dealing with the prevention of harm that the accused could cause, the state argued in the high court that mentally ill persons may pose a danger to themselves and society.⁶⁷ It was acknowledged that there might be circumstances in which detention of mentally ill persons is justified and that such detention in those circumstances serves a legitimate purpose.⁶⁸ The high court, however, warned against an assumption that all persons with mental illness are dangerous especially since s 77(6)(a) does not require, or even permit, the court to enquire into the potential danger that the accused may pose to society.⁶⁹ The Constitutional Court agreed and added that s 77(6)(a) perpetuated stereotyping in that it nurtured the perception that all persons with mental illnesses are dangerous.⁷⁰ The assumption of dangerousness is therefore not an acceptable reason or objective for depriving the accused of his liberty. The acceptability of the argument that the objective with the deprivation of liberty is to provide treatment to the unfit accused, is dealt with later in this

⁶⁵ *De Vos* CC case supra (n1) at para [31].

⁶⁶ *De Vos* CC case supra (n1) at para [32].

⁶⁷ *De Vos* HC case supra (n36) at paras [41], [46], [47]. The respondents (Minister of Justice and Constitutional Development) argued that the deprivation of freedom in the case of persons detained because they are mentally ill 'gives effect to legitimate governmental objectives, which were identified by the respondents as being the following: (a) An accused person with a mental illness, who is found to have committed a serious or violent act, poses a potential danger to society. The community must accordingly be protected from such persons and the State must fulfil its obligation to provide safety and security for the people of South Africa. (b) The DPP further contended that s 77(6)(a) is "designed primarily to protect the interest of the accused person" and that it is necessary 'to protect the mentally ill person from danger to him, as well as the public from possible danger from the accused person.' (at para [46]).

⁶⁸ *De Vos* HC case supra (n36) at para [48]. Also see *De Vos* CC case op supra (n1) at para [7].

⁶⁹ *De Vos* HC case supra (n36) at para [49] reads: 'It is equally well-recognised, however, that not every person with a mental illness or mental defect is a danger to society or requires to be detained in an institution. This is so because there are varying degrees of mental illness and various types of mental disability, and institutionalisation is not invariably required or indeed appropriate. And herein lies the rub, because s 77(6)(a) does not require, or even permit, the court to enquire into either the potential danger to society posed by the accused person or the individual needs or circumstances of such person.'

⁷⁰ *De Vos* CC case supra (n1) at para [56].

contribution where the constitutionality of detention under s 77(6)(a)(i) and (ii) is discussed.

With regard to procedural fairness, the court considered the trial on the facts as a mechanism built into the process to ensure such fairness when depriving an unfit accused of his liberty under s 77(6). The court found, however, that the trial on the facts is not a satisfactory safeguard against arbitrary detention since the result of the trial, regardless of the finding, was inevitably detention.⁷¹ It appears that the deprivation of liberty of the unfit accused under s 77(6) does not meet the substantive or the procedural requirements to justify such deprivation. Consequently, the automatic detention of an unfit accused under s 77(6) amounts to arbitrary detention.

The Constitutional Court confirmed that such arbitrary detention violates the unfit accused's right to freedom and security of the person, equality and dignity. The right to dignity is a value central to interpreting the right to freedom and security of the person.⁷² A person with a mental illness has the right to not be deemed dangerous due to the mere presence of the mental illness and to not be deprived of liberty on the basis thereof. This is in line with the constitutional duty to promote the equality of, especially, persons disadvantaged by past practices⁷³ including accused persons with mental illnesses or intellectual disabilities.⁷⁴

The Constitutional Court gave due consideration to international law⁷⁵ and in particular the United Nations Convention on the Rights of Persons with Disabilities⁷⁶ which specifically states the 'existence of a disability shall in no case justify the deprivation of liberty'.⁷⁷ The court reiterated that persons with disabilities cannot simply be removed from society for the mere fact that they have a mental illness or intellectual disability.⁷⁸

The court considered s 36 of the Constitution (the limitation clause) to determine whether the limitation on the unfit accused's s 12 right

⁷¹ *De Vos* CC case supra (n1) at para [57]. The trial on the facts is the process during which it is determined whether the unfit accused committed the crime in question

⁷² *De Vos* CC case supra (n1) at para [46].

⁷³ Section 7 of the Constitution. Also see *De Vos* CC case supra (n1) at para [56].

⁷⁴ Accused persons with mental illness or intellectual disabilities have been historically disadvantaged and discriminated against *De Vos* CC case supra (n1) at para [46].

⁷⁵ Section 39(1)(b) of the Constitution requires courts to consider international law when interpreting the Bill of Rights.

⁷⁶ United Nations Convention on Persons with Disabilities and Optional Protocol (A/RES/61/106) adopted on 13 December 2006.

⁷⁷ Article 14(1)(b) of the United Nations Convention on the Rights of Persons with Disabilities op cit (n76).

⁷⁸ *De Vos* CC case supra (n1) at para [30].

could be justified. The court found that such limitation was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁷⁹

Having established that arbitrary detention of unfit accused persons violates such accused's right to freedom and security of the person, the court had to consider the constitutionality of s 77(6)(a)(i) and (ii) which facilitates such detention.

3.4.1 Detention of state patients (s 77(6)(a)(i))

3.4.1.1 Detention in prison

The court found that s 77(6)(a)(i) in so far as it mandates the imprisonment of an unfit accused based on resources shortages alone, is inconsistent with the Constitution and accordingly invalid. The declaration of invalidity was suspended for 24 months to allow the legislature to remedy the invalidity.⁸⁰

The court did not accept the respondent's argument that the aim with or reason for imprisonment of an unfit accused is to provide care and treatment to the accused and to facilitate therapeutic remedies for the accused.⁸¹ The court rejected this reasoning based on evidence presented to the court that prisons do not have facilities to provide psychological services to detainees with mental illness or intellectual disabilities.⁸² The lack of facilities in prison means the intended objective with detention, namely, treatment, is unachievable. The court emphasised that the aim with imprisoning the unfit accused is not punishment.⁸³ There is consequently no rational link between the deprivation of liberty by way of detention in prison and the objective of providing treatment to such an accused. Detention of state patients in prison for treatment is therefore unjust.

The Constitutional Court further reiterated that imprisonment of an unfit accused violates the accused's right to dignity and that it reinforces the stigma and marginalisation of accused persons with mental illness.⁸⁴ Accused persons, who are not considered dangerous, should not have their freedom limited in a manner that amounts to degrading punishment as this violates their dignity and breaches their right not to be deprived of their freedom without just cause.⁸⁵

⁷⁹ *De Vos* CC case supra (n1) at para [59].

⁸⁰ *De Vos* CC case supra (n1) at para [65].

⁸¹ *De Vos* CC case supra (n1) at paras [42], [43].

⁸² *De Vos* CC case supra (n1) at para [43]. Also see *De Vos* HC case supra (n36) at para [42]. This evidence was uncontested by the Minister of Health in the high court.

⁸³ *De Vos* CC case supra (n1) at para [39].

⁸⁴ *De Vos* CC case supra (n1) at para [46].

⁸⁵ *De Vos* CC case supra (n1) at para [46].

The court found that imprisonment should only be used as a ‘stop-gap’ measure where an unfit accused awaits availability of a bed in a hospital for treatment and where the court believes that the accused poses a danger to himself and others if released awaiting such availability.⁸⁶ Where there is no threat of harm, the court should be allowed to craft a fitting order that allows for the outpatient treatment of the accused by, for example, extending the bail conditions, or any other appropriate order pending availability of a bed in a psychiatric hospital.⁸⁷

3.4.1.2 Detention in psychiatric hospital

The Constitutional Court found that detaining a state patient in a psychiatric hospital⁸⁸ is permissible because the accused is properly assessed during the s 79 fitness assessment to establish whether he has a mental illness and is in need of treatment.⁸⁹ Such detention serves the objective of care and treatment, and therefore, justifies infringing the accused’s liberty.⁹⁰

⁸⁶ *De Vos* CC case supra (n1) at para [47].

⁸⁷ *De Vos* CC case supra (n1) at para [63] where the court stated: ‘Section 77(6)(a)(i) operates rationally subject to certain qualifications. Imprisonment should only be available to accused persons who pose a serious danger to society or themselves. If an accused person does not pose a serious danger to society or themselves, then resources alone cannot dictate that an accused person be placed in prison. If resources alone require an accused person to be kept in prison, then to this extent, section 77(6)(a)(i) is inconsistent with the Constitution and is invalid. If resources are significantly constrained such that a bed in a psychiatric hospital is unavailable, then a presiding officer should be able to craft an appropriate order that encompasses treating the accused as an outpatient, for example, by extending the bail conditions, or any other appropriate order pending the availability of a bed in a psychiatric hospital.’ An order similar to that provided for in s 35(1)(f) of the Constitution or 79(2)(c) of the Criminal Procedure Act 51 of 1977 should be considered. Section 35(1)(f) of the Constitution states: ‘(1) Everyone who is arrested for allegedly committing an offence has the right— (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.’ Section 79(2)(c) of the Criminal Procedure Act 51 of 1977 states: ‘The court may make the following orders after the enquiry referred to in subsection (1) has been conducted- (i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine; (ii) refer the accused at the request of the prosecutor to the court referred to in section 77 (6) which has jurisdiction to try the case; (iii) make any other order it deems fit regarding the custody of the accused; or (iv) any other order.’

⁸⁸ In terms of s 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977, which deals with persons accused of serious crimes involving violence.

⁸⁹ *De Vos* CC case supra (n1) at para [38]. The high court found that such hospitalisation is unconstitutional. See *Janse van Rensburg* op cit (n45) 53.

⁹⁰ *De Vos* CC case supra (n1) at para [31] the court reiterated the importance of a rational connection between the deprivation of liberty and the objective with which it is done.

The court found that the safeguards built into s 47 of the Mental Health Care Act regarding discharge measures, are sufficient to protect the accused's rights⁹¹ and ensures that such person is not detained for longer than necessary.⁹²

3.4.2 *Detention of involuntary mental health care users (s 77(6)(a)(i))*

Since s 77(6)(a)(ii) mandates the institutionalisation of all unfit accused persons regardless of whether they require treatment or pose a danger to themselves or others, it is inconsistent with the Constitution.⁹³

The state argued that the reason for detaining an involuntary mental health care user as an accused found not to have committed the act in question or found to have committed a non-violent offence is because such an accused needs treatment.⁹⁴ The Constitution rejected this argument and the court pointed out that the objective of treatment alone cannot justify institutionalisation as this fails to appreciate that mental illness is complex.⁹⁵ It was stressed that not all mental illnesses are treatable (such as Down's syndrome) and that institutionalisation of a person with this condition would not serve the purpose of treatment as the condition will not improve.⁹⁶ The court stressed that the presence of a mental illness or intellectual disability per se cannot justify the deprivation of liberty⁹⁷ in the form of institutionalisation, nor is the mentally ill person's contact with the criminal justice system a justifiable reason for institutionalisation.⁹⁸

The court considered the criteria set out on the Mental Health Care Act for involuntary care treatment and rehabilitation services and noted that s 77(6)(a) effectively creates a pathway for an accused through the criminal justice system to be admitted as an involuntary mental health care user where they would not have met the criteria had they not

⁹¹ *De Vos* CC case supra (n1) at paras [35]-[38].

⁹² *De Vos* CC case supra (n1) at para [38].

⁹³ *De Vos* CC case supra (n1) at para [66].

⁹⁴ *De Vos* CC case supra (n1) at para [53].

⁹⁵ *De Vos* CC case supra (n1) at para [55]. This finding ties in with the high court's observation that there are varying degrees of mental illness and intellectual disability and institutionalisation is not always required or appropriate. See *De Vos* HC case supra (n36) at para [49].

⁹⁶ The objective of treatment in itself is therefore not sufficient to justify an infringement of a person's liberty. See *De Vos* CC case op cit (n1) at para 55.

⁹⁷ *De Vos* CC case supra (n1) at para [56].

⁹⁸ *De Vos* CC case supra (n1) at para [57].

been in the criminal justice system.⁹⁹ The court held that this state of affairs results in accused persons more readily being institutionalised under the Criminal Procedure Act without the ordinary safeguards of the Mental Health Care Act.¹⁰⁰

As stated, the court found s 77(6)(a)(ii) inconsistent with the Constitution. As a remedy, the court ordered that s 77(6)(a)(ii) should, from the date of the order and pending amendment by the legislature, read as follows:

‘(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence— (aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act (bb) be released subject to such conditions as the court considers appropriate; or (cc) be released unconditionally.’¹⁰¹

3.5 Conclusion

The Constitutional Court did not confirm the order of invalidity of s 77(6)(a)(i) and (ii) as determined by the high court.¹⁰² The Court did, however, find that s 77(6)(a)(i) is inconsistent with the Constitution in as far as it provides for the compulsory imprisonment of an adult accused person.¹⁰³ It further held that s 77(6)(a)(ii) is inconsistent with the Constitution and suggested new wording of this section¹⁰⁴ which was eventually incorporated into the Amendment Act.¹⁰⁵ Changes to these sections are necessary so as to not perpetuate violations of the accused’s right to freedom and security of the person which

⁹⁹ *De Vos* CC case supra (n1) at para [54] the court explains that involuntary admission under the Mental Health Care Act 17 of 2002 is only permissible if ‘any delay in providing care, treatment and rehabilitation services or admission may result in the— (i) death or irreversible harm to the health of the user; (ii) user inflicting serious harm to himself or herself or others; or (iii) user causing serious damage to or loss of property belonging to him or her or others.’ The court then observes that ‘without a court order, the accused would not be able to be institutionalised involuntarily unless (i), (ii) or (iii) above can be established. Thus, absent one of the above criteria, if an accused has committed no offence, institutionalisation cannot follow under the Mental Health Care Act. In effect, then, accused persons are more readily institutionalised under the Criminal Procedure Act without the ordinary safeguards prescribed by the Mental Health Care Act.’

¹⁰⁰ *De Vos* CC case supra (n1) at para [54].

¹⁰¹ *De Vos* HC case supra (n36) at para [69.4].

¹⁰² *De Vos* CC case supra (n1) at para [69.1]. Also see Janse van Rensburg op cit (n45) 56.

¹⁰³ *De Vos* CC case supra (n1) at para [69].

¹⁰⁴ *De Vos* CC case supra (n1) at para [69].

¹⁰⁵ Criminal Procedure Amendment Act 4 of 2017.

materialised through the *predetermined and mandatory outcome*¹⁰⁶ prescribed by s 77(6).

The wording of s 77(6) deprived the court of using its discretion regarding an appropriate order having due regard to the facts of the individual case.¹⁰⁷ This lack of discretion could lead to injustice where a rule is applied mechanically without due regard to the uniqueness of each case. In the context of s 77(6), such injustice is the automatic detention of an unfit accused regardless of whether the unfit accused is in need of mental health care treatment or whether their condition is treatable, whether they committed an offence or not or pose a danger to themselves or others or whether less restrictive alternatives for treatment exist. Importantly, the *De Vos* judgment acknowledges that not all persons with mental illness are dangerous and thus for that reason only need to be detained. This acknowledgement debunks the assumption of dangerousness that was routinely associated with mental illness.¹⁰⁸

The court's acknowledgement that not all mental illness is treatable, confirms that it is unjustifiable to detain all unfit accused persons for treatment. In certain instances, such as the case with intellectual disabilities, detention simply does not serve the purpose of treatment as the condition is simply not treatable.¹⁰⁹ A fitting order for an unfit accused who poses no danger to themselves or others might well be conditional discharge with the view of securing outpatient treatment. Section 77(6), however, does not allow the court to consider the nature of the illness or desirability of inpatient versus outpatient treatment. The need for discretion when making the s 77(6) orders is imperative since judicial discretion has a very important role to play here to ensure justice.¹¹⁰

¹⁰⁶ *De Vos* HC case supra (n36) at para [49].

¹⁰⁷ *De Vos* HC case supra (n36) at para [49].

¹⁰⁸ Unfit accused persons were detained not because they committed an offence or because they were dangerous, but merely because they had a mental illness. This practice perpetuated the stigmatisation of mentally ill persons as dangerous.

¹⁰⁹ Khan op cit (n18) 44.

¹¹⁰ *De Vos* HC case supra (n36) at para [50] where the court quoted from the judgment of Ngcobo J, writing for the majority in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) at para [119] where it was stated: '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 particular cases. 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 that is appropriately tailored to the needs of the individual case. It is only through discretion that the goal of individualised justice can be achieved. Individualised justice is essential to the proper administration of justice.'

The *De Vos* judgment highlights the necessity to expand the orders available to a court when finding an accused unfit to stand trial. The Amendment Act does just that. A discussion of the amended s 77(6)(a)(i) and (ii) follows.

4 Criminal Procedure Amendment Act 4 of 2017

4.1 Introduction

This Act which came into force on 29 June 2017 seeks to amend ss 77 to 79 of the Criminal Procedure Act. The aim of amending s 77 is to provide the courts with a wider range of options regarding orders to be issued where an accused is found incapable of understanding criminal proceedings.¹¹¹ This is achieved by, *inter alia*, replacing the word ‘shall’ in s 77(6)(a) with ‘may’. The Amendment Act gives effect to the *De Vos* judgment and aims to remedy the unconstitutionality of s 77(6)(a)(i) and (ii). The specific amendments to s 77(6)(a)(i) and (ii) are explained below.

Before the amendments to s 77(6)(a)(i) and (ii) are discussed, it is important to note that the Amendment Act brought about a change in terminology. ‘Intellectual disability’¹¹² replaces ‘mental defect’ as the more acceptable term and one used in the mental health profession.¹¹³

4.2 Amendment of s 77(6)(a)(i) (charged with offence involving violence)

Previously under s 77(6)(a)(i), the court had no option but to order the detention in prison or a psychiatric hospital of an unfit accused charged with and found to have committed a violent act. Since the court in the *De Vos* judgment found the imprisonment of state patients until released by an order of a judge in chambers unconstitutional, the option of imprisonment now falls away. Detention in hospital is still permissible. The court may also order detention where the court

¹¹¹ The preamble to the Criminal Procedure Amendment Act 4 of 2017.

¹¹² Section 1 of the Criminal Procedure Amendment Act 4 of 2017 amends s 77(1) to this effect. Section 2 of the Criminal Procedure Amendment Act 4 of 2017 amends s 78 to incorporate the more acceptable term of ‘intellectual disability’. Section 3 of the Criminal Procedure Amendment Act 4 of 2017 amends s 79 with regard to the substitution of the term ‘mental defect’ with ‘intellectual disability’.

¹¹³ American Psychiatric Association *The Diagnostic and Statistical Manual of Mental Disorders (DSM-V)* released in 2013 at 33 refers to intellectual disability rather than mental retardation and defines intellectual disability as follows: ‘Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains’. Three criteria as set out in the *DSM-V* must be met before this diagnosis can be made.

considers it to be necessary in the public interest.¹¹⁴ The table below illustrates the difference between the orders available to the court immediately before the enactment of the Amendment Act and the orders available thereafter.

| Orders available to the court under s 77(6)(a)(i) of the Criminal Procedure Act | |
|---|---|
| Criminal Procedure Act 51 of 1977 prior to amendment | Criminal Procedure Amendment Act 4 of 2017 |
| (aa) Detained as state patient in psychiatric hospital or a prison pending the decision of a judge in chambers in terms of s 47 of the Mental Health Care Act, 2002 ¹¹⁵ | (aa) detained as state patient in psychiatric hospital pending the decision of a judge in chambers in terms of s 47 of the Mental Health Care Act, 2002; ¹¹⁶ OR (bb) temporary detention in a correctional facility permissible if accused awaiting availability of bed in psychiatric hospital and if he or she poses a danger to self or others. ¹¹⁷ OR (cc) admitted to and detained in a designated health establishment stated in the order as if he or she were an involuntary mental health care user contemplated in s 37 of the Mental Health Care Act, 2002; ¹¹⁸ OR (dd) Released subject to such conditions as the court considers appropriate ; ¹¹⁹ |

The options available to the court under s 77(6)(a)(i) are expanded significantly to include less restrictive alternatives for purposes of

¹¹⁴ This was provided for in s 77(6)(a)(i) prior to its amendment as well. This will most probably be the case where an accused poses a danger to society at large.

¹¹⁵ Section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977 prior to the amendment. Under the Criminal Procedure Act 51 of 1977 prior to this amendment, an unfit accused charged with and found to have committed a violent act faced automatic detention.

¹¹⁶ Section 1(b) of the Criminal Procedure Amendment Act 4 of 2017 amends s 77(6)(a)(i)(aa) of the Criminal Procedure Act 51 of 1977. The Amendment Act amends s 77(6)(a)(i) to remove the option for such an accused to be detained in prison indefinitely after a finding of unfitness. An unfit accused charged with and found to have committed a violent act can no longer be detained indefinitely as a state patient in prison but *only* as such in a psychiatric hospital. Temporary detention is however permissible as per s 1(b) of the Criminal Procedure Amendment Act 4 of 2017 which amends s 77(6)(a)(i)(bb) of the Criminal Procedure Act 51 of 1977.

¹¹⁷ Section 1(b) of the Criminal Procedure Amendment Act 4 of 2017 amends s 77(6)(a)(i)(bb) of the Criminal Procedure Act 51 of 1977.

¹¹⁸ Section 77(6)(a)(i)(cc) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Amendment Act 4 of 2017. Involuntary care is a less restrictive form of detention under the Mental Health Care Act.

¹¹⁹ Section 77(6)(a)(i)(dd) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Amendment Act 4 of 2017.

treatment of the unfit accused. The option of conditional release¹²⁰ leaves room for outpatient treatment. This accused may not, however, be released unconditionally.

The provision for the temporary detention of a state patient in a correctional health facility of a prison while awaiting a bed in a psychiatric hospital gives effect to the ‘stop-gap’ measure as proposed by the Constitutional Court in the *De Vos* judgment.¹²¹

4.3 Amendment of s 77(6)(a)(ii) accused (charged with minor offence)

Under the Criminal Procedure Act prior to the 2017 amendment, an accused who was found to have committed an offence other than a violent offence referred to in s 77(6)(a)(i) or found not to have committed any offence at all had to be detained as an involuntary mental health care user in terms of the Mental Health Care Act.¹²² This option remains in the Amendment Act. However, it is no longer the only order available to the court as set out in the table below.

| Options available to the court under s 77(6)(a)(ii) of the Criminal Procedure Act | |
|--|---|
| Criminal Procedure Act 51 of 1977 prior to amendment | Criminal Procedure Amendment Act 4 of 2017 |
| (aa) Be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in s 37 of the Mental Health Care Act, 2002. | (aa) Be admitted to and detained in a designated health establishment stated in the order as if he or she were an involuntary mental health care user contemplated in s 37 of the Mental Health Care Act, 2002; OR (bb) released subject to such conditions as the court considers appropriate; ¹²³ OR (cc) released unconditionally. ¹²⁴ |

¹²⁰ Section 77(6)(a)(i)(dd) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Amendment Act 4 of 2017.

¹²¹ *De Vos* CC case supra (n1) at para [47].

¹²² Section 77(6)(a)(ii)(aa) of the Criminal Procedure Act 51 of 1977 prior to amendment by the Criminal Procedure Amendment Act 4 of 2017.

¹²³ Section 77(6)(a)(ii)(bb) inserted by s 1(b) of the Criminal Procedure Amendment Act 4 of 2017.

¹²⁴ Section 77(6)(a)(ii)(cc) inserted by s 1(b) of the Criminal Procedure Amendment Act 4 of 2017. In the Criminal Procedure Amendment Bill [B2-2017], the proposed amendment entailed that unconditional release will only be possible if the court finds that the accused did not commit the offence at all. This proviso does not appear in the Amendment Act 4 of 2017. Unconditional release is therefore apparently not only reserved for cases where the unfit accused is found not have committed the act in question.

These options of conditional and unconditional release give effect to the proposed reading-in as suggested by the Constitutional Court with regard to s 77(6)(a)(ii).¹²⁵

4.4 Comments on the Amendment Act

The Amendment Act strengthens the unfit accused person's right to freedom and security of the person. This is clear from the removal of the option to detain a state patient in prison for purposes of treatment until he is released by order of a judge in chambers. In addition, persons who previously could only be detained as state patients may now be detained and treated as involuntary mental health care users. It is easier to secure the discharge of an involuntary mental health care user than that of a state patient. State patients may now even be released conditionally. The expanded options available to the court enables the court to order treatment for the unfit accused in less restrictive ways based on the individual circumstances of the case including the nature of the mental illness of the accused. In the case of an accused with an intellectual disability, for example, the conditions for release may include sessions at a rehabilitation centre rather than a psychiatric hospital as a more suitable place that can provide the proper care and/or treatment for the particular condition.¹²⁶ Probably the most drastic amendment of s 77(6) is the option of unconditional release of an accused found to have committed an offence other than a violent offence or found not to have committed any offence at all.¹²⁷ This approach recognises that not all mental illnesses are treatable and not all persons with mental illnesses are dangerous and for these reasons only need to be detained.

The possibilities of conditional or unconditional release as introduced into the law by the Amendment Act transforms the trial on the facts into an adequate procedural safeguard against arbitrary detention. The trial on the facts was not an adequate safeguard against arbitrary detention since the result of the trial, regardless of the finding on whether the unfit accused committed the act in question, was inevitably detention. This trial previously only served to determine whether the

¹²⁵ See the amended s 77(6)(a)(ii) as set out in *De Vos* CC case supra (n1) at paras [39], [69]. These amendments do not have retrospective force. The Constitutional Court disagreed with the reading-in proposed by the high court which effectively amounts to incorporating the provisions (and options of orders) of s 78(6) into s 77(6). The Constitutional Court argued that there is a logical reason for accused persons under s 77 to be treated differently from those under s 78. Also see *De Vos* HC case supra (n36) at para [52]. For further discussion on the court's approach and comparison between these two sections, see Janse van Rensburg op cit (n45) 12-15.

¹²⁶ *De Vos* CC case supra (n1) at para [55], footnote 61.

¹²⁷ Section 77(6)(a)(ii)(dd) of the Criminal Procedure Amendment Act 4 of 2017.

accused should be detained as a state patient or an involuntary mental health care user. The trial on the facts will now after the Amendment Act serve as a mechanism to facilitate the unconditional release of an accused in appropriate cases.

The Amendment Act does not, however, address assessing dangerousness for purposes of detaining a state patient in prison temporarily.¹²⁸ Is dangerousness assumed based on the violent nature of the charge against the accused?¹²⁹ It is also not clear to what extent the criteria for involuntary mental health care as set out in the Mental Health Care Act will be considered, if at all, when the court orders that an unfit accused be detained as an involuntary mental health care user as per s 77(6)(a)(ii).

5 Conclusion

The new legal position brought about by the Amendment Act, as motivated by the *De Vos* judgment, ensures a victory for judicial discretion and the unfit accused's right to freedom and security of the person. The changes brought about by the Amendment Act end the practice of automatic detention of all unfit accused. Such detention was arbitrary and without just cause as it was based on an assumption of dangerousness due to the presence of a mental illness. Mental illness is no longer in itself the reason for detention in prison.¹³⁰

The new regime leaves room for the court to exercise discretion in that the amended s 77(6)(a)(i) and (ii) enables the court to craft orders with due consideration to the individual circumstances of the case including the nature of the accused's mental condition and whether it is treatable. Unfit accused persons may now be released unconditionally (if found to have committed a minor offence or not to have committed the act in question) or released conditionally into the care of suitably skilled people to provide treatment or rehabilitation on an outpatient basis where appropriate.

¹²⁸ The temporary detention of a state patient in prison while awaiting a bed in a psychiatric facility is allowed if the court is of the view that the accused poses a danger to himself or others. See s 77(6)(a)(i)(bb) of the Criminal Procedure Act 51 of 1977 as amended. The fitness assessment that takes place under s 79, however, does not allow for the assessment of dangerousness.

¹²⁹ Khan op cit (n18) 44 suggests that this is the leap that the Constitutional Court made when it found that hospitalisation of unfit accused persons are warranted under s 77(6)(a)(i) merely based on the fact that the charges against such accused stems from an allegation of murder, culpable homicide, rape or another act involving violence.

¹³⁰ State patients could be detained in prison pending the order of release from a judge in chambers. Detention of an unfit accused in prison is no longer allowed unless such detention is temporary while the accused awaits a bed in a psychiatric hospital.

Orders for conditional or unconditional release of unfit accused persons, could arguably free up much-needed resources in the criminal justice system¹³¹ and mental health care system,¹³² as unfit accused persons will no longer automatically be detained in prison or institutions for treatment as the case was before.

¹³¹ State patients may no longer be detained in prison for purposes of treatment which will free up space in prisons. State patients may only be detained in a correctional facility temporarily while awaiting a bed in a psychiatric hospital.

¹³² The fact that not all unfit accused persons will automatically be detained for purposes of treatment, will arguably aid in lightening the load on resource-strapped psychiatric facilities which previously had to provide treatment to all unfit accused persons who, by order of court, had to receive treatment as a state patient in terms of s 77(6)(1)(i) or an involuntary mental health care user under s 77(6)(a)(ii) regardless of whether the condition was treatable.