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CRIMINAL PROCEDURE

Andra le Roux-Kemp*

LEGISLATION

Criminal Matters Amendment Act 18 of 2015

The Criminal Matters Amendment Act 18 of 2015 was published in *Government Gazette* 39522 of 15 December 2015 and aims to amend and regulate miscellaneous matters relating to essential infrastructure-related offences. Essential infrastructure is defined in section 1 of the Amendment Act as 'any installation, structure, facility or system, whether publicly or privately owned, the loss or damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public'. The commencement date of this Act has not yet been proclaimed.

Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015

The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015 came into operation on 7 July 2015 (*GG* 38977). The Act amends the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 to, inter alia, give presiding officers a discretion to decide whether an offender's particulars should be included in the National Register for Sex Offenders, and to provide for a procedure in terms of which certain persons may apply for the removal of their particulars from this National Register. It also provides for the removal of the particulars of child offenders who have been convicted for having engaged in consensual sexual acts with one another from the National Register.

Correctional Matters Amendment Act 5 of 2011

The President, by proclamation in the *Government Gazette* (Proc 1 *GG* 38377 of 5 January 2015), determined 5 January

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2015 as the date of commencement of section 9 of the Correctional Matters Amendment Act 5 of 2011 insofar as it relates to section 48 of the Correctional Services Act 111 of 1998. Section 9 of the Amendment Act deals with the management, safe custody and well-being of remand detainees and matters related thereto.

Legal Aid South Africa Act 39 of 2014

The Legal Aid South Africa Act 39 of 2014 came into operation on 1 March 2015 as per Proclamation R7 *Government Gazette* 38512 of 27 February 2015.

Forensic DNA Regulations, Criminal Law (Forensic Procedures) Amendment Act 37 of 2013

The Forensic DNA Regulations pertaining to the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 were published on 13 March 2015 (GN R207 *GG* 38561). The regulations provide, inter alia, for the procedure for the taking of DNA samples, the keeping of records of collected buccal and crime scene samples, the chain of custody of such samples, and the conducting of comparative searches on the National Forensic DNA Database (NFDD). Article 13 of the regulations also provides for the protocols and training related to familial searches to be conducted on the NFDD, and articles 14 to 24 deal with the lodging of complaints with the Forensic Oversight and Ethics Board.

Prevention and Combating of Trafficking in Persons Act 7 of 2013

The date of commencement of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 is 9 August 2015 (Proc R32 *GG* 39078 of 7 August 2015). (This is save for ss 15, 16 and 31(2)*(b)*(ii) which will come into effect on a future date.) The primary purpose of this Act is to give effect to South Africa's international obligations with regard to the combating and punishment of trafficking in persons. The Act purports to do this by, inter alia, creating statutory offences and penalties for trafficking in persons and related offences. Administrative and procedural matters for the coordination of efforts to prevent and combat the trafficking of persons within and across the borders of South Africa are also addressed.

In the regulations published pursuant to the Act (GN R737 *GG* 39119 of 21 August 2015) provision is made for the process and administration a prosecutor must use in referring suspected victims of trafficking in persons in terms of section 22(2) of the Act.

CASE LAW

The National Prosecuting Authority

The legislative scheme for the South African National Prosecuting Authority is based on the provisions of section 179(1) of the Constitution of the Republic of South Africa, 1996, ('the Constitution') and is given effect to by way of the National Prosecuting Authority Act 32 of 1998.

The authority to prosecute in terms of the National Prosecuting Authority Act 32 of 1998

Section 38 of the National Prosecuting Authority Act 32 of 1998 provides for the appointment of persons with suitable qualifications and experience to perform certain services in specific cases, including conducting a prosecution under the control and direction of the National Director of Public Prosecutions or the Deputy Director of Public Prosecutions. The constitutionality of this provision was attacked in *Moussa v S & another* 2015 (2) SACR 537 (SCA) (14 April 2015).

The appellant in this case was charged with sixteen counts of fraud, and in the alternative, three counts of theft and three counts of money laundering under the Prevention of Organised Crime Act 121 of 1998 (para [1]). And, due to the nature of the commercial transactions with which the appellant was charged, the National Prosecuting Authority (NPA) engaged the services of an advocate in private practice, who is also a member of the Pretoria Bar and a former prosecutor, to conduct the prosecution in terms of section 38 of the National Prosecuting Authority Act 32 of 1998 (para [3]). The appellant challenged this appointed prosecutor's authority to prosecute on the ground that section 38 of the National Prosecuting Authority Act 32 of 1998 is unconstitutional as it permits the appointment of a prosecutor from outside of the NPA's normal staff complement and, therefore, does not give effect to the constitutional principle enshrined in section 179(4) of the Constitution which provides for a single independent NPA in

South Africa, and which requires that the prosecuting authority exercise its functions without fear, favour or prejudice (para [8]). The appellant further argued that prosecutors appointed in terms of section 38 of the National Prosecuting Authority Act 32 of 1998 were not required to take the oath as required by section 32(2) of the Act and that this was 'foundational to the independence of a prosecutor' (para [12]).

Judge Nevsa, for the majority of the Supreme Court of Appeal, stated that the practice of engaging persons with specialised skills to assist in prosecutions is not 'statutorily novel' (paras [13]-[15]; see paras [32]-[42] for a comparison with other jurisdictions; and also see *S v Tshotshoza & others* 2010 (2) SACR 274 (GNP)). The statutory scheme providing for a prosecuting authority in South Africa was found to be in line with the constitutional imperative of ensuring independence, impartiality, and prosecution without fear, favour or prejudice. It was also found that the current section 38 of the National Prosecuting Authority Act 32 of 1998 is in line with these objectives in that it ensures that the appointment of persons with suitable qualifications and experience to perform prosecution-related services is restricted to specific cases only, and then only after consultation at the highest level involving the Minister, the National Director and/or Deputy National Directors of Public Prosecutions (para [25]). Moreover, once such persons have been appointed in terms of section 38 of the Act, they must perform their duties under the control of these NPA officials (para [25]). The argument that section 38 of the National Prosecuting Authority Act 32 of 1998 undermines prosecutorial independence and impartiality could, therefore, not stand (para [26]).

With regard to the submission that persons appointed under section 38 of the Act are not required to take the oath as provided for in section 32, the court stated that '[i]t is not the taking of the oath that guarantees prosecutorial independence and impartiality. Nor can the taking of the oath by itself ensure an accused's fair trial rights. It is the manner in which prosecutions are initiated and conducted that is the test of prosecutorial independence' (para [29]).

In another case, *Porritt & another v National Director of Public Prosecutions & others* [2015] 1 All SA 169 (SCA), the appellants were charged with more than 3 000 counts involving contraventions of the Income Tax Act 58 of 1962, the Companies Act 61 of 1973, and the Stock Exchanges Control Act 1 of 1985, as well as

racketeering and fraud. The appellants first tendered a plea in terms of section 106(1)*(h)* of the Criminal Procedure Act 51 of 1977 in the South Gauteng High Court, alleging that the prosecution team had no title to prosecute. This plea was based on a number of grounds, including that the required consultation with the Minister of Justice and Constitutional Development had not taken place in regard to the appointment of a suitably qualified and experienced prosecutor in terms of section 38(1) of the National Prosecuting Authority Act 32 of 1998, and that the appointment of the prosecutors breached the appellants' fair trial rights. It was also alleged that the appointment of the prosecutors was in conflict with the provisions of section 32(1) of the National Prosecuting Authority Act 32 of 1998 which required, inter alia, that prosecutors serve impartially and carry out their duties without fear, favour or prejudice (paras [2] [3]).

In the South Gauteng High Court, Justice Mailula held that there had indeed been proper consultation as required by the National Prosecuting Authority Act and that there had been no irregularities in the appointment of the first prosecutor. However, it was found that the involvement of the second prosecutor in drafting an affidavit in respect of a civil matter in which the appellants were involved, did create a reasonable perception of bias and partiality (para [4]). It was consequently ordered that the two prosecutors be removed and that different prosecutors be appointed if the NPA decided to continue with the case against the appellants. The court *a quo* rejected the appellants' plea that they were entitled to be acquitted under section 106(4) once the removal of the prosecutors had been ordered, and rather compared section 106(1)*(h)* of the Criminal Procedure Act 51 of 1977 to the application for the recusal of a presiding officer: 'The proceedings in such a case [recusal of a presiding officer] are a nullity, and the accused would not be entitled to demand either ''conviction'' or ''acquittal''' (para [4]).

Justice Tshiqi, writing for the majority of the Supreme Court of Appeal, agreed that the appellants were not entitled to an acquittal in terms of section 106(1)*(h)* of the Criminal Procedure Act 51 of 1977, but held that the court *a quo* had misdirected itself in applying the test for the recusal of a judicial officer on the grounds of apprehension or bias (see *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC)). She held that there was a fundamental difference between the role and functions of a

prosecutor and those of a magistrate or judge, and that the principles governing prosecutorial conduct differ from those applicable to presiding officers (paras [10]-[13] [21]). The correct test to be applied in the current matter was formulated in *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA) 1332F–H where it was held that 'unfairness does not flow axiomatically from a prosecutor's having a dual role' (para [18]). The order of the High Court removing the two prosecutors was consequently set aside and the matter was remitted back to the court *a quo* to proceed with the criminal trial (para [19]).

Immunity and liability of prosecutors

Section 42 of the National Prosecuting Authority Act 32 of 1998 provides that '[n]o person shall be liable in respect of anything done in good faith under this Act'. This provision came under scrutiny in the case of *Minister of Justice and Constitutional Development v X* 2015 (1) SACR 187 (SCA), a case that dealt with an appeal against an order by the Western Cape High Court declaring the appellant, a prosecutor, liable to the respondent for the payment of damages arising out of the abduction and rape of her five-year-old daughter (para [1]). This order was made pursuant to a summons issued against the Minister of Safety and Security and the appellant, based on their alleged negligence in the hearing of the bail application of the rape offender in this matter and which caused the rape offender to be released on his own recognisance during which time he allegedly abducted the respondent's five-year-old daughter and raped her twice (paras [6] [7]).

The alleged offender in the rape case bore the onus of proving the existence of exceptional circumstances justifying his release on bail in the interests of justice and in terms of section 60(11)*(a)* of the Criminal Procedure Act 51 of 1977 (para [2]). During the bail hearing the offender disclosed that he had previous convictions including one for rape and four or five for assault but did not provide any details, nor did the prosecutor pursue this under cross-examination or present further evidence in this regard to the court (para [26]). At the conclusion of the bail hearing, the magistrate was extremely critical of the evidence (or lack thereof) presented by the state and was also critical of the fact that the prosecutor had not presented the court with a record of the offender's previous convictions (para [28]). No explanation was ever tendered for the prosecutor's failure to place all the relevant

information before the magistrate (para [29]). This was also not ameliorated in the subsequent bail hearing more than a month thereafter (para [30]).

With reference to the case of *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA), Judge Fourie, writing for the majority of the Supreme Court of Appeal, held that

> a reasonable prosecutor would, in the prevailing circumstances, undoubtedly have foreseen the reasonable possibility that if he or she were to fail to place all relevant information before the magistrate, . . . [the offender] . . . might be granted bail. [Moreover] . . . a reasonable prosecutor would [also] have foreseen the reasonable possibility of the . . . [the offender], . . . if released on bail, causing bodily injury to vulnerable members of the community, particularly women and young children (para [35]).

Judge Fourie also emphasised that section 42 of the National Prosecuting Authority Act 32 of 1998 'seeks to introduce a ground of justification for conduct which is prima facie wrongful. Therefore, wrongful conduct that would otherwise give rise to delictual liability may be justified and rendered lawful by virtue of the statutory immunity conferred in terms of section 42 of the National Prosecuting Authority Act. It is a defence specifically directed at the wrongfulness element of delictual liability' (para [41]). However, the appellant in this case had not properly pleaded this defence and, given the very late stage of the proceedings, it was held that to allow for the appellant to raise the section 42 defence at that point would be grossly unfair to the respondent (paras [43] [44]). With reference to the case of *Simon's Town Municipality v Dews & another* 1993 (1) SA 191 (A) it was also held that a prosecutor exercising the powers conferred in terms of section 20 of the National Prosecuting Authority Act, and wishing to avail him- or herself of the immunity afforded by section 42, 'is required to show that he or she acted within the authority conferred by the power in question, which, in turn, requires him or her to have taken all reasonable precautions to avoid or minimize injury to others. A failure to do so would render his or her conduct unlawful and the reliance on section 42 of the NPA Act would therefore fail' (para [52]). Furthermore, even if it was accepted that the prosecutor in this case had acted *bona fide*, it was held to be 'abundantly clear that he had failed to use due care and to take all reasonable precautions to avoid or minimize injury to the respondent and her minor daughter' (para [53]). The prosecutor was, for this reason, precluded from relying on the ground of justification

created by section 42 of the National Prosecuting Authority Act 32 of 1998 (para [53]).

Also see *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) in which a police officer was held to be liable for damages to an accused on the ground of wrongful detention in that the police officer informed the court that the accused was clearly depicted on a video as one of the bank robbers in question, even though he was not. The court held that this amounted to a breach of the public duty owed by a police officer to an accused, and the general public at large. However, in *Minister of Safety and Security v Van der Walt & another* 2015 (2) SACR 1 (SCA), it was held that the magistrate was not liable for her negligent conduct in this matter because, for reasons of public and legal policy, a magistrate's conduct, when performing his or her judicial functions, is not regarded as wrongful. And, the fact that a magistrate is immune from liability for his or her negligent conduct, means that there is also no basis for holding any other party vicariously liable for such negligent conduct (para [23]).

Bail

The appellant in *Hlatywayo v S* [2015] ZAECPEHC 33 (19 May 2015) was arrested and charged, together with two others, on counts of robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997, and for possession of an unlicensed firearm and ammunition in contravention of the provisions of the Firearms Control Act 60 of 2000 (para [1]). During the formal bail hearing the appellant submitted an affidavit as evidence to the court and in order to comply with the provisions of section 60(11) of the Criminal Procedure Act 51 of 1997 in discharging the onus to satisfy the court that exceptional circumstances justified his release on bail and that the interests of justice did not require his detention in custody (para [3]; also see *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat* 1992 (2) SACR 51 (CC)).

While the appellant in this bail hearing relied solely on the affidavit submitted, the content of which could obviously not be tested by way of cross-examination, the state presented rebutting evidence in the form of oral testimony by witnesses testifying under oath (para [6]). In his judgment denying bail to the appellant, the magistrate emphasised that the facts as elicited by the appellant in his affidavit lacked detail which could be verified

or confirmed and that the appellant's 'failure to testify in Court deprived him of the opportunity to explain the inconsistency between his evidence and that of the state witnesses' (para [9]). This was particularly detrimental to the appellant's case as he had a duty in terms of section 60(11) of the Criminal Procedure Act 51 of 1977 to show, on a balance of probabilities, why he should be released on bail (para [10]; also see *Najoe & others v S* 2012 (2) SACR 395 (ECP) and *Mathebula v S* 2010 (1) SACR 55 (SCA)).

Judge Tshiki for the High Court Eastern Cape Local Division, Port Elizabeth, subsequently confirmed the decision of the magistrate's court in finding that 'on an analysis of the evidence as a whole, the probative value of the statement produced by the appellant and the burden of exceptional circumstances that rested on the appellant in the court a quo that the appellant had not succeeded in demonstrating that the court a quo was wrong' (para [16]).

Also see *Booi v S* (CA&R04/2015) [2015] ZAECPEHC 38 (11 June 2015) and *Faku v S* (13/2015) [2015] ZAECPEHC 50 (8 September 2015).

Chapter 13 of the Criminal Procedure Act 51 of 1977

Chapter 13 (ss 77–79) of the Criminal Procedure Act 51 of 1977 deals with the cognitive capabilities of an accused and specifically with the capacity of an accused to understand proceedings, the presence of mental illness or other incapacities, and ultimately also the effect thereof on the criminal responsibility of such an accused. Section 77 deals with the capacity of an accused to understand proceedings and provides that if it appears to the court at any stage during 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, that the court shall direct that the matter be enquired into and be reported in accordance with the provisions of section 79 of the Act. Section 79 of Chapter 13 prescribes the process in terms of the composition of the panel of medical experts to inquire into and report on the ability of an accused to understand the proceedings in terms of section 77 of the Act, or to inquire into and report on whether an accused suffers from a mental illness or mental defect that affects his or her criminal responsibility in terms of the alleged offence committed (s 78).

Section 77(6)(a)*(i) and the capacity of an accused to understand proceedings*

Specifically with regard to the question of whether an accused is capable of understanding the proceedings so as to make a proper defence, section 77(6)*(a)*(i) empowers a court to direct that an accused, who is found to be incapable of understanding the proceedings so as to make a proper defence, and who is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, or a charge involving serious violence, or if the court considers it to be otherwise necessary in the public interest, or finds that the accused has committed the act in question, or any other offence involving serious violence, that such an accused 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 17 of 2002. And, where a court finds that the accused has committed an offence other than one of the offences contemplated in section 77(6)*(a)*(i) and described above, or finds that the accused has not committed the offence, that such an accused be admitted to and be detained in an institution stated in the order as if he or she were an involuntary mental health user as contemplated in section 37 of the Mental Health Care Act 17 of 2002. A court will make a decision on the involvement of an accused in committing the offence in terms of a 'trial of facts' which requires an assessment, on a balance of probabilities, about the act only, not engaging in any enquiry around the guilt of the accused.

The primary difference between sections 77(6)*(a)*(i) and (ii) and sections 47 and 37 of the Mental Health Care Act 17 of 2002 is that the mental health status of an accused admitted to and detained in an institution in terms of section 77(6)*(a)*(ii) of the Criminal Procedure Act 51 of 1977 and section 37 of the Mental Health Care Act 17 of 2002 must be reviewed six months after the commencement of care, treatment and rehabilitation services, and then every twelve months thereafter. The review report so compiled must then be considered by a Review Board which ultimately decides whether the accused can be discharged (section 37(5)), and that the Registrar of the High Court be notified in writing of a discharge made in terms of this section (section 37(6)). An accused admitted and detained in terms of section 77(6)*(a)*(i) and section 47 of the Mental Health Care Act 17 of 2002, however, can only be discharged on an application to

a judge in chambers. (Also see *S v Siko* 2010 (2) SACR 406 ECB.) This can furthermore be contrasted with section 78(6) of the Criminal Procedure Act 51 of 1977 which vests a wide discretion in a presiding officer, including to release an accused with or without conditions, where that accused is found not to be criminally responsible for his or her actions or omission due to a mental illness or a mental defect which makes him or her incapable of appreciating the wrongfulness of his or her actions or omissions or to act in accordance therewith.

The constitutionality of sections 77(6)*(a)*(i) and (ii) of the Criminal Procedure Act 51 of 1977 and how these two provisions prescribe for accused persons incapable of understanding the criminal proceedings to be admitted and detained in mental health institutions came under scrutiny in *De Vos NO & others v Minister of Justice and Constitutional Development & others* 2015 (2) SACR 217 (CC), 2015 (9) BCLR 1026 (CC). The first and fourth applicants in this case were the curators *ad litem* of two accused, both suffering from an intellectual disability, and who had been charged with murder and rape respectively (para [4]). The first accused was fourteen years old in 2005 when he allegedly stabbed a fourteen-year-old girl to death. The second accused was 35 years old and was charged with the rape of an eleven-year-old girl. Both accused were referred for observation in terms of section 77(1) of the Criminal Procedure Act 51 of 1977 and both were found not capable of appreciating the wrongfulness of their actions and also not in a position to understand court proceedings (paras [5] [6]).

In considering the constitutional validity of the two impugned provisions, the Western Cape High Court in 2015 (1) SACR 18 (WCC) held that while it may in some circumstances be justified to detain a person with a mental illness or an intellectual disability, it may not always be so as not every person with a mental illness or intellectual disability is a danger to himself or to society. Special provision must also be made for children with a mental illness or an intellectual disability, especially given the inadequacy of facilities for children in prisons and psychiatric hospitals (para [9]). Section 77(6)*(a)* was therefore found to fall short in not allowing a presiding officer to '(i) determine whether an accused person continues to be a danger to society; (ii) evaluate the individual needs or circumstances of that person; or (iii) consider whether other options are more appropriate in the individual circumstances of the accused' (para [7]). Moreover, no

justification could be found for the stringent requirements of sections 77(6)*(a)*(i) and (ii), compared to the wide judicial discretion provided for in terms of section 78(6) of the Act (para [8]).

The Constitutional Court agreed to an extent with Western Cape Division's declaration of invalidity. With regard to section 77(6)*(a)*(i), it was held that courts should be afforded a wider discretion to deal appropriately with accused persons found to be incapable of understanding the criminal proceedings so as to make a proper defence. It was held that the tenets of the South African Constitution 'dictate that accused persons, who are not considered dangerous, should not have their freedom curtailed in a manner that is tantamount to inhuman and degrading punishment in a way that impinges on their dignity and breaches their right not to be deprived of their freedom without just cause' (para [46]). Imprisonment as a state patient can, therefore, only be justified for the purpose of protecting the public, ie where that state patient is likely to cause serious harm to him- or herself or others (para [47]). Moreover, children suffering from a mental illness, defect, or intellectual disability may, as required by section 28*(g)* of the Constitution of the Republic of South Africa, 1996, only be detained as a last resort (para [52]). Yet, with regard to the distinction made between the options provided for under section 77(6)*(a)*(i) and (ii) and section 78(6) of the Criminal Procedure Act 51 of 1977, the Constitutional Court held that the wider discretion in terms of section 78 is not irrational, as sections 77 and 78 of the Act serve different purposes; eg an accused person dealt with in terms of section 78(6) may not necessarily suffer from a mental illness at the time of the court proceedings (para [39]).

With regard to section 77(6)*(a)*(ii), the Constitutional Court emphasised that in terms of section 9(1)*(c)* of the Mental Health Care Act 17 of 2002, an accused person can only be committed involuntarily and in the absence of a court order if any delay in providing care, treatment and rehabilitation services may result in the death or irreversible harm to the health of that accused, or if the accused is at risk of inflicting harm on himself or herself or others, or of causing serious damage to or loss of property (para [54]). Thus, the effect of section 77(6)*(a)*(ii) was that accused persons could more readily be institutionalised under the Criminal Procedure Act without the ordinary safeguards as prescribed in section 9(1)*(c)* of the Mental Health Care Act 17 of 2002 (para [54]). (In this regard it was also held that the 'trial of the facts'

does not provide an appropriate procedural safeguard (para [57]). Mental illness and disability is furthermore complex; there are varying degrees and types and institutionalisation and treatment is not always required or appropriate (para [55]). The Constitutional Court therefore agreed, as had been argued, that the peremptory provisions of section 77(6)*(a)*(ii) of the Criminal Procedure Act 51 of 1977 do breach the right to equality and human dignity in that they perpetuate harmful stereotypes and the assumption that all people with a mental illness or intellectual disability are dangerous (para [56]).

It was subsequently declared that section 77(6)*(a)*(i) of the Criminal Procedure Act 51 of 1977 is inconsistent with the Constitution and invalid to the extent that it provides for the compulsory imprisonment of an adult accused person and the compulsory hospitalisation or imprisonment of children. This declaration of invalidity was further suspended for a period of 24 months from the date of the judgment in order to allow for Parliament to see to the necessary legislative amendments. Section 77(6)*(a)*(ii) of the Criminal Procedure Act 51 of 1977 was declared to be inconsistent with the Constitution and invalid and was amended to read as follows

> (ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence —
> *(aa)* be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002;
> *(bb)* be released subject to such conditions as the court considers appropriate; or
> *(cc)* be released unconditionally (para [69]).

The correct procedure in applying the provisions of section 77 of the Criminal Procedure Act 51 of 1977

The accused in *S v Dlali* (3/2015) [2015] ZAECBHC 2 (27 February 2015) was charged with assault and was admitted and detained as a state patient pending the decision of a judge in chambers, in terms of section 77(6)*(a)*(i) and section 47 of the Mental Health Care Act 17 of 2002, after the prosecutor placed on record that the accused 'has *(a)* history of mental illness' (paras [1] [2]). No indication was given as to the objective of the referral, nor was it clear whether the court issued the direction in terms of sections 77(1) or 78(2) of the Criminal Procedure Act 51 of 1977

(para [5]). Yet, a psychiatric report was compiled by an examining panel consisting of only two psychiatrists who found the accused unable to follow court proceedings so as to make a proper defence in terms of section 79(4)*(c)* of the Act, and also unable to appreciate the wrongfulness of the act in question and unable to act in accordance therewith in terms of section 79(4)*(d)* of the Act (para [11]). The examining panel consequently recommended that the accused be admitted as a state patient to Komani Hospital in terms of section 42 of the Mental Health Care Act 17 of 2002 (para [11]). The magistrate duly accepted this psychiatric report and recommendation without making any indication on the record as to whether the prosecution or the defence accepted or contested the psychiatric report (para [7]).

There were a number of procedural misdirections in this case: first, it is important that the basis for the ordering of a section 79 inquiry be established and included in the record (para [18]). The record must further contain sufficient detail relating to the accused person's mental history, indicate the meaningful participation of all parties and/or their legal representatives in the court proceedings, and show that a transparent, proper and relevant reason exists for invoking the provisions of either section 77(1) or section 78(2) of the Criminal Procedure Act 51 of 1977 (para [19]). A court must then, based on this information, make a direction either in terms of sections 77(1) or 78(2), or both, as this is a necessary jurisdictional basis for the enquiry in terms of section 79(1) to be conducted and reported on (para [20]). The composition of the examining panel also differs in terms of section 77(6)*(a)*(i) as opposed to the panel in terms of subsection (ii)*(aa)*: 'In the former case the court is obliged to receive a report under section 79(1)*(b)* from a plenary panel (although not necessarily including a psychologist except where the court so directs), whereas in respect of the latter the report of a single psychiatrist under section 79(1)*(a)* will suffice' (para [22]). Upon receipt of the psychiatric report, a court must then make a finding as to whether the accused is capable of understanding the proceedings so as to make a proper defence and/or whether the accused can be held criminally responsible for his or her actions and/or omissions. This, it was held, is 'an obvious prerequisite' before such an accused can be detained, whether as a state patient or as an involuntary mental health care user (para [25]).

In reviewing this case Judge Hartle of the High Court Eastern Cape Division, Bhisho, stated that he 'cannot imagine a more

vulnerable category of accused persons than those subject to the provisions of Chapter 13' of the Criminal Procedure Act 51 of 1977 (para [32])

> Such an accused person is present in court yet possibly mentally absent, particularly if he cannot instruct his legal representative or meaningfully participate in the court proceedings. He is displaced to a foreign environment in a psychiatric hospital where he is subjected to an enquiry of a different kind (before a 'trial' on the facts is undertaken to determine if he probably perpetrated the crime), the relevance of which may have no significance to him (yet infringe upon his fair trial rights), by an array of professionals he has no affinity with. This is an experience which in itself must be anxiety provoking. Thereupon the court may issue an order appointing him as a state patient which has potentially serious consequences but which might not be warranted in all the circumstances (especially if the charge is in respect of a petty offence) or be more damning than if he were just convicted and sentenced in the ordinary course (para [33]).

The correct procedure in applying the provisions of section 77 of the Criminal Procedure Act 51 of 1977 was set out in *S v Matu* 2012 (1) SACR 68 (ECD) (para [29] of the *Matu* case and referred to in para [28] of the case under discussion). Judge Hartle further emphasised the absolute need for a legal practitioner to be vigilant in ensuring that an accused's fair trial rights are respected throughout the process and 'properly weighed against the need to protect the community from mentally ill members of society who brush with the law' (para [36]). This matter was subsequently referred back to the magistrate's court to be dealt with appropriately in terms of Chapter 13 of the Criminal Procedure Act 51 of 1977 (para [38.2]).

Number of psychiatrists to be appointed

The accused in *S v Pedro* 2015 (1) SACR 42 (WCC) was charged with culpable homicide and referred for assessment in terms of section 79(1)*(b)* of the Criminal Procedure Act 51 of 1977. In terms of a report compiled by two state psychiatrists, the accused was found not to have the capacity when he committed the alleged offence, of appreciating the wrongfulness of his actions and acting accordance therewith (para [5]). The accused was subsequently found not guilty in terms of section 78(6)*(a)* of the Criminal Procedure Act 51 of 1977 and was ordered, in terms of section 77(6)*(a)*(ii) of the Act, to be admitted and detained at Valkenberg Hospital as an involuntary mental health user as contemplated in section 37 of the Mental Health Care Act 17 of

2002 (para [5]). (In doing so, the magistrate departed from the recommendation in the psychiatric report for the accused to be detained as a state patient in terms of section 77(6)*(a)*(i) of the Act (para [5]).)

The trial magistrate erred in a number of respects: the charge was never put to the accused and the accused was never asked to plead. A finding of not guilty on the charge of culpable homicide was, therefore, not proper. Furthermore, the order for the accused's admission to and detention at a mental health care institution should have been made in terms of section 77(6)*(a)*(i) and not section 77(6)*(a)*(ii) (paras [6] [7] [80] and [101]-[104]). Important for the discussion here, is the composition of the psychiatric panel.

Section 79(1)*(b)* requires the following persons to serve on the assessment panel for an accused charged with murder, culpable homicide, rape, compelled rape, other charges involving serious violence, or if the court considers it necessary or otherwise in the public interest: the medical superintendent of a psychiatric hospital or another psychiatrist appointed by the medical superintendent (s 79(1)*(b)*(i)), a psychiatrist appointed by the court and who is not in the full-time service of the state unless the court directs otherwise upon application of a prosecutor (s 79(1)*(b)*(ii)), a psychiatrist appointed for the accused by the court (s 79(1)*(b)*(iii)), and a clinical psychologist where the court so directs (s 79(1)*(b)*(iv)). Section 79(1)*(a)* applies to accused charged with offences not referred to in section 79(1)*(b)*, and as set out above, and requires that the mental health assessment be conducted by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court. Section 79(1)*(a)* can therefore be said to apply to less serious cases.

With regard to section 79(1)*(b)*(ii), section 79(13) states that the National Director of Public Prosecutions must, in consultation with the Minister, issue directives regarding the cases and circumstances in which a prosecutor must apply to the court for the appointment of a psychiatrist as provided for in section 79(1)*(b)*(ii). In this regard, therefore, some uncertainty existed: it was unclear whether the panel referred to in section 79(1)*(b)*(ii) must include a second psychiatrist, unless the court, on application by the prosecutor, directs otherwise, or if the court must appoint such a psychiatrist only if the prosecutor applies to the court for such an appointment to be made. A further question was

whether that psychiatrist must be from private practice or employed by the state, or as a third alternative to the above, if the court must always appoint a second psychiatrist to the panel, unless the prosecutor applies for a direction that this psychiatrist need not be a private psychiatrist but that the court may appoint a state psychiatrist (para [28]).

In considering the explanatory memorandum accompanying the legislative amendments that gave rise to section 79(13), ie the Judicial Matters Amendment Act 66 of 2008, as well as the directives issued by the National Director of Public Prosecutions in this regard, Judge Rogers (Judge Binns-Ward concurring) for the High Court Western Cape Division, Cape Town, held that the 'most natural meaning' of the words used in section 79(1)*(b)*(ii) is that the mental health assessment panel must include a second psychiatrist, unless the court, on application by the prosecutor, directs otherwise (para [50]; also see *S v Lubisi & others* 2003 (2) SACR 589 (T)). The appointment of this second psychiatrist to the panel is therefore not based on the condition that the prosecutor must first apply for the appointment of such a psychiatrist, as section 79(13) seems to suggest. Further, with regard to whether such a second psychiatrist must be from private practice or may also be employed by the state, it was held that there are good policy reasons for the second psychiatrist to be from private practice and not also be a state psychiatrist like the other appointees to the panel (para [51]). It was suggested that the legislative requirement for a private psychiatrist was premised on the notion that the presence of such a psychiatrist on the panel would provide greater protection for the rights of the accused, as there was

> an institutional connection between the prosecution and the state psychiatrists, all being public servants. Where [for example] two state psychiatrists are on the panel they will often be employed at the same psychiatric hospital. Considerations of collegiality might tend, subconsciously, towards consensus; or differences in seniority might result in one psychiatrist displaying some deference to the other. There is even danger that, due to the greater pressure on state psychiatric resources, the primary assessment in respect of a particular accused will be left to one of the state psychiatrists, with the other providing a more supporting role (para [52]).

Judge Rogers further stated that section 79(13)*(a)* of the Criminal Procedure Act 51 of 1977 must be construed so as to empower the National Director of Public Prosecutions to issue directives regarding the circumstances under which prosecutors

may apply to a court to dispense with the appointment of a private psychiatrist (para [60]). Section 79(13)*(a)* was therefore held to deal with those circumstances in which a private psychiatrist is not to be appointed (para [60]).

The panel responsible for the mental assessment of the accused in this case consisted of only two psychiatrists. In terms of the explanation above, section 79(1)*(b)*(ii) had not been properly complied with, nor had section 79(1)*(b)*(iii) as it was evident that the court did not appoint the second psychiatrist for the accused (paras [73]-[75]). Moreover, with regard to section 79(1)*(b)*(i) which requires that the medical superintendent or a psychiatrist appointed by the medical superintendent serve on the panel, it was also held that this requirement should be interpreted to mean the person holding the most senior psychiatric position at the mental health institution (para [77]). In the present case, it was not clear whether the first psychiatrist was indeed the relevant 'medical superintendent' or the valid designee of the 'medical superintendent' (para [78]).

A final peculiarity in this case was that the accused was discharged from detention at the Valkenberg Hospital in terms of section 38 of the Mental Health Care Act 17 of 2002 within less than two months after the assessment panel had found him to lack the capacity to understand criminal proceedings and to also lack criminal responsibility as to the offence that he allegedly committed. The court held that this is surprising as a discharge in terms of section 38 of the Mental Health Care Act 17 of 2002 can only be effected by the head of the mental health institution and after it is decided that the accused/mental health care user is capable of making informed decisions, ie informed decisions about his own care (para [113]). It was consequently recommended that a referral for detention in terms of section 77(6)*(a)*(ii) of the Criminal Procedure Act 51 of 1977 should also include that periodic review reports as to the accused's mental health status be sent to the relevant Director of Public Prosecutions, as it is usually appropriate for that accused, if he or she recovers, to be prosecuted so that an appropriate verdict and order can be made in terms of the provisions of the Criminal Procedure Act 51 of 1977 (para [114]).

Also see *S v Ralane* (A222/14) [2015] ZAECBHC 18 (21 June 2015); *S v Maphuko* (A180/15) [2015] ZAECBHC 17 (30 June 2015); *S v Diniso* (A3970/14, 21/15) [2015] ZAECBHC 27 (11 September 2015); *Director of Public Prosecutions v Roro*

(464/2015) [2015] ZAECGHC 98 (14 September 2015) and *S v Maluka* 2015 (2) SACR 273 (GP).

Joining of accused and separation of trials

Sections 155 to 157 of the Criminal Procedure Act 51 of 1977 deal in general with those instances where it is necessary and in the interest of justice to either join together more than one accused in the same trial, or to separate the trials of accused who had been jointly charged. While section 157 of the Act sets out the general principles, sections 155 and 156 make provision for special instances, respectively for accused who have been implicated in the same offence to be tried together, and for persons who had committed separate offences but at the same time and place, to be joined together in the same trial.

Joining together the trials of persons having committed separate offences at the same time and place

Section 156 of the Criminal Procedure Act 51 of 1977 allows for persons having committed separate offences at the same place and at the same time or at about the same time, to be charged and tried together if the prosecutor informs the court that the evidence admissible against one of these persons will, in his opinion, also be admissible as evidence at the trial of any other such person or persons so tried.

In *Dereki & another v S* [2015] ZAECGHC 59 (13 February 2015), the two accused were charged with contravening section 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992, and were tried jointly in terms of this provision of the Criminal Procedure Act 51 of 1977. Both the accused were convicted and sentenced (para [1]). Yet, it was apparent from the record that the prosecutor, when applying for the accused to be tried together, expressly stated that the evidence against each accused would be 'separate' (para [5]). And, although the legal representative of the accused indicated that this could be a misjoinder if the accused were to be tried together, and that the accused would be prejudiced, this objection was withdrawn after the magistrate gave assurance that he would differentiate between the two charges when giving judgment (para [5]). This assurance and the withdrawal of the objection raised, according to Judge Roberson of the High Court Eastern Cape Division, Grahamstown, did not legitimate the incorrect application of section 156 of the Criminal Procedure Act 51 of 1977 (para [5]).

Section 156 of the Act should not have been invoked in this case as the evidence implicating the two accused was not only completely separate, but the two offences allegedly committed were more than two months apart and for this reason 'not at the same time or about the same time' (para [5]). Given that only the place where the alleged offences had been committed was the same, it was found to be prejudicial to the accused in the absence of any other similarities and evidence linking the two cases together (para [6]). Despite the other irregularities identified and considered in the automatic review, Judge Roberson indicated that the misjoinder alone was a sufficient ground for the setting aside of the proceedings (para [14]).

Separation of trials where the state alleges a common purpose to defraud with considerable overlap in evidence

In *Maringa & another v S* 2015 (2) SACR 629 (SCA) (23 March 2015), a total of seven accused were arraigned on a total of 339 charges that included fraud, forgery, uttering and corruption (para [1]). The first appellant in this matter was charged with all of the counts, barring those counts relating to the corruption charges, and the second appellant was charged with 34 counts of fraud. Before any of the accused pleaded, the two appellants objected to being charged together with the other five co-accused, on the ground that they did not face all the same charges together (para [1]). The state, however, argued that the seven accused acted in pursuance of a common purpose, and that all the accused, including the two appellants, all played an intricate and necessary part in the criminal scheme (paras [8]-[11]).

Judge Schoeman, writing for the majority of the Supreme Court of Appeal, described the purpose of sections 155 and 156 of the Criminal Procedure Act 51 of 1977 in pursuance of avoiding a multiplicity of trials where there are a number of accused (para [14]). It was also held that it is ultimately the discretion of a trial court to decide whether to allow a trial to proceed, or to order a separation of trials (para [15]). After considering relevant case law, it was concluded that the alleged offences in this particular case were all 'committed within a period of two months and were therefore committed at about the same time and place and were furthermore in furtherance of a common purpose' (para [19]; also see *S v Ntuli & others* 1978 (2) SA 69 (A) para [73]; *R v Heyne* 1956 (3) 604 (A); *S v Ramgobin & others* 1986 (1) SA 68 (N);

S v Naidoo 2009 (2) SACR 674 (GSJ)). Moreover, the only prejudice that may result from the appellants being tried together with the other co-accused, was that the appellants would have to sit through a trial while evidence was presented that did not relate directly to the charges that they faced (para [20]). Conversely, if a separation of trials were ordered, the state would suffer prejudice as there would then be a total of three separate trials (as the two appellants could then not be tried together), and essentially the same witnesses would have to testify in each case about the same facts, and there would also be considerable overlap in the other evidence presented (para [20]). It was, therefore, concluded that the magistrate had correctly exercised a discretion and there was no indication that his discretion had not been exercised judicially (para [21]).

Pleas

The plea of an accused person, including the possibility of plea and sentence agreements, are dealt with in Chapter 15 of the Criminal Procedure Act 51 of 1977.

A plea of guilty to a charge of driving a motor vehicle while under the influence of intoxicating liquor

In *S v Funani* (4/2015) [2015] ZAECBHC 8 (17 April 2015), it was affirmed that where an accused pleads guilty in terms of section 112 of the Criminal Procedure Act 51 of 1977, to a charge of having contravened section 65(1)*(a)* of the National Road Traffic Act 93 of 1996, that the presiding officer shall ensure, in terms of section 112(1)*(b)* of the Criminal Procedure Act 51 of 1977, that the accused indeed admits to all the allegations in the charge and that the accused is guilty of the offence (paras [4]-[6]; also see *S v Naidoo* 1989 (2) SA 114 (A)).

Such a guilty plea must, for example, include an admission that the driving ability of the accused was impaired as a result of the consumption of intoxicating liquor. This, it was held, 'is necessary on account of the relevant substantive law requirement that ''the skill and judgment normally required of a driver in the manipulation of a vehicle (must be) diminished or impaired as a result of the consumption of intoxicating liquor''' (para [7]; also see *S v Mzimba* 2012 (2) SACR 233 (KZP)). The lack of this necessary admission by an accused that he or she was incapable of exercising proper control of the motor vehicle, or that his or her

ability to drive had been impaired due to the consumption of liquor, constitutes a fundamental irregularity (para [12]).

Also see *S v Mxhaka* (191/2014) [2015] ZAFSHC 31 (9 February 2015) and *S v Mhlophe* (245/2015) [2015] ZAFSHC 232 (10 December 2015). In the *Mhlophe* case, it was reaffirmed that an accused cannot be convicted on both the main and alternative charges stemming from the same set of facts in contravention of the Criminal Procedure Act 51 of 1977.

Double jeopardy/Autrefois convict

The appellant in *Lelaka v S* (272/15) [2015] ZASCA 169 (26 November 2015) was charged with one count of assault with the intent to do grievous bodily harm and, upon pleading guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, was remanded in custody for sentencing (para [1]). However, before sentencing the magistrate was informed that the complainant in the matter had since died and that the state was considering bringing a murder charge against the appellant (para [2]).

Judge Mathopo writing for the majority of the Supreme Court of Appeal affirmed that the plea of *autrefois convict* is not available in those cases where it was impossible at the previous trial to prefer the more serious charge*(s)* as it later presented (para [7]). Thus, in the present case, a conviction for assault was no bar to a prosecution for murder or culpable homicide where the victim had since died (para [7]). In this matter, the appellant pleaded guilty and was convicted on 14 February 2013 and the deceased died on 15 February 2013 from injuries relating to the assault. When the appellant was convicted the deceased was still alive and a case of murder or culpable homicide therefore only became viable thereafter (para [8]).

Prevention of Organised Crime Act 121 of 1998

The Prevention of Organised Crime Act 121 of 1998 (POCA), together with statutes such as the Financial Intelligence Centre Act 38 of 2001 (FICA) and the Prevention and Combating of Corrupt Activities Act 12 of 2004, were adopted to give effect to South Africa's international obligations to prevent and punish serious economic and organised crime. The POCA provides for three clusters of offence that can collectively be viewed as core organised crimes, namely: racketeering offences; money laundering offences; and offences related to criminal gang activities.

Apart from substantive criminal law, the POCA also provides for comprehensive procedural mechanisms aimed at criminal and civil forfeiture of the proceeds of crime. These procedural frameworks apply to all proceeds of crime *generally* and are not limited to the proceeds of the three groups of offence provided for in the POCA.

Payment of living expenses from assets restrained in terms of a provisional order granted under section 26 of the Prevention of Organised Crime Act 121 of 1998

In *Van Staden & another v Knoetze NO & another* 2015 (1) SACR 97 (WCC), the High Court Western Cape Division, Cape Town, had to consider when a person or persons had sufficient interests in assets that are subject to a restraint order made in terms of section 26 of the POCA.

Section 26 of the POCA provides for a restraint order to be issued by way of an *ex parte* application by the National Director to a competent High Court, and in respect of such realisable property as specified in the restraint order, and held by the person against whom the restraint order is made, or realisable property held by such a person irrespective of whether it is specified in the restraint order or not, or in respect of property which, if it is transferred to such a person after the restraint order has been put in place, would constitute realisable property (s 26(1)-(2)*(a)–(c)*). Such a restraint order may further provide for the reasonable living expenses of a person against whom it has been made, as well as for that person's family or household, and for the reasonable legal expenses of such a person in connection with any proceedings instituted against him or her in terms of Chapter Five of the POCA or any other criminal proceeding to which such proceedings may relate. This, however, will only be allowed where the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in the property subject to such a restraint order and that the person is furthermore unable to meet the expenses concerned out of his or her unrestrained property (s 26(6)*(a)–(b)*).

The applicants in the *Van Staden* case were the wife and 21-year-old son of Johannes Erasmus van Staden, whose assets were placed under restraint, together with those of various other defendants, pending a criminal trial for alleged fraud committed against the South African Revenue Service (SARS) (paras [5] [6]).

The applicants were also trustees of the Van Staden family trust, which was also subject to the restraint order (para [7]). The applicants sought payment of living and other expenses from the assets that formed part of the trust and that were subject to the restraint order, and argued that they had the necessary *locus standi* to bring such an application as they had a direct link to the assets under restraint (para [13]). The National Director of Public Prosecutions, on the other hand, in relying on *Naidoo & others v National Director of Public Prosecutions & another* 2012 (1) SACR 358 (CC), submitted that the applicants did not have a sufficient interest in the property to seek the relief they had (para [12]).

The correct interpretation of section 26(6) of the POCA was considered at length in the *Naidoo* case where it was found, inter alia, that too wide an interpretation of section 26(6) of the Act would run counter to the purpose of the scheme, and that the provision for reasonable living and legal expenses ought, for this reason, to be 'narrowly crafted' in light of the overall legislative purpose of discouraging defendants who faced criminal prosecution from hiding their assets (para [19]; also see *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC)).

With regard specifically to the property relating to this application, the court emphasised that all the trustees and beneficiaries of the trust to which the application referred and which was subject to the restraint order, were not before the court and the two applicants rather brought their application in their individual capacities. The court held that this was insufficient to link the applicants to the property and that it was also not satisfactory that only two beneficiaries brought such an application where there were many more beneficiaries listed in the trust deed (para [25]). The applicants also failed in relying on section 26(1) of the POCA in support of their application as this section, it was held, refers to property as a means of earning money so as to provide for reasonable living expenses, and not to cash, which was what the applicants' application for relief was aimed at (paras [32] [33]). The same applied to the applicants' reliance on section 28(2)*(a)* and 28(3)*(a)* of the POCA (paras [35]-[37]).

It was consequently concluded that section 26(6) of the POCA is only available 'for an order to be made for release of cash for living and legal expenses against restrained property in these circumstances', and furthermore only once the following conditions had been met: there must be full disclosure of the interests of that person in the restrained property; and that person must not

be able to otherwise meet the expenses concerned out of his or her unrestrained property (para [39]).

Also see *Schoeman & others v National Director of Public Prosecutions & another* 2015 (1) SACR 451 (WCC) with regard to the rescission of restraint orders in terms of section 26(3) of the POCA.

The proportionality requirement for the forfeiture to the state of the instrumentalities of offences

In *National Director of Public Prosecutions v Salie* 2015 (1) SACR 121 (WCC), the applicant applied, in terms of sections 48(1), 50(1)*(a)* and *(b)* and 53(1)*(a)* of the POCA for an order declaring two immovable properties and a motor vehicle owned by the respondents forfeit to the state. (At the time of the judgment the money held in bank accounts of the respondents and which the applicant also wanted to be forfeited to the state had been depleted.) The applicant contended that the property was the proceeds of contravening sections 2 (keeping a brothel) and 20(1)*(a)* (knowingly living wholly or in part on the earnings of prostitution), in terms of the Sexual Offences Act 23 of 1957 (para [6]). A preservation of property order had previously been duly served on the respondents and the current application for a forfeiture order was made in terms of the applicable provisions of the POCA which require a court to make the requisite forfeiture order if it finds, on a balance of probabilities, that the property concerned is an instrumentality of an offence referred to in Schedule 1 of the POCA, or the proceeds of other unlawful activities (para [5]).

In considering all the evidence, Judge Breitenbach of the Western Cape High Court, Cape Town, agreed that the property indeed constituted the proceeds of offences as submitted by the applicant (paras [99]-[107]). However, the respondents argued that even if the property was the proceeds of the offences, none of it should be forfeited to the state as the forfeiture would be disproportionate and would consequently infringe on the respondents' right not to be arbitrarily deprived of property in terms of section 25(1) of the Constitution (para [109]).

First, with regard to the question whether proportionality applies to the forfeiture to the state of the proceeds of unlawful activity, it was concluded that proportionality is indeed a requirement for the forfeiture to the state and the proceeds of unlawful activity under the POCA (para [135]). It was held that the

forfeiture of instrumentalities of crime and the proceeds of unlawful activities must be at the very least rationally related to its purposes (para [112]). In the case of *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA), it was held that 'the relationship between the purpose of the forfeiture and the property to be forfeited must be close, that the purpose of the forfeiture must be compelling and that a proportionality analysis in which the nature and value of the property subject to forfeiture is assessed in relation to the crime involved and the role it played in its commission' (paras [30] [31]) of the *Cook Properties* case; also see *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC)). This proportionality analysis was described in *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC) as 'weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purpose of the commission of the offence, bearing in mind the nature of the offence' (para [58] of the *Prophet* case).

Furthermore, equivalences exist between the confiscation orders envisaged in Chapter 5 of the POCA and the forfeiture orders as per its Chapter 6 (paras [120]-[128]). For example, both section 18(1) of Chapter 5 and section 50(1)*(b)* of Chapter 6 are directed at preventing people from 'benefiting from the fruits of crime; and, once the jurisdictional requirements for a confiscation order or a forfeiture order relating to the proceeds of unlawful activities are met, both of them confer on the court a discretion as to whether or not to make any such order at all and, if so, the extent of the benefit to be confiscated or the property to be forfeited to the state' (para [128]). And, because of these equivalences, the three considerations or elements of the proportionality enquiry in terms of section 18(1) of the POCA as raised in *S v Shaik* 2008 (2) SACR 165 (CC) also apply to section 50(1) of the POCA (para [134]). These three elements are: all the circumstances of the criminal activity concerned (para [130]); the extent to which the property is derived directly from the criminal activities (para [131]); and the nature of the crimes that fall within the express contemplation of the Act (para [132]). A further consideration not considered in *Shaik* but also relevant to the

proportionality analysis for forfeiture to the state, is the use to which the property is being put (para [137]).

In applying all of these considerations to the case at hand, and also taking into account evidence on the circumstances of the criminal activity and the nature and inherent seriousness of the offences, the court found that although contraventions of sections 2 and 20(1)*(a)* of the Sexual Offences Act must be regarded as serious, 'the commission of those offences in the present matter was not accompanied by any aggravating factors' and a range of notable mitigating factors were also present (para [150]). Both properties the brothels operated from were, for example, 'tidy and well-run places with no violent abuse of the prostitutes, no pimps, no compulsion, no trafficking in persons for sexual purposes, no child prostitution, no drugs on the premises and no connection with other crimes, and . . . care was taken to protect the women against sexually transmitted diseases' (para [148]). Yet, the contraventions in this case constituted an organised crime offence, namely racketeering in terms of section 2(1)*(e)* of the POCA (paras [152]-[160]), and a relatively close connection existed between the property and the commission of the offences (para [161]). The respondents also had a considerable interest in the property and the value of their total proven benefit from the unlawful activity was also considerable (paras [162]-[165]). The court therefore concluded that the forfeiture to the state of the property involved would not be disproportionate when viewed in monetary terms (paras [165]-[167]).

The case at hand was therefore not 'an exceptional one in which an entire forfeiture, as opposed to a partial forfeiture or no forfeiture, will constitute an arbitrary deprivation of property in contravention of s 25(1) of the Constitution' (para [168]).

Remand Detainees

Section 49G of the Correctional Services Act 111 of 1998 requires that the head of a remand detention facility or correctional centre refer to the court concerned all remand detainees 'whose period of detention exceeds two years from the detainee's initial date of admission to the facility or centre, in order to determine the further detention of such (detainee) or (his or her) release under conditions appropriate to the case (*S v Matshoba & others* 2015 (1) SACR 448 (ECP) para [3]). The procedure to be followed for such referrals is set out in the Justice, Crime Prevention and Security (JCPS) Protocol (see s 49G(5) of the

Correctional Services Act 111 of 1998). Furthermore, article 4.3 of the JCPS requires that the head of a facility or correctional centre forward to the clerk of the court 'the request for the court to consider the further detention of awaiting trial prisoners once the period of detention exceeds 21 months from the initial date of admission' (*S v Matshoba & others* 2015 (1) SACR 448 (ECP) para [4]).

The purpose of section 49G was considered in *Ditlhakanyane & others v S* 2015 (1) SACR 437 (GJ) where it was held that the provision aims to 'strike a balance between the interests of the accused's right to liberty and the interests of justice because, pending the finalisation of an accused's trial, he or she is presumed to be innocent until proven guilty' (para [34]).

With regard to the process of the section 49G enquiry, the JCPS provides that, in considering the further detention of a remand detainee, the normal principles and requirements relating to bail, as set out in the Criminal Procedure Act 51 of 1977, apply (a 6(2) of the Protocol; *S v Matshoba & others* 2015 (1) SACR 448 (ECP) para [5]). However, Justice Hartle of the Eastern Cape High Court, Port Elizabeth, held in *S v Matshoba & others* 2015 (1) SACR 448 (ECP) that the objective of section 49G of the Correctional Services Act 111 of 1998 is not to 'hold a bail hearing proper, such as envisaged in s 60 of the Criminal Procedure Act 51 of 1977' (para [6]). Quoting from an unreported judgment he delivered on 6 August 2013 (*S v Sheyi* unreported, case no CC 4/2911 (ECB), 6 August 2013) he held that

> . . . all that is required is to take note that the detained person has passed a certain threshold, one which puts him into a category of persons the Department of Correctional Services should be particularly mindful of. This no doubt acts as a bulwark (and as an oversight function) against the rights of an incarcerated person being infringed without lawful cause or him being subjected to arbitrary detention. It ensures that upon reflection there remains good reason for his continued incarceration. Whilst I have no doubt that considerations such as an inordinate delay in prosecution, the loss of absence of vital evidence or witnesses (or other convincing grounds such as will evolve in practice which threaten to condemn an incarcerated detainee to an open ended and unreasonably protracted incarceration) may provide a sound reason for a court to release an accused who has hitherto been pending a trial, I am not persuaded that the amendment requires the court to revisit the issue as if it were a bail hearing (*S v Matshoba & others* 2015 (1) SACR 448 (ECP) para [6]).

In *Ditlhakanyane & others v S* 2015 (1) SACR 437 (GJ), the applicants brought an application to be released in terms of

section 49G(3) of the Correctional Services Act 111 of 1998. All of the applicants in this matter had been arrested in the period between June 2011 and March 2012 on charges in terms of the POCA and had launched bail applications which were ultimately unsuccessful (paras [1]-[3]). In this case, Justice Mokgoatlheng of the South Gauteng High Court, Johannesburg, held that given the seriousness of the charges against the applicants, and the fact that the charges fall within the purview of Schedule 5 of the Criminal Procedure Act 51 of 1977, the onus was on the applicants to show that their release would not prejudice the interests of justice (para [6]). And, because the continued detention of the applicants limits and curtails their constitutional right to liberty, there is also a corresponding onus on the respondent to show that the release of the applicants would not be in the interests of justice (para [6]).

In considering the particular circumstances of each of the applicants' cases, as well as the strength of the respondent's case, Justice Mokgoatlheng found that it would not be in the interests of justice to order the release of the applicants (para [51]). Some of the considerations he took into account in reaching his decision included the following

(a) The probable period of time the trial is still to endure until finalisation;
(b) the reasons for any delay in the prosecution and finalisation of the trial;
(c) the nature and the gravity of the charges the applicants are facing;
(d) the strength of the case against the applicants and the probability that the applicants as a consequence thereof may attempt to flee or evade their trial; and
(e) the severity of the sentence likely to be imposed, should the applicants be convicted (para [49]).

Validity of Proceedings Where the Attorney Representing a Client has no Right of Appearance

Where an attorney representing a client has no right of appearance, the proceedings in terms of which he or she appeared on behalf of the client are a nullity based on the irregularity thereof, and it is then up to the state to decide whether to proceed against the accused *de novo* (see, for example, *S v Nghondzweni* 2013 (1) SACR 272 (FB) 273 paras [5] [6]). This was confirmed in the case of *S v Swapi & others* (14/14, RCZ 300/13, 6/2014) [2015] ZAECBHC 23 (1 September 2015). However, a further question

considered in the *Swapi* matter was whether the proceedings ought to be set aside in their entirety where the case entails more than one accused joined in the same proceedings, and only one of the accused is represented by an attorney without the requisite right of appearance.

Contrary to the decision in *S v Gwantshu & another* 1995 (2) SACR 384 (E), where it was held that the mere fact of one attorney's lack of authority was sufficient to vitiate the proceedings as a whole, and irrespective of the wishes of the affected parties (386a–c of *Gwantshu* and para [19] of the case under discussion), Judge Stretch of the Eastern Cape High Court, Bhisho, held that 'the main test in deciding whether the entire trial should start afresh (in other words without separating the affected accused from the others) is [rather] whether any of the accused will suffer prejudice, or are likely to suffer prejudice if this course of conduct is to be preferred' (para [23]). In particular, it was held that such trials should not be set aside entirely where the record does not call for such a course of conduct to be followed, or where the affected parties, including the accused, the presiding officer and the prosecutor do not deem such an approach necessary, convenient, or in the interests of justice, where it appears to be in the interests of justice to commence *de novo* against the affected accused only, or where a separation of trials together with appropriate measures are unlikely to prejudice the accused or the administration of justice (para [22]). Matters like this, therefore, ought to be dealt with on a case-by-case basis and each on its own merits (para [23]).

Warrant for Arrest in Terms of Section 5 of the Extradition Act 67 of 1962

In *Saliu v S* (2014/A262) [2015] ZAGPJHC 175 (25 August 2015), the interaction between section 5 of the Extradition Act 67 of 1962 and sections 30(1)K and 43 of the Criminal Procedure Act 51 of 1977 came under scrutiny. In this case, the appellant, a Nigerian citizen, was wanted in the United States of America on several fraud-related charges (para [1]). An order subsequent to an enquiry committing the appellant to prison pending the decision by the Minister of Justice and Constitutional Development with regard to his surrender to the United States of America, was consequently issued in terms of section 10(1) of the Extradition Act 67 of 1962 (para [2]). However, the appellant argued that his arrest had been unlawful because the warrant on which his

arrest relied, and which was issued in terms of section 5 of the Extradition Act 67 of 1962, had been unlawfully procured, and as such, the extradition enquiry was also tainted as it ought never to have been conducted (para [3]).

This arrest warrant was obtained just moments after the appellant had been released from the prison cells at the Kempton Park Magistrate's Court, after that court had set aside an earlier arrest (without a warrant) on the basis that it was unlawful (paras [4] [9]). While all the necessary elements for a warrant under section 5 of the Extradition Act 67 of 1962 had been complied with, it was argued that the magistrate who issued the warrant had been misled by a material non-disclosure, in that he was not informed of the setting aside of the previous arrest and the circumstances relating thereto (para [9]; also see *McCarthy v Additional Magistrate, Johannesburg & others* [2000] All SA 561 (A)).

However, Judges Sutherland and Francis of the South Gauteng High Court, Johannesburg, did not agree with this submission. They held that even if the history of the case had been disclosed there would have been no objective reason why the magistrate would have had any objection to issuing the subsequent arrest warrant (para [13]). The judges also reaffirmed that the provisions of section 43(1)*(b)* of the Criminal Procedure Act 51 of 1977 only apply to arrest warrants for persons who have allegedly committed crimes within the jurisdiction of South Africa (para [16]). Section 40(1)K of the Criminal Procedure Act 51 of 1977 covers those instances where an arrest is to be effected of persons who allegedly committed crimes outside the ordinary jurisdiction of South African courts and in respect of which no trial in a South African court would be competent (para [17]).

Written Permission to Prosecute Necessary before Commencing with the Prosecution of Certain Individuals

The applicant in *Masinga v National Director of Public Prosecutions & another* (AR 517/2013) [2015] ZAKZPHC 24 (7 May 2015) was found guilty of attempted murder and sentenced to ten years' imprisonment (para [1]). The applicant, however, complained that the prosecution was irregular in that it was instituted and proceeded with without the written authorisation or instruction of the DPP (para [2]). Such authorisation was required, it was argued, in terms of the prosecution policy issued under section 21(1)*(b)* of the National Prosecuting Authority Act 32 of 1998, as

the applicant was a magistrate at the time of the criminal proceeding against him (para [2]; also see section 179(5) of the Constitution). The policy directive upon which the applicant relied stated the following

> In addition to instances where statutory provisions require prior authorisation from the National Director or DPP for the institution of a prosecution, there are certain categories of persons in respect of whom prosecutors may not institute and proceed with prosecutions without the written authorisation or instruction of the DPP or a person authorised thereto in writing by the National Director or DPP (either in general terms or in any particular case or category of cases) (para [3]).

Magistrates are included in the categories of persons in respect of whom written authorisation or instruction is required (para [4]).

It was not disputed that the requisite written authorisation of the DPP was not obtained, but the prosecutor who had handled the prosecution claimed that oral authorisation of the then acting DPP was indeed obtained to proceed with the prosecution against the applicant (para [6]).

Judge Ploos van Amstel of the Kwazulu-Natal High Court, Pietermaritzburg, agreed that the absence of written authorisation in this case constituted an irregularity, but this did not automatically result in a failure of justice or an unfair trial (paras [10] [11]). And in this particular matter, the irregularity was not of such a nature that it per se amounted to a failure of justice (para [14]). This finding was based on the following reasons: oral authorisation was indeed obtained from the acting DPP to proceed with the prosecution of the applicant; the applicant did not protest before or during the trial about the absence of written authorisation; and to 'hold that the absence of written authorisation in those circumstances per se amounted to a failure of justice, irrespective of whether the applicant was prejudiced thereby, would be contrary to the public interest and will bring the administration of justice in disrepute' (para [14]).