

SOUTH AFRICA / JUDGMENT

S v Pholoholo (Review) (HC 01/2025)

[2025] ZANWHC 31 (14 February 2025)

[2025] ZANWHC 31**COURT**

North West High Court, Mafikeng

BEFORE

A H Petersen, A Reddy

CASE / FILE NUMBER

HC 01/2025

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****REVIEW****NUMBER: HC 01/2025****MAGISTRATE'S****CASE NUMBER: R01/2025****REGIONAL****COURT CASE NUMBER: RCA 04/2023****Reportable:**

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

**the review matter
between:**

THE

STATE

and

JOHNNY

MODISAOTSILE PHOLOHOLO ACCUSED

DATES

REVIEW RECEIVED: 21 JANUARY 2025 & 3 FEBRUARY 2025

DATE

OF JUDGMENT :

14 FEBRUARY 2025

ORDER

1.

The proceedings and resultant order before Acting Regional Magistrate Maphango is reviewed and set aside.

2.

The matter is remitted to the Regional Court for consideration of the matter de novo before a Regional Magistrate, other than Acting Regional Magistrate Maphango, having due regard to this judgment which must be brought to the attention of the presiding Regional Magistrate.

3.

Arrangements must be made by the prosecution, in consultation with Legal Aid South Africa, for the appearance of the accused in the Regional Court, Ditsobotla, as a matter of urgency.

4.

Pending the remission of the matter, the accused is to be detained at the Bophelong Psychiatric Hospital, Mahikeng as if he were an involuntary mental health care user as contemplated by the provisions of section 37 of the Mental Health Care Act, No. 17 of 2002.

REVIEW

JUDGMENT

THE COURT

- [1] This matter served before us at the behest of the Acting Regional Magistrate, Itsoseng in terms of section 304 of the Criminal Procedure Act 51 of 1977 ('the CPA'), with a request that his decision declaring the accused an involuntary mental health care user as contemplated in terms of s37 of the Mental Health Care Act 2002 ('the MHCA') be reviewed.
- [2] The request was prompted by a communiqué from the Clinical Manager of the Bophelong Hospital, Dr K. Mothanka, who requested that the accused be reclassified as a mental health care user as envisaged in s42 of the MHCA, as recommended by a panel of psychiatrists in terms of section 79 of the CPA.
- [3] A detailed chronology of the common cause facts is essential for this Court to appreciate both the procedure and reasoning of the Acting Regional Magistrate which culminated in the order under review.
- [4] The accused a forty-one

- (41) year old male was arrested on 5 August 2021 on an allegation of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. On 6 August 2021, the accused made his first appearance in the Regional Court sitting at Ditsobotla.
- [5] At the first appearance of the accused, his rights in section 35(2)(b) and (c) of the Constitution of the Republic of South Africa, 1996 were explained. The accused elected legal representation from Legal Aid South Africa ('LASA'). Mrs. Molale from LASA confirmed appearance for the accused and after a brief consultation with the accused informed the Acting Regional Magistrate as follows:

"I could not understand what accused is saying and it seems he had a mental problem."

- [6] The Acting Regional Magistrate thereupon summarily postponed the matter for 'mental observation'. Since the enactment of the Criminal Procedure Amendment Act 4 of 2017 which came into force on 29 June 2017, the term 'mental defect' has been replaced with the term 'intellectual disability'. The use of terms such 'mental problem' as used by Mrs. Molale are therefore to be avoided, to give effect to what the legislature has endorsed as being in line with accepted international practice and to show deference to those who may suffer from an intellectual disability. It is apparent that the provisions of section 77 of the CPA were skirted, an aspect to which we return later. Notwithstanding the

incorrect application of the provisions of section 77, the matter was postponed on several occasions for the admission of the accused at the Sterkfontein Psychiatric Hospital.

- [7] The accused was eventually admitted on 23 November 2022. On 19 December 2022, two psychiatrists, Dr L. Y. Goga and Dr N. Govender produced a joint psychiatric report. The psychiatrists unanimously diagnosed the accused with schizophrenia or cannabis induced psychotic disorder in terms of section 79 (4)(b) of the CPA. The doctors found that the accused was fit to stand trial in terms of s77 of the CPA. They, however, found that that the accused at the time of the alleged offence whilst able to appreciate the wrongfulness of his actions was unable to act in accordance with such an appreciation, as envisaged in s78(2)(b) of the CPA.
- [8] The doctors ultimately recommended that the accused be admitted as a State patient to Bophelong Hospital in terms of s42 of the MHCA.
- [9] On 31 March 2023, the public prosecutor read the charge into the record, followed by the content of the psychiatric report of 19 December 2022. The accused was now represented by Mr Vorster from LASA. Mr Vorster had no objection to the approach adopted by the public prosecutor. What followed is best encapsulated with reference to the record:

'PROSECUTOR: As the Court pleases Your Worship, in proceeding to show if there is a prima facie case against the accused before court. I will proceed to read the statement into the record. The statement of Martha Pholoholo.

COURT: Mr Voster any objection.

MR VOSTER: Thank you, Your Worship, I do not have an objection that the statement be handed up. I think it is important for that to be out in the open. So that these issues can be ventilated.'

[10] Once the statement of Ms. Pholoholo was read into the record, the Regional Magistrate invited Mr Voster to adduce evidence, which invitation was declined. The public prosecutor proceeded to address the court as follows:

'As the Court pleases Your Worship. State submit that the not guilty verdict be returned taking into consideration that the Accused person was found to be not mentally fit at the time of the commission of the offence. But at the time of this offence Your Worship he had a mental illness or intellectual disability. And therefore, he cannot be criminally responsible for the offence.

May the Court make findings and since the Accused person is charged with this offence contemplated in Section 78 Subsection [6] 1, being murder we request the Court to direct that the Accused be detained in a Psychiatric Hospital as a State patient pending the decision of a Judge in chambers. As it pleases the Court.'

[11] Mr Voster in turn postulated the following in his address:

'As the Court pleases thank you Your Worship. Like I already said Your Worship it is important that we look at EXHIBIT A, I mean EXHIBIT B rather. The statement of Martha Pholoholo. The important thing I just want to highlight is, that no one saw the Accused on the scene if we look at the contents of Martha statement

A4. Martha alleges that she only heard the voice of the Accused talking to the deceased.

In fact, she says that the person she thinks is the Accused even mentioned the deceased Ruwanda name. And but it is important to note that not one of the two voices mentioned the name of the Accused. It is also important to look at the time when Martha made an audio observation.

She is talking about 01:00 o' clock in the morning. She just woke up after hearing the noise of music. So, one wonders how clear her observation was?

That is all I have Your Worship, I will therefore, all I want to say is I am asking Your Worship to consider whether that is sufficient evidence to find that there is a prima facie case against the Accused. That is all I have your Worship. I will leave it in Your Worship capable hands.'

[12] The Acting Regional Magistrate intimated that he was unwell, and postponed the matter to 12 April 2023, for his pronouncement on the enquiry. The matter was, however, subsequently postponed on several occasions for additional evidence at the behest of the Acting Regional Magistrate.

[13] On 19 June 2023, the public prosecutor confirmed that no additional evidence could be secured. The Acting Regional Magistrate resultantly delivered a brief judgment as follows:

‘Yes thank you that suffice. Thank you very much I have taken note of that and as far as I am concerned on this enquiry I am not satisfied that on the minimum of evidence that I have that the accused has committed an offence.

But the Act however allows in terms of Section 77(6)(a)(i) if the court finds that the accused has not committed the offence but the court may direct and make an order that he be detained at an institution in terms of section 13(ii) where the court finds that he has not committed the offence but the court may give a direction that he be detained in terms of section 37 of Mental Health Care Act 2000 which reads as follows. I am going to read for the record:

‘Where the court finds that the accused has committed an offence other than the one contemplated a (i) or I rely on this portion. Or that he or she has committed any offence be detained to and be admitted to and detained in an institution stated on the order as if or she were an involuntary mental health care user contemplated in terms of section 37 of Mental Health Act.’

It is in terms of this provision that I reply on giving direction.”

- [14] On 10 November 2023, some months after the accused was declared an involuntary mental health care user within the purview of s37 of the MHCA, he was admitted to Bophelong Psychiatric Hospital.
- [15] After a long hiatus, following the admission of the accused at Bophelong Psychiatric Hospital, Dr Mothanka on 14 August 2024 penned a communiqué requesting a review of the classification of the accused in terms of s42 of the MHCA. The fulcrum of this request was fourfold. First, the accused had committed the murder and acknowledged same at Bophelong Psychiatric Hospital. Second, it was recommended that the accused be declared a State patient. Third, the accused has a proclivity to be aggressive towards other users. Fourth, a bed is needed for other general users.
- [16] On 19 December 2024, the Director of Public Prosecutions issued a directive to the Regional Court Control Public Prosecutor. The fulcrum of which is that the Acting Regional Magistrate ordered the admission of the accused in terms of section 37 of the MHCA, contrary to the recommendation of the panel of psychiatrists that the accused be admitted in terms of section 42 of the MHCA. Dovetailing on these considerations, the Acting Regional Magistrate drafted a memorandum, which forms the basis of this review.
- [17] The review proceedings initially served before Petersen J on 21 January 2025, inexplicably escalated by the Acting Regional Magistrate as an “urgent review”. Petersen J alerted the Acting Regional Court Magistrate to the fact that the review record was incomplete. The proceedings of 31 March 2023 which was central to the invocation of s37 of the MHCA was not part of the record. A complete record served before Reddy J on 3 February 2025 and was considered subsequently by the Court.

[18] The law as it relates to the capacity of an accused to understand proceedings (s77), mental illness or intellectual disability and criminal responsibility (s78) and the panel for purposes of the enquiry and report (s79) is settled. As already indicated supra the Acting Regional Magistrate failed to give effect to what is required by s77 of the CPA; and if we may hasten to add, s78 of the CPA. The sentiments expressed in *Nkonwane v S* (CA 49/20)

[2024] ZANWHC 90 (28 March 2024) by Reddy J at paras 7 – 15, are, in general apposite.

[19] In particular, the finding by the Acting Regional Magistrate necessitating the referral of the accused for mental observation was not fact based. In *S v Dlali* [2015] ZAECBHC (27 February 2015 at para 18, Hartle J held that:

“The criterion for criminal responsibility assessed at the time of the commission or omission of the offence is provided for section 78. Before a court can refer an accused for observation whether in terms of section 77 (1) or 78 (2), it must be satisfied that as to the existence of factual allegations of lack of fitness to stand trial and or of criminal incapacity.”

(own emphasis)

[20] In casu, there was no indication other than the reference by Ms. Mohale from LASA at the first appearance of the accused that she ‘could not understand what the accused was saying’. On this sole utterance it was deduced by the Acting Regional Magistrate that the accused had a ‘mental problem’. Like what transpired in *Dlali* as captured at para 3 of the judgment, the accused was remanded in custody on several dates for admission at a psychiatric facility in anticipation of “mental observation” without any indication as to the objective for the referral being stated on the record.

[21] The failure by the Acting Regional Magistrate to conduct an initial enquiry to satisfy himself as to the existence of factual allegations of either lack of fitness to stand trial and/or of criminal incapacity is a misdirection. Like in *Dlali* at paragraph 5, again, when the accused was eventually admitted to Sterkfontein Psychiatric Hospital, no direction was given by the Acting Regional Magistrate whether the enquiry required was in terms of section 77(1) or 78(2) of the CPA, as a necessary basis for the section 79 enquiry. The relevant warrant (J138E) refers in broad to the provisions of section 77-79 of the CPA.

[22] A referral holds serious consequences for an accused, and it should be transparent that cogent reasons exist to invoke the provisions of ss77, 78 and 79 of the CPA. With the benefit of hindsight, the misdirection by the Acting Regional Magistrate in failing to conduct an enquiry as postulated in *Dlali* supra is superseded by a finding by the psychiatrists that the referral was objectively justified. Magistrates should be mindful of the enquiry that is necessitated when allegations are made of a mental illness or when a suspicion of same arises, to ensure that they satisfy themselves as ‘to the existence of factual allegations of lack of fitness to stand trial and or of criminal incapacity.’

[23] As made plain at paragraph 13 of Dlaki, the fitness of an accused to stand trial is a pre-requisite before conducting an enquiry into the facts. In casu, the Acting Regional Magistrate moved straight to conducting an enquiry and received the evidence in the affidavit of Ms Pholoholo.

No reason was given by the Acting Regional Magistrate for the need for the enquiry. As also made plain in Dlaki at footnote 3 “The enquiry is only held if the court is the view that it would be in the accused’s interest that one be held (s77 (6)). That would be the case, for example, where doubt exists that he was involved in the commission of the offence. Perhaps it was not so clear in this case that there was probably a prima facie case against the accused based on the information at everyone’s disposal, but the magistrate gives no inkling why she thought it necessary to hold such an enquiry. One gains the distinct impression from the exercise, however, that she perceived this enquiry to be the single determining factor in the matter whilst glossing over other requirements and necessary enquiries in the Chapter 13 trajectory.”

[24] Unlike s77(6) of the CPA, section 78 suggests, inter alia, that when an accused is charged with what is termed a serious offence, like murder, it is incumbent on the judicial officer to hold an enquiry to establish if the accused committed the crime so charged. In Dlaki, the court pointed out at paragraph 18, as happened in casu, that “There is no indication other than the reference in the record to the accused’s history of mental illness to discern the basis for the ordering of the section 79 enquiry in the first place. The criterion for fitness to stand trial is whether the accused is “by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence”. This concerns the question whether at the time of consideration he lacks fitness to stand trial. The criterion for criminal responsibility, assessed at the time of the commission or omission of the offence, is provided for in section

78. Before a court can refer an accused for observation whether in terms of section 77 (1) or 78 (2), it must be satisfied as to the existence of a factual or medical basis for the allegations of lack of fitness to stand trial and or of criminal incapacity.”

(emphasis added)

[25] We agree with the dictum at paragraphs 22 and 23 of Dlaki that ‘... a distinction is to be drawn between a referral expected to result in the issue of a direction in terms of section 77(6)(a)(i) as opposed to one 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... Given the absence of any firm indication of the reason for or objective to be attained by the referral in this particular instance, it was not surprising that the panel was not constituted as it ought to have been for the relevant order which the court ultimately purported to grant. As it turned out only two psychiatrists examined the accused whereas he ought to have been interviewed in accordance with the requirements

of section 79(1)(b). This entails at the very least a three member panel of suitably qualified psychiatrists including one appointed for the accused by the court. Absent such an enquiry, peremptory in terms of section 77(1) read with section s79(1), the court was therefore not empowered to act in terms of section 77(6)(a)(ii) by issuing the order which it did and this on its own constitutes a gross irregularity in the circumstances.” (emphasis added)

- [26] The failure by the Acting Regional Magistrate to follow the letter of the law as envisaged in section 77(1) and (78(2) of the CPA, aside from the issue which brings this matter under review, constitutes a gross irregularity in the proceedings. The failure resulted, amongst others, in the examination of the accused by a panel of two psychiatrists rather than three since the accused is charged with murder. Further, the enquiry where the evidence of Ms. Pholoholo’s affidavit was adduced post receipt of the psychiatric report, further demonstrates the pitfalls of summarily postponing a matter without an initial proper enquiry, on the mere ipse dixit of the accused’s legal representative that she could not understand the accused.
- [27] If an initial enquiry was conducted following the appearance of the accused in court, the Acting Regional Magistrate may have been seized with more information to make an informed decision of the basis of the referral for observation. This much is clear from the finding by the psychiatrists, albeit not properly constituted, that in terms of s77 the accused was fit to stand trial. It may also have elicited evidence as the psychiatrists found that the accused in terms of s78(2) at the time of the alleged offence was able to appreciate the wrongfulness of his actions but unable to act in accordance with such appreciation.
- [28] In the final analysis, the recommendation by the psychiatrists that the accused be admitted as a State patient to the Bophelong Hospital in terms of section 42 of the MHCA, may very well be justified, if the matter was considered in accordance with the prescripts of Chapter 13, and what was said in *Dlali*, a judgment which the Acting Regional Magistrate should have been acquainted with.
- [29] In the final analysis, the issue that brought this matter under review is secondary to the gross procedural irregularities in the conduct of the matter from inception when the accused appeared in court the first time.
- [30] The order of the Acting Regional Magistrate stands to be reviewed and set aside. We are, however constrained to deal with two patent misnomers in the understanding of the Acting Regional Magistrate of the orders which can be granted in terms of s 78 of the CPA. To this end, a recital of the relevant parts of s78 of the CPA is apposite:

78 Mental illness or intellectual disability and criminal responsibility

- (7) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable—

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.

(1A) Every person is presumed not to suffer from a mental illness or intellectual disability so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.

(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

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

- (3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the

relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine

the matter on such report without hearing further evidence.

- (4) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.
- (5) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 enquired into the mental condition of the accused.
- (6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—

- (a) the court shall find the accused not guilty;

... and direct—

(7) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be —

(8)

(aa) detained in a psychiatric hospital;

(bb) temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to himself or herself or to members of the public, pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

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

(dd) released subject to such conditions as the court considers appropriate;

(ee) released unconditionally; or

...

(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or intellectual disability, the court may take the fact of such diminished

responsibility into account when sentencing the accused...”

(our emphasis)

[31] Section 78(6) of the CPA provides for what is to happen in a scenario where the court finds that an accused has committed the act in question and where he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act. In such a scenario, the court shall find the accused not guilty and direct, considering as in the present case that the accused is charged with murder that the accused be detained in a psychiatric hospital pending the decision of a judge in chambers in terms of section 47 of the MHCA.

[32] The Acting Regional Magistrate found that there was no evidence that the accused committed the act in question. Section 78(6) of the CPA is silent on what should happen to the accused in such a case. The Acting Regional Court Magistrate in his memorandum contended that resulting from the factual finding made, he found that section

78(6)(b)(ii) of the CPA found application. Therefore, the accused had to be admitted to and detained in an institution as an involuntary

user in terms of section s37 of the MHCA.

[33] The explanation of the Acting Regional Magistrate for his order is further exacerbated by his explanation with reference to the communiqué of Dr Mothanka:

‘I have taken notice of a letter from Bophelong psychiatric hospital, requesting a review of classification of the accused through declare him a state patient. However, I am of the view that the decision I have taken, not to declare him a state patient, was based on the fact that I did not find that the accused committed the offence as I have already stated. Hence, I have followed the provisions of section 6(b) (ii) as this provision referred to “any other case than contemplated in paragraph (i)”. My understanding is that reference to “any other case referred to in (i) ” refers to other less serious offences and it will include where the accused is found not to have committed the act alleged.

After considering the contents of the letter from the psychiatric hospital requesting a review of my decision not to refer the accused to the hospital as a state patient pending a decision of a judge in Chambers, I wondered if I was obliged to decide and make an order to declare the accused a state patient as contemplated in terms of section 78(6)(a)(i), in line with the recommendations on the report, despite the fact that I have made a finding that I was not satisfied that he committed the act alleged. It is against this background that I seek guidance....”

[34] This interpretation of section 78(6)(b)(ii) of the CPA by the Acting Regional Magistrate is flawed since the reference to “any other case than contemplated in paragraph (i)’ refers to offences other than those identified in paragraph (i). The decision of the Constitutional Court in *De Vos NO & others v Minister of Justice and Constitutional Development & others* 2015

(2) SACR 217 (CC) at para [39], notwithstanding the amendment of ss 77 and 78 by the Criminal Procedure Amendment Act 4 of 2017 with effect from 29 June 2017, is further instructive, in that:

‘If it is established that at the time of the offence the person did not have the requisite appreciation or ability to act in accordance

therewith, the accused must, for that reason, be found not guilty. It is only then that the several options in section 78(6) become available. Sections 77 and 78 serve different purposes and that is why section 78(6) provides a wider range of options. An accused, dealt with in terms of section 78(6), may have no mental illness at the time of the court proceedings, in which case mandating hospitalisation would be patently irrational.'

[35] The Acting Regional Magistrate did not find the accused not guilty as envisaged by section 78(6) of the CPA because he did not have the requisite appreciation or ability to act in accordance therewith but on the basis that he did not commit the act in question. In those circumstances, no order as envisaged by section 78(6) of the CPA could be made.

Order

[36] In the result, the following order is made:

1. The proceedings and resultant order before Acting Regional Magistrate Maphango is reviewed and set aside.
4. Pending the remission of the matter, the accused is to be detained at the Bophelong Psychiatric Hospital, Mahikeng as if he were an involuntary mental health care user as contemplated by the provisions of section 37 of the Mental Health Care Act, No. 17 of 2002.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

A REDDY

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