

SOUTH AFRICA / JUDGMENT

S v Thupa (07/2023) [2023] ZAMPMHC 27 (23 August 2023) [2023] ZAMPMHC 27

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

07/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MIDDELBURG, MPUMALANGA DIVISION

Review Case Number: 07/2023

Magistrates RC09/2022

Coram: Langa J

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 23th day of August 2023 at 10h00.

In the matter between:

THE STATE

And

E THUPA

ACCUSED

REVIEW JUDGMENT

Langa J

Background and facts

- [1] This is a special review in terms of section 304A of the Criminal Procedure Act 51 of 1977, as amended, (“the CPA”). The review was laid before court by Magistrate JJ Combrinck in respect of a “decision and order” of his erstwhile colleague Ms Greyvenstein (Ms Greyvenstein) who has since reportedly resigned as a magistrate.
- [2] The accused Mr Thupa had been charged with the murder of a 4-year-old girl allegedly committed on 12 December 2021 in Emalahleni. During the course of the proceedings it was alleged that the accused might not be fit to stand trial, or alternatively, that he lacked the criminal responsibility at the time of the commission of the alleged crime due to mental illness. Consequently, the court (Ms Greyvenstein) referred the accused for mental observation for a period of thirty
- (30) days in terms of sections 77 (1) and 78 (2) of the CPA for the matter to be enquired into and be reported on in accordance with the provisions of section 79 of the CPA.
- [3] Pursuant this court order, the panel of psychiatrists, Dr E Weiss and Dr MP Pitjeng, after apparently examining and observing the accused made the following diagnosis: Transient Visual Hallucination of most possibly organic origin. They consequently concluded as follows in bullet point form:
1. That the accused was not fit to stand trial;
 2. He will be able to follow the proceedings
 3. He will not be able to give a full account of the time of the alleged offence
 4. He will therefore not be able to instruct his attorney
- [4] The further concluded that he did not have the necessary capacity to appreciate the wrongfulness of his actions at the time of the alleged offence and further that his ability to act was therefore impaired by mental defect. Lastly they recommended that he “be declared a State Patient for accommodation in correctional Services until a bed in Weskoppies can be obtained. His physical and mental health will be monitored in custody and the psychiatrist will follow him up.”
- [5] However, when the matter came before the court a quo on 27 July 2022 the court made an order, ostensibly in terms of section 77
- (6) (a) (ii) (aa) of the CPA to the effect that the accused be detained in a psychiatric hospital. This in fact was the order which

had been advocated for by the Director of Prosecutions as appears from the communications with the local prosecutor. The court,

however, discovered that there was apparently no psychiatric hospital available to admit the accused in line with such an order. The Magistrate apparently also decided that she could not make an order in terms of section 77 (6) (a) (i) (dd) of the CPA for the accused to be detained in a correctional facility as the State and the defence were of the opinion that the accused did not

pose a threat to the community and that he should therefore be released pending the availability of a hospital to admit him. The accused was accordingly released in terms of section 77 (6) (a) (i) (dd) of the CPA and an order was made that he shall surrender himself to the authorities when called upon to do so as soon as his admission in a psychiatric hospital is possible. When a hospital space became available the accused was brought before court in order to be dealt with in terms of the purported order previously made by Ms Greyvenstein for him to be detained in a psychiatric hospital pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002.

The issues

- [6] After considering the facts of the matter and the process followed, the current presiding Magistrate, Mr JJ Combrinck, was of the view that it was not correctly established that the grounds existed anchoring the finding that the accused is not fit to stand trial and further that he lacked the necessary criminal capacity for his actions. He formulated a view that the findings made by the psychiatrists were, in his opinion, incorrect and not based on the facts. He asserts further that the panel did not make any defined mental diagnosis as required but speculated about the possible causes of the accused's illogical conduct.
- [7] Furthermore, Mr Combrinck seems to be of the view that the accused was not properly observed and evaluated by the panel as he was seen and interviewed only on two days, on 9 February 2022 and 9 March
2022. He is of the view that the proceedings were not in accord with justice based on the evaluation only.

Applicable legal provisions

- [8] The applicable statutory provisions are section 77, 78 and 79 of the CPA. I will not deal in-depth with these provisions as I am of the view that it is unnecessary given my findings which I deal with in the ensuing paragraphs. However, it is necessary to state that section 77 deals with the capacity of an accused person to understand proceedings whereas section 78 deals with mental illness or intellectual disability and criminal responsibility. Section 79 on the other hand deals with the nuts and bolts of the enquiry and the reporting under sections 77 and 78 of the CPA including the period of observation. For the reasons of conciseness, I will quote only the relevant parts of the sections here.

Section 77

- [9] Section 77 (1) provides that if it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

[10] Section 77 (6) (a) provides that if the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court may direct that the accused—

(i) in the case of a charge of 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 a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be—

(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; or

(cc) ...

(dd)...

(ee)...

[11] Section 78 (1) on the other hand provides that 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.

[12] Subsection (2) provides that 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.

- (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, or
- (b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty, by reason of mental illness or intellectual disability, as the case may be, and direct—
- (i) 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 —
- (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)...
- (dd)...
- (ee)....; or
- (ff)....; or (My emphasis)
- [13] Section 79 (2) (a) deals with the enquiry and provides that the court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

Evaluation

[14] It is common cause in this matter that the court a quo, acting in terms of sections 77 (1) and 78 (2), referred the accused for an enquiry in terms of section 79 (1) (b) of the CPA for a period not exceeding thirty (30) days at Ermelo hospital. It is further common cause that a report by a panel constituted by the two Psychiatrists was filed with the court. According to the report the accused was seen on 09 February

2022 and again on 09 March 2022 and the report was thereafter compiled on 13 March 2022. It is to be noted that the report incorrectly states that the crime was committed on 13/12/2023 whereas the date of the commission of the offence was in fact 12 December 2021 according to the charge sheet. Taking into account the accepted facts before, one can accept that this is just a typing error.

[15] It is further common cause that the diagnosis was recorded as Transient Visual Hallucinations of most possibly organic origin and that the findings and recommendations of the panel are as reflected in paragraph [3] of this judgment above.

[16] As stated above, Mr Combrinck, the current Magistrate, is questioning the correctness of the report by the psychiatrist as well as whether or not enough time was devoted to the observation of the accused who was only seen by the doctor on two occasions. He is further of the view that the order by his erstwhile colleague Ms Greyvenstein that the accused be detained in a psychiatric hospital is incompetent and should be reviewed and set aside. Given the issues raised by Mr Combrinck, I will deal first with the issue of the order by Ms Greyvenstein, and in particular, whether she indeed made an order in terms of section 77 (6) (a) (i) (aa) of the CPA as asserted by Mr Combrinck.

[17] It is clear from his submissions that Mr Combrinck is relying in this assertion on what Ms Greyvenstein stated on the 27 July 2022 in her discussion with the Prosecutor inter alia that “remember we originally ordered in terms of section 77 (6) (a) (i) (aa) that he be detained in a psychiatric hospital.” This is the order that Mr Combrinck seeks to have set aside.

[18] However, after perusing the record of the proceedings it is in my view questionable whether this alleged order was ever made by Ms Greyvenstein. After I raised a query with Mr Combrinck to concisely identify and specify the offending finding and /or order and the relief sought, he stated that the order referred to in paragraph 17 above is the one in question. He, however, also stated in his response dated 17 July 2023 that according to the record, Ms Greyvenstein “intended to act in terms of section 77 (6) (a) (i) (aa) of the Criminal Procedure Act 1977 (Act 51 of 1977, ... in line with the instructions by the Director of Public Prosecutions”. He stated further that on 27 July 2022 she, Ms Greyvenstein, concluded that it was impossible to give effect to the said order as there was apparently no space for admission in a psychiatric hospital. He stated further that it thus appears that she did make an order but failed to endorse such on the front page of the J15 charge sheet. (My emphasis).

[19] I find Mr Combrinck’s assertion that an order was made by Ms Greyvenstein in terms of section 77 (6) (a) (i) (aa) to the effect that the accused be detained in a psychiatric hospital problematic. This is a factual as opposed to a legal issue. I have read the record and could

not find any such order. What is however, clear from the record is that Ms Greyvenstein did intend making such an order but did not make it. What she states on 27 July 2022 that “we originally ordered in terms of section 77 (6) (a) (i) (aa) that he be detained in a psychiatric hospital” is simply not correct. She is referring to the proceedings of the 24 May 2022 when she purportedly made the said order. The record of 24 May 2022 however does not support such a conclusion that the order was made.

- [20] A careful perusal of record of the proceedings of 24 May 2022 reveals that no such order was made. Furthermore, this is borne by her statement from page 5 of the proceedings of the 27 July 2022, where the following is stated by Ms Greyvenstein.

“it was only while half reading out such an order on 24 May 2022 that I realised that there is no place in a psychiatric hospital for the detention of the accused which caused the court to go back to the drawing table and have a look at Section 77 (6) (i) (aa) ag (bb) but the court, can only order the detention of the accused at a correctional health facility pending the availability of a bed at a psychiatric hospital if the court is of the opinion that it is necessary to do so on grounds that the accused poses a serious danger or threat to himself or herself or members of the public which we all agreed is not in the position (sic). So the court cannot order his detention at a correctional facility it leaves me with very little to do”. (My emphasis).

- [21] In another discussion with the Prosecutor on 24 May 2022 at page 6 of the transcribed record Ms Greyvenstein stated the following. “Thank you let me just look (sic) so I must not order in terms of Section 77

- (6) (a) (i) (aa) but I must order in terms of Section 77 (6) (a) (i) (bb)” (sic) to which Prosecutor replied in the affirmative. Therefore, read in context, this can be only understood as confirmation that although she intended making the order, however, no order in terms of section 77 (6) (1) (aa) was made as was originally requested by the State pursuant the instruction by the Deputy Director of Prosecutions. Furthermore, nowhere does it appear that the court found that the accused is guilty of the offence charged with. Ms Greyvenstein only commented that the evidence appears to support that allegation but did not make any finding in this regard. An order in terms of section 77 (6) (a) (i) (aa) can only be made after the court has made a finding that the evidence establishes that the accused committed the offence. In his case no

such formal finding was made.

- [22] I consequently find that no order for the detention of the accused in terms of section 77 (6)

- (a) (i) (aa) was ever made by Ms Greyvenstein. There is therefore no order to review and set aside as contended by Mr Combrinck. Absent such an order, there is no reason why this matter cannot be proceeded with before Mr Combrinck or another Magistrate as Ms Greyvenstein made no order save for the order to have the accused detained in terms of section 77 (a) (i) (bb) pending the availability of a bed in the psychiatric hospital. There is therefore no order to review and set aside and the matter therefore ought to be remitted to

the court a quo for further hearing.

[23] As regards the challenge to the correctness of the report by the panel, this is an issue to be determined by the Magistrate hearing this matter who may even order re-evaluation where he/she is not satisfied with the report by the panel. This court will therefore not make any determination on this issue.

Order

[24] In the result the following order is made:

The matter is remitted back to the court a quo for the application in terms of section 77 (1) and 78 (2) read with 79 of the CPA to be proceeded with before another magistrate.

MBG LANGA

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

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