IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CA&R54/2026

In the matter between:

THE STATE

and

MELIKHAYA LOZWA **ACCUSED**

JUDGMENT – REVIEW

Zono AJ:

Introduction

[1] This matter emanates from the Magistrates Court, Mthatha. The accused was apparently charged under Case No: D562/2022 for contravening Section 17(a) read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act 116 of 1998. On 23rd June 2022 the Magistrates Court granted an order in terms of which the accused was prohibited from *inter alia*, entering the complainant's residence, Peter Lozwa at Ndabeni Location in Qweqwe Administrative Area, Mthatha. He was further ordered not to assault or threaten to assault or swear or shout or insult the complainant and his wife. It was alleged that accused person breached the terms of the

protection order in that, notwithstanding the terms of the protection order, the accused had never left the homestead of the complainant ever since the granting and service of the court order upon him[1].

[2] On 12th April 2023 the matter appeared before court and the Public Prosecutor addressed the court *inter alia,* that the court would proceed with an inquiry in terms of section 77 of the Criminal Procedure Act 51 of 1977 (CPA) regarding the accused capacity to understand the proceedings. Charges were put to the accused. It does not appear that accused was caused to plead to the charges put to him. However, elsewhere in the record it appears that the Magistrate enquired from the defence attorney if she agrees with the state that it has succeeded to show on a balance of probabilities, that the accused has committed the act, to which the defence attorney confirmed and agreed. In the judgment the Magistrate[2] makes reference to the provisions of section 77(6) of the CPA and sought to rely on and give impression that those provisions were applicable in the matter. The judgment further demonstrates that a directive by the Director of Public Prosecutions (DPP) which directed that the accused be admitted and detained in an institution stated in the order, was handed in as an exhibit by consent. The DPP's Directive sought the accused to be treated as an involuntary healthcare user as contemplated in section 36 of the Mental Care Act 17 of 2002. It dealt with the matter as a section 77 matter.

[3] To fortify the impression that the Magistrate was dealing with a section 77 of CPA, in its findings he made the following observation:

[1] This presupposes that at the time of the granting and service of the protection order the accused was residing or staying with or at the complainant's place.
[2] The opening sentence of the judgment.

"*FINDING*

In terms of section 77(5) of the Criminal Procedure Act, the court has to make a finding whether indeed that the accused is not capable of understanding the proceedings, so as to make a proper defence…. Based in this psychiatrist report, which is done by the expert who qualified, the court finds that the accused is not capable of understanding court proceedings, so as to make a proper defence. But now we are left with the second leg of section 77(6) of the Criminal Procedure Act 51 of 1977 as amended"(sic).

That finding flew not only from the psychiatric report dated 06th February 2023 handed in, but also from the directive of the DPP dated 29th March 2023 expressly invoking the provisions of section 77 of the CPA.

[4] With that said, the Magistrate recorded that he is satisfied that the state has shown on a balance of probabilities that the accused committed the act. The Magistrate thereafter entered a verdict of not guilty and as a reason for that verdict the Magistrate found that the accused is unable to follow the proceedings and make a proper defence. It is apposite to quote that finding verbatim as follows:

"The accused is found not guilty as he is not able to follow proceedings and make a proper defence." (sic)

Immediately thereafter the magistrate switched and abruptly made reference to and applied the provisions of section 78(6) of the CPA thus:

"*In terms of section 78(6) of Act 51 of 1977, accused is to be admitted and detained at, in Umzimkhulu Hospital, sorry, sorry not Umzimkhulu Hospital. At, to be admitted and detailed at Nelson Mandela Academic Hospital in Mthatha in terms of section 47 of the Mental Health Care Act 17 of 2002*" (sic).

That finding permeated through to the charge sheet (J15). An order in terms section 77(6)(a) (i) of the CPA embodied in MC 20 Form does not only order that the accused be detained in Nelson Mandela Academic Hospital, but also extends the scope of the original order for the accused to

be temporarily detained in Mthatha remand centre at a correctional health facility of a prison.

[5] The provisions of section 77(6) and section 78(6) of the CPA are seemingly conflated. That will be clear if the respective provisions are discussed hereinunder. The full text of section 77(6) of CPA reads as follows:

> *"6(a) 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;

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

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

(ee) referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008 (Act 75 of 2008), and pending such referral be placed in the care of a parent, guardian or other appropriate person or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005 (Act 38 of 2005); or

(ii) in the case 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 be

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

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

(cc) released unconditionally; or

(dd) referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate person or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005, and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106 (4) to be acquitted or to be convicted in respect of the charge in question."

[6] In the light of the fact that the provisions of section 77 of CPA deal with the capacity of the accused to understand the proceedings, the court must then make a finding regarding the accused's capacity to understand the proceedings so as to make a proper defence. The Magistrate correctly made that finding that the accused is unable to understand the proceedings. Once that finding is made, no verdict must then follow. In fact, the subsection does not provide for any verdict to be made, either a verdict of guilty or of not guilty. Under this subsection it is not available to the court to either convict or acquit. No power to convict or acquit is conferred upon the court under this subsection.

[7] Courts have a duty to ensure that the doctrine of legality, which is part of the rule of law, is upheld. The principle encompasses all three arms of government, i.e. the executive, the legislature and the judiciary[3]. The courts are constrained by the doctrine of legality to exercise only those powers bestowed upon them by the law[4]. The doctrine of legality which requires that power should have a source in law is applicable whenever a power is exercised. A power can be validly exercised if it is clearly sourced in law[5]. In *Welkom High School and Another* the Constitutional Court[6]held that:

> "*1. State functionaries, no matter how well- intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation."*

Although this dictum was made in an administrative context, it applies to this matter with equal force. The Magistrate had no power to acquit the accused under section 77 of CPA.

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[3] ***Lester v Ndlambe Municipality and another*** 2014 (1) ALL SA 402 (SCA) ;2015 (6) SA 283 (SCA) Para 24 and 25.

[4] ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) Para 15.

[5] ***AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*** 2007 (1) SA 343 (CC) Para 58.

[6] ***Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and another*** 2014 (2) SA 228 (CC) Para 1.

[8] It is plain that the Magistrate did not have power to pass a verdict in the context of section 77(6) of the CPA. The Magistrate exceeded his power or authority under the circumstances. He acted *ultra vires*. That conduct amounts to gross irregularity in terms of section 22(1) (c) of the Superior Court Act 10 of 2013. Exceeding powers is an incident of gross irregularity as envisaged in section 22(1)(c) of the Superior Court Act. A decision made and court order granted in circumstances where the court has no power is subject and susceptible to a review in terms of section 22(1) (c) of the Superior Court Act.

[9] I have alluded in the preceding paragraphs to the fact that the Magistrate conflated the provisions of section 77(6) and section 78(6) of the CPA. That spells out a material error of law which is also susceptible to review under section 22(1)(c) of the Superior Court Act[7]. The Magistrate proceeded with the inquiry and made some findings under section 77 of the CPA. When approaching the end of his judgment, he started dealing with the matter as if it was a section 78(6) inquiry. No basis at all was laid for such an approach. It is fundamentally important to note that there are different considerations that need to be taken into account under the two sections of the CPA. The two sections are markably different in terms of their purpose and aim. The first difference is that, section 77 of the CPA generally deals with the capacity of the accused to understand proceedings and make proper defence which is not the case in section 78 of CPA. Section 77 of the CPA deals with the mental state of the accused person at the trial. Accused person may not be tried while he or she is incapable of understanding the proceedings[8] so as to make a proper

[7] ***Jordan v Penmill Investments CC*** 1991 (2) SA 430 E at 441 B-C; ***Qozeleni v Minister of law and order*** 1994 (3) SA 625(E) at 638 E-G; ***Nelson Mandela Bay Metropolitan Municipality v Nobumb***a No 2010 (1) SA 579 (ECG) at 584 E-F.

[8] ***S v Mabena and Another*** 2007(1) SACR 482(SCA); 2007(2) ALL SA 137 SCA Para 12.

defence and must instead be detained in a psychiatric hospital or a prison until otherwise directed by a Judge. Section 77 of CPA permits a court to direct such an enquiry whenever it appears to the court, at any stage, 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[9].

[10] On the other hand, section 78 of the CPA permits the court to direct such an inquiry if it is alleged at Criminal proceedings that the accused is by reason of mental illness or mental defect 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 relevance of the enquiry in the case of section 78 of the CPA is that a person who commits an act or omission amounting to an offence while suffering from a mental illness or mental defect that makes him or her incapable of appreciating the wrongfulness of the act, or acting in accordance with such an appreciation, is not criminally responsible for the act or omission. In such a case a court must find the accused not guilty and must direct that he or she be similarly detained[10]. In section 77 enquiry there is no finding regarding guilt or otherwise of the accused person, which is a distinguishing phenomenon in section 78 enquiry.

[11] In Mabena[11]Nugent JA aptly and neatly puts it thus:

> *"[12] In about September or October 2004 an enquiry into the mental state of Mr Mabena, who has a history of epileptic seizures, was directed in terms of ss 77 and 78 of the Criminal Procedure Act. Those sections, respectively, permit a court to direct such an enquiry 'whenever it appears to the court at any stage 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', or if it is 'alleged at*

[9] Section 77 (1) of Criminal Procedure Act 51 of 1977.

[10] Section 78(1) and section 78(6) (b) of Criminal Procedure Act 51 of 1977. Accused may be detained if he or she poses a serious danger or threat to himself or herself or to the members of public.

[11] ***S v Mabena*** 2007 (2) ALL SA 137; 2007 (1) SACR 482 (SCA) Para 12.

criminal proceedings that the accused is by reason of mental illness or mental defect . . . 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 relevance of the enquiry in the former case is that a person may not be tried while he or she is incapable of understanding the proceedings and must instead be detained in a psychiatric hospital or a prison until otherwise directed by a judge. The relevance of the enquiry in the latter case is that a person who commits an act or omission amounting to an offence while suffering from a mental illness or mental defect that makes him or her incapable of appreciating the wrongfulness of the act, or acting in accordance with such an appreciation, is not criminally responsible for the act or omission. In such a case a court must find the accused not guilty and direct that he or she be similarly detained".

[12] I have alluded above to the fact that there is no record of the accused entering a plea. The record does not show that the accused pleaded to the charges[12]. After putting the charges to the accused, the Prosecutor sought the plea to be entered, which request the court rejected. It is therefore apposite to refer to the record in this regard:

> "*Prosecutor: .... Now that we have read the charge preferred against the accused person, we just need to enquire of his plea; your worship so that we can proceed.... [intervenes]*
> *Court: Forget about the plea. The court will determine it later*" (sic).

No plea was thereafter called to be entered in the entire proceedings. That was a correct approach in terms of section 77 of the CPA. However, in terms of section 78 a plea is required to be entered. The reason is not far to fetch. The court is required to make a finding on the accused's guilt in terms of section 78(6) of the CPA.

[13] In *Pedro*[13], the full bench of the Western Cape Division in its interpretative exercise of the two sections made the following dictum:

> *"[80] As to the question of a verdict, this was a matter on which counsel were agreed. I have no difficulty with the referring magistrate's view that the finding*

[12] Section 105 and section 106 of Criminal Procedure Act 51 of 1977.
[13] ***S v Pedro*** 2015 (1) SACR 41 (WCC); 2014(4) ALL SA 114 (WCC) Para 80-81.

of not guilty in terms of s 78(6)(a) was irregular and incompetent. Section 78(6) applies where an accused, who has the mental capacity to understand the proceedings against him as contemplated in s 77, has entered a plea of not guilty. In terms of ss 78(1A) and (1B) a person is presumed to have been criminally responsible at the time he perpetrated the alleged offence, and an accused who puts his criminal responsibility in issue bears the burden of proving the lack of criminal responsibility. Section 78(6) applies where, pursuant to criminal responsibility having been raised as an issue, the court finds that the accused lacked criminal responsibility at the relevant time. (Throughout this judgment I refer to lack of criminal responsibility only where it is brought about by mental illness or mental defect.)

[81] Where, by contrast, an accused is not capable of understanding proceedings as contemplated in s 77, he cannot in the nature of things enter a plea and the question of his criminal responsibility at the time of the alleged offence cannot be judicially determined in accordance with s 78. An accused who by reason of mental illness or mental defect is not capable of understanding the proceedings may or may not also have lacked criminal responsibility at the time he perpetrated the alleged offence; either way, he must be dealt with in accordance with s 77, not s 78. This means that he can be found neither guilty nor not guilty; no verdict is entered, and instead a direction must be made in accordance with either sub-para (i) or (ii) of s 77(6)(a). There are several cases in which erroneous verdicts in terms of s 78(6) have on this basis been set aside on review (see, for example, S v Matumbela Case 104/02/2012 WCHC Reference 2/13; S v Hendricks Case B690 WCHC Ref No 13195).

[14] On the authority of *Pedro a* finding of guilty may only be made if there is a plea of not guilty entered by the accused under section 78(6) of CPA. By contrast, under section 77(6) of CPA there is no plea required to be entered or made. The reason is not far to fetch. The accused is unable to follow or understand the proceedings to make a proper defence.

[15] The unfathomable approach of the Magistrate to conflate the two distinct provisions of the Criminal Procedure Act[14] is at the core of the irregularity. Such an approach was influenced by a material error of law. It is a contradiction in terms to deal with a matter in terms of and conduct an inquiry under section 77(6) of the CPA[15], but only make orders rooted in

[14] Section 77(6) and 78(6) of Criminal Procedure Act 51 of 1977.
[15] And also make some findings under section 77(6) of CPA.

the provisions of section 78(6) of the CPA. I have explained above how and to what extent the provisions of section 77 and 78 of the CPA are different. As the enquiry was in terms of section 77 of the CPA, it was incompetent of the Magistrate to make orders which do not flow from those provisions, but from different provisions[16]. I have stated above that the provisions of section 77 and 78 of the CPA deal with different situations and circumstances[17].

[16] The conclusions and orders based on the provisions of section 78(6) of the CPA preponderantly appear in different parts of the court record or documents. The charge sheet(J15) records same as follows:

> *"Judgment 12-04-2023 not guilty not able to follow proceedings and make a proper defence. Sentence in terms of section 78(6) of Act 51 of 1977, accused is to be admitted and detained in Nelson Mandela Academic Hospital in Mthatha in terms of section 47 of the Mental Health Care Act 17 of 2002*" (sic).

A verdict of guilt is consistent with the provisions of section 78(6) of CPA, but a finding that the accused is not able to follow proceedings and make a proper defence is an incident of section 77(6) of the CPA. These two orders do not legally sit together comfortably. The order making reference to section 78(6) is repeated in J4, which is a review case covering form. The MC20 form records an order in terms of section 77(6) (a)(i) of the Criminal Procedure Act No 51 of 1977. I will not decide if the accused failure, without more, to leave complainant's homestead[18] is a charge involving serious violence in terms of section 77(6)(a) (i) of the CPA.

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[16] Section 78(6) of the Criminal Procedure Act 51 of 1977.

[17] Section 77 of the Criminal Procedure Act 51 of 1977 provides for the capacity of the accused to understand proceedings; whereas section 78 provides for accused's criminal responsibility at the time of the act or omission.

[18] Which was the offence with which the accused was charged.

Remedy

[17] It is commendable that the magistrate concerned accepts in his letter dated 28th September 2023 that he granted orders (rulings) that are contradictory in the following specific terms:

> " *Magistrate agrees with an Honourable Judge that there are 2 rulings which are contradictory and it was an error on my part, I sincerely apologise for that*"(sic).

This now leads to a remedy. The Director of Public Prosecutions, Eastern Cape, Mthatha(DPP) in its letter dated 07th July 2024, after having pointed out that the Magistrate has committed an irregularity, suggested the remedy as follows:

> "*It is therefore my respectful opinion that these proceedings were a nullity and as such should be set aside and the matter be referred back to the Magistrate who dealt with it to issue a correct order*"(sic).

There is no contrary suggestion to the one proposed by the DPP. It is appreciable that the Magistrate understands what he should have done and what needs to be done.

[18] The gravamen of the DPP's complaint lies with the nature of the orders granted and not with the manner in which the proceedings were conducted. Nothing taints the proceedings or inquiry, therefore there is no basis for setting them aside. Only the contradictory orders that need to be set aside[19]. The practical effect of setting aside only the decision (order) is that the proceedings from which the decision (order) emanates are still extant before the Magistrate. In those circumstances the best order to make therefore would be to remit the matter back to the Magistrate who made

[19] ***Matiwane v President of the Republic of South Africa and others*** 2019 (3) ALL SA (ECM) Para 27; ***Hlamandana and another v Premier Eastern Cape Provincial Government and others*** (2227/2023) [2025] ZAECMH1 (4 February 2025) Para 54.

the impugned orders for a lawful, competent order or decision to be made or taken.

[19] However, in paragraph 12 above I have alluded to the fact that charges were put to the accused, although that he was not called upon to plead thereto. It would be inconsequential to allow the charges to be put to the accused when it is clear that the accused is not going to plead thereto. Putting charges to the accused is an integral part of pleading. If it transpired from the beginning that the accused may not be capable of understanding and following the proceedings so as to make a proper defence the enquiry in terms of section 77 of CPA should have been started without putting the charges to the accused. Putting charges when it has transpired that the accused may not understand or follow the proceedings is plainly inconsistent with the provisions of section 77 of CPA. Putting charges is a step initiating the conduct of the criminal proceedings or trial. The provision proscribes that the proceedings may be commenced with when it is manifest that the accused is incapable of understanding the proceedings. The step of putting charges in circumstances where it is plain that the accused is incapable of understanding the proceedings is irregular. That step vitiated and tainted the entire proceedings and rendered them to be susceptible to be reviewed and set aside.

Order

[20] I accordingly make the following order:

1. **The proceedings and the orders granted by the Mthatha Magistrate under Case** No**: D562/2022 on 12th April 2023 be and are hereby reviewed and set aside.**

2. **The matter under Mthatha Case No. D562/2022 is remitted and referred back to the Magistrate Court to start *de novo.***

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A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

I agree

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JOLWANA J

JUDGE OF THE HIGH COURT

Delivered on : 17 June 2026