Criminal procedure

2015 SACJ 387

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1. Prosecutor as dominus litis

In *S v Sehoole*2015 (2) SACR 196 (SCA) the question arose as to whether a court may interfere with the state's discretion to elect the charges to bring in against an accused. The respondent was convicted in a regional magistrates' court of *inter alia* contravening s 3 of the Firearms Control Act 60 of 2000, in that he was found in the unlawful possession of a firearm. On appeal the high court set aside the conviction and sentence on the ground that the respondent should have been charged with the more serious offence of contravening s 4 of the Act, having been in possession of a firearm, the serial number of which had been filed off (at para [5]). The state appealed against the judgment of the high court on questions of law in terms of s 311(1) of the Criminal Procedure Act 51 of 1977. The Supreme Court of Appeal held that ss 3 and 4 of the Firearms Control Act share one essential feature, namely that both prohibit the possession of unlicensed firearms. The court also pointed out the essential differences between the two sections. Section 3 contains a general prohibition against the possession of a firearm without a licence, whilst s 4 deals with prohibitions in instances where firearms may not be possessed at all, except under exceptional circumstances, and a firearm where the serial number has been changed or removed without the written permission of the Registrar of Firearms. Furthermore the Act prescribes a maximum penalty of 15 years' imprisonment for a breach under s 3, and a maximum penalty of 25 years in respect of s 4 (at para [8]). The two sections each prohibit possession of firearms. However, for a successful prosecution in terms of s 4(1)(*f*)(iv), the state must also prove that the firearm's serial number or identifying mark has been removed or altered without the written permission of the Registrar (at para [9]). The court held that the state as *dominus litis* has a discretion regarding prosecution and pre-trial procedures. The state may, for instance, decide whether or not to institute a prosecution; on what charges to prosecute; in which court or forum to prosecute; and when to withdraw charges. The state can also elect to charge a person with a less serious offence (at para [10]). The court found that there is no statutory provision which compels the state to charge a person with the more serious offence (at para [11]) and, ordinarily, courts are not at liberty to interfere with the prosecutor's discretion unless there

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are truly exceptional circumstances for doing so. This might happen where a prosecutor has not exercised his or her discretion properly. When preferring a particular charge against an accused, courts are not at liberty to interfere with the discretion exercised by the prosecution during a trial (at para [12]). As a result the conviction of the respondent for the contravention of s 3 of the Firearms Control Act was reinstated.

In *S v Mashinini*2012 (1) SACR 604 (SCA) at para [15] it was stated:
'It is a well-known fact that the state is dominus litis. After the police have concluded their investigations, the docket is given to the prosecutor. He or she gains access to all documents and statements in the docket. Based on this, he or she decides on which charge(s) to prefer against an accused person.'

E du Toit et al *Commentary on the Criminal Procedure Act* (RS 54 2015) 1-41 point out that no exaggerated importance should be given to the notion of *dominus litis*. It merely means that the prosecution can do what is legally permissible to set criminal proceedings in motion, such as determining the charges and the date and venue of the trial. Fairness to the accused requires the courts to retain a measure of residual control over decisions taken by the prosecution as *dominus litis*. Apart from the discretionary powers that the prosecution as *dominus litis* possesses (and pointed out in *Sehoole*), case law also reveals that the prosecutor may in terms of this notion, accept a guilty plea on an alternative or lesser charge. However, once an accused has pleaded not guilty, a court is seized with the duty of determining the issues between the state and the accused raised by the accused's original plea of not guilty and the prosecutor cannot interfere with the exercise of this duty (*S v Sethoga*1990 (1) SA 270 *(a)* at 274I-275G; *S v Brown*2015 (1) SACR 211 (SCA) at paras [96]-[100] and A Kruger & VG Hiemstra *Hiemstra's Criminal Procedure* (2015) 17-12). In *Brown v Director of Public Prosecutions*2009 (1) SACR 218 *(c)* at 224A-C the court held:

'There is no obligation on ... the State, in any intended prosecution, to approach a suspect for an explanation about the intended charges, nor does the suspect have a right to demand that he or she be approached for an explanation prior to the State applying for a warrant of arrest. I can, in any event, imagine that in certain circumstances it would be rather unwise for the State to adopt such an approach. Similarly, an accused person cannot, as of right, demand that additional charges brought against him or her should be joined to any existing charges. The State, or second respondent in this instance, is *dominus litis*.'

There are sound policy considerations for courts limiting their own power to interfere in prosecutorial decisions. The independence of the prosecuting authority must be safeguarded by limiting the extent to which review of its decisions can be brought. Furthermore the great

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width of the discretion exercised by the prosecuting authority and the polycentric character that generally accompanies its decision making, including considerations of public interest and policy, prohibits the court from interfering for flimsy reasons (*National Director of Public Prosecutions v Freedom Under Law*2014 (2) SACR 107 (SCA) at para [25]; also see P du Toit 'Recent cases: Criminal procedure' (2015) 28 *SACJ* 85 at 88).

2. Arrest and detention

In terms of s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1 to the Act. In *Duncan v Minister of Law and Order*1986 (2) SA 805 *(a)* at 818G-H it was held that the jurisdictional facts which must exist before the power conferred by s 40(1)*(b)* may be invoked are: first, the arrestor must be a peace officer; secondly, he or she must entertain a suspicion; thirdly, it must be a suspicion that the arrestee committed an offence referred to in schedule 1 to the Act; and fourthly, the suspicion must rest on reasonable grounds. The test whether a peace officer 'reasonably suspects' a person of having committed an offence within the ambit of s 40(1)*(b)* is objective (*Minister of Law and Order v Hurley*1986 (3) SA 568 *(a)* at 579H). Once these jurisdictional requirements are met, a discretion arises as to whether or not to arrest. This discretion must be exercised rationally (*Minister of Safety and Security v Sekhoto*2011 (1) SACR 315 (SCA) at para [28]).

In *Lapane v Minister of Police*2015 (2) SACR 138 (LT) the court ordered the Minister of Police and the Director of Public Prosecutions to pay damages to the plaintiff as a result of his unlawful arrest, detention and prosecution. The plaintiff was detained for just over two years without being granted bail before the charges were withdrawn (at para [2]). He was denied bail based on the submissions made by the investigating officer and the prosecutor (at para [10]). It appeared that an informer had tipped off the police that a robbery was to be committed in an area where there had been a spate of robberies. The arresting police officer testified that housebreaking instruments were found near the plaintiff but not on his person. When he was asked to be more specific he simply said 'nearby'. He could not even give an estimate of the distance. The court found that he was trying to justify the arrest *ex post facto* (at para [13]). The plaintiff was also told by the investigating officer that the housebreaking suspects were male and he therefore formed the reasonable suspicion that this person, the plaintiff, had to be arrested. The court held that this was 'a most unsatisfactory basis on which to arrest the plaintiff' (at para [17]).

The plaintiff had an alibi that was very easy to check. He told the policeman who arrested him that he was on his way from a nearby tavern. The court held it would have been easy to check there and then whether the plaintiff's explanation was true. The arresting officer did not consider the reasonableness of the suspect's explanation and did not try to evaluate its authenticity. The arresting officer failed to show that he had reasonable grounds for suspicion justifying arrest. The arresting officer acted over-hastily and imprudently (at para [23]). There is a constitutional duty on the police officers and public prosecutor(s) handling a case to ascertain the reasons for any further detention of the suspect and the prosecutor has to place such reasons or lack thereof before court (at para [29]). The prosecutors in the case seeking the many postponements were responsible for the unfortunate and lengthy incarceration of the plaintiff. None of the prosecutors applied their minds to the charges facing the plaintiff. They simply rubber-stamped the request by the police. The information the prosecutors had at their disposal was fundamentally those which were contained in the police documents, which were flawed. The continual postponements were carried out by the prosecutors in 'robotic mode' (at para [49]).

The Supreme Court of Appeal has stated that, notwithstanding the onerous task that prosecutors face, their function is not merely to have the matter placed on the roll simply to have it postponed for further investigation. A prosecutor must pay attention to the contents of his or her docket. The prosecutor must act with objectivity and must protect the public interest (*Minister of Police v Du Plessis*2014 (1) SACR 217 (SCA) at para [34]; *S v Rozani; Rozani v Director of Public Prosecutions Western Cape*2009 (1) SACR 540 (C) at 549*f*-550*d*; cf P du Toit 'Recent cases: Criminal procedure' (2015) 28 *SACJ* 85 at 85-87).

3. Search and seizure

Search warrants are important tools to assist the police in the investigation of crime. Searches and seizures, however, inevitably interfere with important constitutional rights of individuals, most notably the right to privacy. In *Minister of Safety and Security v Van der Merwe*2011 (2) SACR 301 (CC) at paras [36]-[37] the court identified a number of safeguards to ameliorate the effect of this interference. These safeguards are: first, the significance of vesting the authority to issue warrants in judicial officers; second, the jurisdictional requirements for issuing warrants; third, the ambit of the terms of the warrants; and fourth, the bases on which a court may set warrants aside (cf *Mistry v Interim Medical and Dental Council of South Africa*1998 (4) SA 1127 (CC) at para [25]). In *Minister of Safety and Security v Van der Merwe* supra the Constitutional Court laid down a number of prerequisites

for a valid search warrant (at para [55]). In addition, the court laid down guidelines to be observed by a court considering the validity of the warrants. These are: *(a)* the person issuing the warrant must have authority and jurisdiction; *(b)* the person authorising the warrant must satisfy himself/herself that the affidavit contains sufficient information on the existence of the jurisdictional facts; *(c)* the terms of the warrant must be neither vague nor overbroad; *(d)* a warrant must be reasonably intelligible to both the searcher and the searched person; *(e)* the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and *(f)* the terms of the warrant must be construed with reasonable strictness (at para [56]). It becomes clear that the utmost care must be taken to ensure that search warrants are properly applied for and issued.

In *HO t/a Betxchange v Minister of Police*2015 (2) SACR 147 (GJ) the applicants applied for relief, described by them as 'process in aid' to enable them to prosecute at a later stage a case for the setting aside of search warrants issued in terms of the Counterfeit Goods Act 37 of 1997. The court held that the purpose of requiring judicial oversight over the issue of a warrant to enter, search and seize is to protect a (natural or juristic) person's rights to privacy, and to subordinate to judicial scrutiny and oversight, a belief by the police, however *bona fide*, that they really have a need to invade a person's privacy and that they have shown a cogent basis for a lawful invasion to be authorised, because not every alleged crime justifies a search warrant to procure evidence (at para [28]). These considerations pointed towards any person indeed having a right of access to the founding papers in respect of a search warrant, as part and parcel of the broader right to privacy and freedom from arbitrary state action (at para [29]). The respondents were ordered to deliver a copy of the affidavits or statements, together with annexures used in support of the applications brought for certain search warrants. The respondents were further ordered to furnish the applicants with copies of all photographic images created by them in the course of the execution of the search warrants. Pending the determination of the relief sought relating to the setting aside of the warrants, all items seized pursuant to the search warrants, including all information, documents, data and photographic images, had to be sealed in the possession of the registrar of the court, alternatively of an independent and trustworthy stakeholder as agreed between the parties. The respondents, including any officers, employees or agents of the respondents, were furthermore interdicted from handling, dealing with, processing, examining, interpreting or in any other way having access to the seized items, including all information, documents, data and photographic images. The respondents were also ordered to disclose to the applicants the names of all persons who had been

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orally advised as to the contents of the inventory forms and/or are in possession of the inventory forms and/or any of the photographic images (at para [40]).

The case raises a number of important questions. To what extent is pre-trial litigation pertaining to the validity of searches and seizures permitted by law, especially in the light of the provisions of s 35(5) of the Constitution, which empowers the trial court to exclude unlawfully obtained evidence with reference to specific factors? What is the nature of the obligations on individuals conducting a search and seizure operation to provide information to persons whose rights are adversely affected by the search? Must the searcher, when he or she is legally obliged to hand over a copy of the search warrant, as a rule also hand over a copy of the affidavit in support of the application for the search warrant? May a court order the preservation of evidence even if it is clear that the evidence was unlawfully obtained?

Firstly the issue of preliminary litigation challenging the validity of search warrants will be considered. The majority of the court in *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions*2008 (2) SACR 421 (CC) held that courts should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5) of the Constitution, which pertains to the exclusion of unlawfully obtained evidence. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There is, however, no absolute rule in this regard. If the trial is only likely to commence far in the future, affected persons should be able to engage in preliminary litigation to enforce their fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings, courts should not entertain it (*Thint* supra at para [65]). In *Van der Merwe v National Director of Public Prosecutions*2011 (1) SACR 94 (SCA) at para [32] Bertelsmann AJA held in this regard:
'It is important to bear in mind that, while the Constitution guarantees to an accused a fair trial, that does not mean that the prosecution must satisfy the accused in advance that the trial will indeed be fair. It is the duty of the trial court to try a charge, and to ensure that the trial is fair, and, if it turns out that it was not, then any conviction that followed might be set aside. It might even turn out that the accused is acquitted, in which case the alleged irregularities will be irrelevant. Litigation of the kind that is before us falls squarely into the category of preliminary litigation that ought to be avoided and discouraged.'

In *National Director of Public Prosecutions v King* 2010 (2) 146 (SCA) it was held (at para [5]) that, 'The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems or to encourage preliminary litigation[.]'

The next consideration relates to the information requirement. Ordinarily a search procedure is one without notice to the person whose rights are affected thereby. The legislation in terms of which the warrant was issued will, however, remain instructive. Generally no notice needs to be given that a warrant will be applied for. Section 29(1) of the National Prosecuting Authority Act 32 of 1998, for instance, states that an Investigating Director may enter and search premises 'without prior notice or with such notice as he or she may deem appropriate'. In this regard the Constitutional Court has held the intention of the legislature was that the default position would be that prior notice is not required, while the words 'as he or she may deem appropriate' lend support to the conclusion that it is the prerogative of the investigator to determine whether and how notice needs to be given (*Thint* supra at para [97]). Common sense dictates there would normally be a risk that, if suspects and their associates receive notice of an impending search, they might remove or destroy the evidence. It may well be that the more serious the crime, the more likely it is that suspects or their associates will remove or destroy incriminating evidence. In the absence of such inherent risk, a judicial officer may justifiably require notification of the party to be searched, for the Act does not preclude this. However, in the ordinary course, the provision of notice to affected parties has the potential of frustrating the purpose of the detection and investigation of serious, complex and organised crimes, evidence of which is often to be found in documentary form or stored on computers, which can be easily destroyed or altered (*Thint* supra at para [98]). In *Bennett v Minister of Safety and Security*2006 (1) SACR 523 (T) at para [42] it was held that the 'issuing of a search and seizure warrant in terms of the Criminal Procedure Act 51 of 1977 is not an order of court requiring the affected party or parties to observe a return date for the confirmation of a provisional rule'. The issuing of a warrant does not close the door of the courts to any person affected by its terms or execution. Nothing in law prevents an interested party from approaching a court to exercise or enforce his or her rights.

Legislation empowering searches usually contain a requirement that certain information be provided to a person affected by the search prior to the commencement or upon completion of the search operation. Section 29(9)(*a*) of the National Prosecuting Authority Act 32 of 1998, for instance, provides that any person executing a warrant in terms thereof must immediately before commencing with

the execution identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises. Section 21(4) of the Criminal Procedure Act 51 of 1977, on the other hand, provides for the police officer executing the warrant, after such search or execution and upon demand of any person 'whose rights in respect of any search or article seized under the warrant have been affected', to hand him or her a copy of the warrant and any document referred to in it. One of the grounds upon which the validity of the search warrant, issued in terms of the Criminal Procedure Act, was challenged in *Polonyfis v Minister of Police*2012 (1) SACR 57 (SCA), was that the affidavit accompanying the application for a search warrant was not exhibited by the police at the time when the search warrant was executed. The court found that neither the appellant's manager nor the appellant's attorney who had been present when the warrant was executed had demanded a copy of the affidavit after it was executed and there was accordingly no merit in this complaint (at para [20]). The court did not pertinently consider the question as to whether the Criminal Procedure Act requires the affidavits to be handed over as well. A strict textual interpretation of s 21(4) of the Criminal Procedure Act does not seem to support such an approach. It must, however, be inferred from the *Polonyfis* judgment that a person adversely affected by the search would in principle also be entitled to a copy of the affidavits made in support of the application for the warrant. To enable the person or entity affected by the search to assert the right to privacy and challenge the validity of the warrant, access to the information contained in the supporting affidavit is essential. For instance, for a warrant to be justified the information placed before the judicial officer will necessarily need to demonstrate, firstly, that there are reasonable grounds to believe that a crime had been committed; and secondly, that there are reasonable grounds to believe that an article connected with the suspected crime is to be found upon the particular premises (*Minister of Safety and Security v Van der Merwe*2011 (1) SACR 211 (SCA) at para [10]). It is, however, submitted that there may be exceptional circumstances justifying the refusal of access to all information pertaining to the search warrant. These may be similar to the grounds upon which access to a police docket may be refused, for example if access to the information would lead to the disclosure of the identity of an informer or of state secrets, or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice (*Shabalala v Attorney-General of Transvaal*1995 (2) SACR 761 (CC) at para [72]). Discovery in criminal cases is, after all, always a compromise between competing

rights (*National Director of Public Prosecutions v King*2010 (2) SACR 146 (SCA) at para [5]).

Turning attention to preservation orders. In the current context these orders refer to the preservation of evidence which might have been unlawfully obtained and it should not be confused with preservation of property orders granted in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998. The Constitutional Court has held that s 172(1)*(b)* of the Constitution does permit a preservation order to be made in respect of evidence obtained as a result of a search operation. The section states that a court deciding a constitutional matter may make any order that is just and equitable including an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. The court has held that the section expressly contemplates an on-going violation of a right pending rectification by a competent authority. At times there may be considerations of justice and equity, which outweigh the need to give immediate relief for the breach of a constitutional right (*Thint* supra at para [220]). The court reaffirmed it is highly desirable that the trial court be the one primarily concerned with ensuring trial fairness in general and with the admissibility of evidence in particular by applying its discretion in terms of s 35(5) of the Constitution. Section 29(11) of the National Prosecuting Authority Act 32 of 1998 provides a unique statutory mechanism dealing with claims of privilege in the context of a search and seizure operation. It provides:

'If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the *investigation* and that such information is necessary for the *investigation*, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.'

The Constitutional Court has held that the s 29(11) mechanism comes to an end with the completion of the search (*Thint* supra at para [190]). The ordinary rule should be that it is only if an applicant can identify specific items the seizure of which constitutes a serious breach of privacy that affects the inner core of the personal or intimate sphere, or where there has been particularly egregious conduct in the execution of the warrant, that a preservation order should not be granted. Ordinarily when a court finds a s 29 warrant to be unlawful, it will preserve the evidence so that the trial court can apply its s 35(5) discretion to the question as to whether or not the evidence should be admitted (*Thint* supra at para [223]). In *Craig Smith and Associates*

v Minister of Home Affairs 2014 JDR 1703 (WCC) Davis J was willing to grant an order to preserve evidence obtained on the strength of a search warrant issued in terms of the Immigration Act 13 of 2002. The warrant did not meet the intelligibility requirement for search warrants. Davis J held that, if he had simply ordered the *status quo* to be restored, but the allegations against the suspect were then proved to be accurate, a significant danger would arise of the possible destruction of the kind of evidence necessary to curb what would then have been proved to have been an 'egregiously criminal practice' - a compromise to the very purpose of the Immigration Act itself (at 38-3; cf *Bennett* supra at paras [65]-[66]).

4. Mental illness

It is a fundamental principle of our criminal justice system that an accused must be able to understand the court proceedings as well as give proper instructions to his or her legal representative to enable him or her to conduct a proper defence. Section 77 of the Criminal Procedure Act 51 of 1977 provides for the procedure to be followed where it appears 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. Section 78 of the Act deals with the procedure to be followed when it appears as if the accused did not have the required criminal capacity. If the presiding officer is under the impression that the accused cannot understand the court proceedings due to a mental illness or 'mental defect', he or she must direct that the mental capacity of an accused be investigated and reported on in terms of s 79 of the Criminal Procedure Act 51 of 1977. This can be done at any stage in the proceedings.

*De Vos v Minister of Justice and Constitutional Development*2015 (2) SACR 217 (CC) related to confirmation of proceedings concerning the constitutional validly of s 77(6)*(a)*, which provides for the compulsory hospitalisation, imprisonment or institutionalisation of an accused person who is found to be mentally unfit to stand trial. If the court finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court will assess whether, on a balance of probabilities, the accused has committed the criminal act in question. The Constitutional Court referred to this procedure as a 'trial of the facts' (at para [3]). If found to have committed a serious offence contemplated in s 77(6)*(a)*(i) (eg, murder, culpable homicide, rape or compelled rape as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007), 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

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other offence involving serious violence, the court must direct that the accused be detained in a psychiatric hospital or prison pending the decision of a judge in chambers as contemplated in the Mental Health Care Act 17 of 2002. In terms of s 77(6)*(a)*(ii), if it is established, on a balance of probabilities, that the accused committed a minor offence or has not been found to have committed any offence, the court must direct that the accused be admitted to and detained in an institution if he or she were an involuntary mental health care user contemplated in the Mental Health Care Act 17 of 2002. The court held that s 76(6)*(a)* provides for compulsory incarceration or institutionalisation of the accused person and is peremptory (at para [19]). The court was satisfied that an order in terms of s 77(6)*(a)* deprives a person of his or her freedom as provided for in s 12 of the Constitution (at paras [20]-[22]). With reference to the Constitution and international instruments, the court concluded that persons with mental illnesses or intellectual disabilities cannot be removed from society for the mere fact that they have mental illnesses or intellectual disabilities (at para [30]). The court unanimously found that s 77(6)*(a)*(i) is invalid to the extent that it mandates the detention of children and permits imprisonment based on resource considerations only. The court held that presiding officers should be afforded a discretion when dealing with children so as to ensure that detention is undertaken as a last resort and for the shortest period possible (at paras [63]-[64]). The court further held that the provision pertaining to minor offences (s 77(6)(*a*)(ii)) is constitutionally invalid as it prescribes that an accused person who has committed no act, or a minor offence only, may be institutionalised, regardless of whether they are likely to inflict harm to themselves or others and do not require care, treatment and rehabilitation in an institution that violates their freedom and security of the person. The court suspended the order of invalidity in respect of the compulsory imprisonment of adults and the compulsory hospitalisation and imprisonment of children (s 77(6)*(a)*(i)) for a period of 24 months to allow Parliament to remedy the defects. The court further made use of 'reading in' in respect of s 77(6)*(a)*(ii) by extending the number of options available to a presiding officer after the 'trial of the facts' reveals that the accused has committed either no offence or a minor offence (at paras [66], [69]). In this regard the court order reads:

> 'From the date of this order, section 77(6)(a)(ii) is to read as follows:
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> "(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 –
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> *(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;

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> *(bb)* be released subject to such conditions as the court considers appropriate; or
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> *(cc)* be released unconditionally."' (para [69.4])

In *S v Maluka*2015 (2) SACR 273 (GP) a full court was called upon to consider conflicting decisions on whether an order, in terms of s 78(6)*(a)*(ii)*(aa)* of the Criminal Procedure Act, that an accused person be admitted to an institution to be treated as an involuntary mental health care user, as contemplated by s 37 of the Mental Health Care Act 17 of 2002, should be reviewed by the high court. In *S v Ramokoka*2006 (2) SACR 57 (W) the court expressed the view that, as a matter of good practice, magistrates should refer their orders made in terms of s 77(6) to the high court for review. The conclusion in a number of other cases was different (see *S v Wills*1996 (2) SACR 105 (T); *S v Van Wyk (1)*2000 (1) SACR 79 (T) and *S v Zondi*2012 (2) SACR 445 (KZP)).

In *Maluka* supra the court held that the potential for serious prejudice, which has been demonstrated in both theory and practice in the cases cited in the course of its judgment, makes it desirable for some form of automatic review mechanism to be considered. This is a matter for the legislature to consider, and the court should carefully guard against the usurping of the legislative function. It is a matter best left to the executive and the legislature in terms of their policy-making and legislative functions. The court referred the matter to the ministers of justice and correctional services, as well as to the speaker of the legislature, for further attention (at para [40]). In the interim, and pending that process, and in order to avoid prejudice to those affected, the court held that, 'as a matter of good practice', magistrates should refer orders made in terms of s 78(6)*(a)*(ii)*(aa)* to the high court for review (at para [41]). The approach followed in *Maluka* cannot be supported. Orders in terms of s 78(6)*(a)* are not subject to automatic review – this has been pointed out by a number of cases and this is acknowledged by the court in *Maluka*. Absent a finding of unconstitutionality of legislation a court cannot simply rewrite the law (*Minister of Safety and Security v Sekhoto* supra at paras [14] and [15]). Although the court acknowledged that it cannot usurp the duties of the legislature, it effectively did so. Furthermore, it is quite conceivable that other types of cases not subject to automatic review also have the potential for the accused to suffer serious prejudice, for example where the accused did not receive effective legal representation or the court failed to assist the unrepresented accused. The approach followed in *Maluka* supra was recently also rejected in the Western Cape High Court in *S v Samuels* (15726/2015, SH3/65/15, 8/15) [2015] ZAWCHC 144 (9 October 2015).

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5. Composition of the regional court in murder trials

Assessors have considerable power and play an important role in the functioning as well as the legitimacy of criminal courts. Their dignity, status and needs must be respected by all those who interact with them in the performance of their judicial duties. Assessors must also be aware of the significance of their role and act accordingly (*S v Jaipal*2005

(1) SACR 215 (CC) at para [53]). Section 93*ter*(1)*(b)* of the Magistrates' Courts Act 32 of 1944 requires that at the trial of an accused on a charge of murder in a regional court, the regional magistrate must summon two assessors, unless the accused requests that the trial proceed without assessors. If the accused waives the right to assessors, the court has a discretion pertaining to whether or not to summon one or two assessors. In *S v Naicker*2008 (2) SACR 54 (N) a full court held that, although non-compliance with the peremptory terms of s 93*ter*(1) amounts to an irregularity, it does not necessarily follow that it amounts to a failure of justice, and an assessment is nevertheless required to discover the impact of the irregularity on the integrity of the proceedings. In a number of other cases, however, it was concluded such an irregularity is so fundamental that it constituted a failure of justice vitiating the entire proceedings (see for example *S v Khambule*1999 (2) SACR 365 (O); *S v Mokalaka*2010 (1) SACR 88 (GNP) and *S v Du Plessis*2012 (2) SACR 247 (GJ)).

In *Chala v Director of Public Prosecutions, KwaZulu-Natal*2015 (2) SACR 283 (KZP) the court had the opportunity of reconsidering the correctness of *S v Naicker*. The court held that a regional magistrate trying an accused on a charge of murder commits a fatal irregularity when he or she fails to invoke the provisions of s 93*ter* of the Magistrates' Courts Act. The court aligned itself with the approach followed in *Du Plessis* supra and held that the *Naicker* decision *supra* was clearly wrong, did not constitute good law and should no longer be followed (at para [27]). The court further held that it should always appear from the record of proceedings in cases where s 93*ter* is required to be invoked, that a proper explanation is given by the magistrate to accused persons of the choice they have in the appointment of assessors, together with a brief exposition of the import of that choice and as to what is required of them. The record should also reflect, after having given such explanation and requesting such response from accused persons, in cases where they elect not to have assessors, that the magistrate nevertheless still considered whether such course was advisable in the particular case before him or her (at para [28]).

Assessors in murder trials in the lower courts play an important role in bridging cultural or educational gaps that may exist between the court and the accused. Assessors are also members of the court entitled to decide issues of fact and give a true verdict. An accused in a murder trial

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in the regional courts must therefore have the opportunity of making an informed election as to whether he or she wants the decision-making forum to consist of one individual or more, irrespective of whether or not cultural differences may exist (*S v Gambushe*1997 (1) SACR 638 (N) at 642h-i and *S v Du Plessis* supra at para [11]).

6. Duplication of convictions

Our courts have formulated various tests to prevent a duplication of convictions. These tests are not equally applicable in every case. One such test is to ask whether two or more acts were done with a single intent and constitute one continuous criminal transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another crime (*S v Maneli*2009 (1) SACR 509 (SCA) at para [8]). There is no all-embracing formula and the tests formulated are mere guidelines. They are not rules of law and they are not exhaustive. Their application may yield a clear result, but, if not, a court must apply its common sense, wisdom, experience and sense of fairness to determine whether a duplication of convictions has occurred (*S v Dlamini*2012 (2) SACR 1 (SCA) at para [20]; cf *S v Whitehead*2008 (1) SACR 431 (SCA) at paras [32]-[35]).

In *S v Mahlamuza*2015 (2) SACR 385 (SCA) the question arose as to whether convictions on charges of attempted murder and robbery stemming from a singular instance were in order. In this regard the court referred to *S v Moloto*1982 (1) SA 844 *(a)* where it was held that where attempted murder is committed in connection with a robbery the state is entitled, according to the circumstances, to charge the accused with robbery and with attempted murder and the court is entitled to find him guilty on the two separate offences provided the robber used excessive violence that exceeded the limits and bounds of robbery (which is violence that puts the life of the victim in danger) and it was proved beyond reasonable doubt that the accused also had the intention to kill and not merely to use force aimed at temporarily incapacitating the victim (at para [10]). The court held that the trial and high court's findings that the acts of violence committed against the victims in robbing them exceeded the limits or bounds of the robbery was not sustained on the facts. Apart from hitting one of the victims with the butt of a revolver at the beginning stages of the robbery, the injuries sustained by them were inflicted without the use of dangerous instruments or weapons. None of the injuries sustained were shown to be potentially fatal or even severe. On the contrary, the evidence established that they sustained relatively minor injuries only. It could, therefore, not be concluded that the violence committed against them endangered their lives so as to qualify as excessive force that exceeds

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the bounds of robbery (at para [12]). The totality of the evidence also did not prove beyond a reasonable doubt that the appellants had the further intention (either directly or by way of *dolus eventualis*) to kill the victims. The evidence established that the violence used against them was perpetrated only with the intent of depriving them of their belongings, by inducing them to submit to the deprivation and to overcome any resistance they might have offered (at para [13]). The court therefore held that the appellants should only have been convicted of robbery and set aside the convictions on the charges of attempted murder.

In *S v Umeh*2015 (2) SACR 395 (WCC) the appellant was convicted in the regional court on two counts, namely the contravention of s 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 (dealing in drugs) and the contravention of s 22A(5)*(f)* of the Medicines and Related Substances Act 101 of 1965 (the unlawful possession of phenacytin). The facts of the case are summarised as follows in the headnote:
'The police, acting on information, accosted the appellant in the parking lot of a shopping mall and found him in possession of 49,23 g of methamphetamine. The appellant was then requested to accompany the police to his home where they found almost 2 kg of crack cocaine; 1485,90 g of methamphetamine made up in individual packets; a jewellery scale and vacuum sealer (drug paraphernalia used to weigh and package drugs); and a substance known as phenacytin, used in the production of crack cocaine.'

On behalf of the appellant it was argued that, should the court find that drugs were in both instances seized, due to the fact that such drugs came from the same source, the appellant had a single intention to deal in drugs, irrespective of where and how the drugs were found. On this basis, so the argument went, there was only a single intention to commit one offence, and not two separate offences. Therefore a duplication of charges (at para [47]) had occurred. After considering the definition of 'deal in' in terms of the Drugs and Drug Trafficking Act 140 of 1992 (at para [47]) the court referred to *S v Mabuya*1979 (3) SA 1070 *(a)* at 1076H-1077E where it was held that, even though a person in a broad sense throughout had the intention of dealing, where such person, however, commits more than one prohibited act of dealing, it could in no way be considered to be a single, continuous event, merely because he had the broad intention of dealing throughout (at paras [49] and [50]). With respect to the drugs found in the appellant's possession at the parking area, the court held that such had been transported from the appellant's house with the intention to deliver them to someone else for the purpose of dealing. The court regarded these activities as separate and distinct from those relating to the drugs found at the appellant's premises. In respect of the latter, the appellant not only possessed drugs for distributing, he was also involved in manufacturing such drugs, preparing them (in units), then weighing and packing them for distribution and sale to drug users and other dealers (at para [54]). The court held that the regional court was correct in convicting the appellant on two separate offences (at para [55]). For a summary of case law pertaining to the duplication of convictions in respect of the possession of and/or dealing in drugs, see Du Toit *et al* supra (RS 54 2015) 14-9 - 14-10.