

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: SS 40/2006

- (1) REPORTABLE: **NO**
 (2) OF INTEREST TO OTHER JUDGES: **YES**
 (3) REVISED. **10 March 2017**

SIGNATURE

THE STATE

v

PORRITT, GARY PATRICK

Accused no. 1

BENNETT, SUSAN HILARY

Accused no. 2

JUDGMENT OF 6 MARCH 2017

ARISING FROM Ms BENNETT'S HEALTH ISSUES

SPILG, J:

Ex tempore judgment of 6 March as revised on 10 March 2017

INTRODUCTION

1. On 28 July 2016 the accused, Mr Porritt and Ms Bennett, pleaded to over 3000 charges that were brought against them.

2. At all times Bennett indicated that she would not be engaging private lawyers. Porritt however indicated that he would; save for one or two applications he has yet to do so, either due to the terms of funding allegedly made available to him by a trust in which his wife and attorney Frank Cohen are trustees or due to the non-availability of selected counsel.
3. In the result both accused have represented themselves while Mr Milne has been testifying. Milne is the State's first witness who commenced his evidence on 5 September 2016 and was still being led in chief when the court adjourned for the recess on 8 December 2016.
4. The parties agreed that the matter would resume on 30 January 2017. I had also directed that outstanding issues regarding the admissibility of evidence would be dealt with then, including any admissions either accused may wish to make regarding the status of documents.

Porritt appeared on that date. Bennett did not. Adv Van Den Heever however attended court together with her instructing attorney Frank Cohen. The court was informed that she was acting *pro bono* on behalf of Bennett only and only in respect of the issues concerning Bennett's health and inability to attend court. Their attendance in court was to apply for a postponement on Bennett's behalf as she was ill. There was no formal application for the postponement but counsel handed up a letter addressed by Dr Daniel Maree, a general practitioner in Knysna. This was handed up as *Doc 1*.

5. The letter was dated Thursday 26 January. In it Maree certified that Bennett could not attend court. The reason provided was that, and I quote:

"Due to severe stress she is experiencing cardiovascular and psychiatric complications."

As a consequence Maree stated, and again I quote:

"It is necessary that her case is postponed for at least six weeks"
(emphasis added)

The letter concludes that she is receiving appropriate treatment for the condition.

6. Adv Coetzee for the prosecution challenged the veracity of the certificate. Initially he submitted that a substantive application must be brought and evidence led. At that stage I was prepared to bear in mind that Adv van den Heever was acting *pro bono* and when the court indicated to Adv Coetzee that it would amount to an unnecessary duplication the State said that it required the leading of *vive voce* evidence.

7. Adv van den Heever intended to refer to conversations she had with Dr Maree. I considered it inappropriate for two reasons.

 Firstly Bennett had an opportunity to obtain an affidavit from Maree between the Thursday and the date of hearing and a further explanation would therefore be required as to why this was not done.

 It also amounted at best to what Maree is said to have told Adv van den Heever without the opportunity for the State to test its veracity. It amounted to no more than inadmissible hearsay. However much the court accepts that counsel relays accurately what was said she remains the messenger and it is the author whose statements are relevant.

8. I was then informed by Adv van den Heever that ordinarily an application for a postponement is made from the bar and a medical certificate is handed up.

9. Whatever the norm I considered the following factors to elevate the type of evidence the court should receive to more than the simple handing up of a medical certificate or a basic hearing determined on paper;

- a. The medical certificate did not relate to an incapacity due to infection or injury with a defined recuperation period which either a general practitioner or specialist can ordinarily deal with. The certificate, albeit only by a general practitioner, cautions that the postponement is to be for at least six weeks without setting a basis.

Mr Porritt who has been in court with Ms Bennett and who has been preparing the case with her informed the court that she had complained of her state of health a long time ago.

He added that the stress had manifested itself in Bennett's blood pressure spiking in the past to dangerously high levels, that she previously had undergone a double heart by-pass and that she possibly had a congenital heart condition.

Porritt also related that Bennett was on medication to bring her blood pressure down but this, according to Porritt has had side-effects. He also indicated that when he saw her recently in Knysna she was extremely unwell and was on medication for both her heart condition and for blood pressure. He in fact had taken her as early as 9 January 2017 to see Dr Maree. Porritt believed that Bennett was in an unsafe position. Added to this, according to Porritt, Bennett did not have the financial ability to afford medical aid, as a consequence of which she did not have the angiogram which had been prescribed a year ago.

- b. The court must be conscious of the lengthy delay that has occurred for various reasons since the accused were first charged and arrested in 2002 and 2003 respectively.
- c. The certificate does not provide for a definite time by when Bennett will be well enough to participate in the trial. It couches the six week period only as the minimum period of incapacity.

10. Although Porritt's statements remained untested they provided all the more reason to require that the court has before it proper facts to make an informed decision. Adv van den Heever expressly accepted that this was the correct approach.
11. I indicated that the issues raised particularly by Porritt regarding Bennett's heart condition, and that she was on medication for this and for her blood pressure, may have significant consequences for the future course of the trial; with particular reference to Bennett not being able to again participate in the proceedings.
12. The interests of justice, including the interests of Porritt, therefore required that this court has placed before it sufficient evidence regarding Bennett's condition in order to assess whether the individual or cumulative effect of her heart condition, psychiatric complications and blood pressure issues would result in either a temporary indisposition or an indefinite one. It was again made clear to both Adv van den Heever and Adv Coetzee that the due administration of justice required the court to also consider whether there should be a separation of the trial and that this should be decided upon sooner rather than later.
13. I should indicate for record purposes that Adv van den Heever had presented her submission by reference to s168 of the CPA. That section deals with the adjournment of proceedings. She however conceded to Adv Coetzee's argument that procedurally this court was first and foremost concerned with the peremptory provisions of the CPA dealing with the failure to attend court on the appointed date. Initially the State referred to section 60(1) but after enquiry it turned out that Bennet had been released on a warning in lieu of bail with the result that s72(4) is the applicable provision.
14. The prosecution challenged the contents of Maree's report and also his expertise to provide an opinion regarding a patient's psychological or psychiatric condition and persisted that there was no evidence before the court to excuse Bennett's non-attendance on 30 January.

15. After Adv van den Heever took telephonic instructions from Bennett and after discussion with Dr Maree she identified that the following specialists would be relevant in assessing Bennet's condition and should be permitted to do so;

- a. A cardiovascular specialist
- b. A Psychiatrist
- c. An Internist

16. The following proposed order was drafted by the court pursuant to being informed that the parties had reached agreement that Bennett would be examined by specialist medical practitioners, who would of necessity have access to her hospital and medical records, for the purposes of compiling a report and that there would be a process of exchanging medical reports with the specialists attending court to testify in case of dispute:

1. *Pursuant to agreement between Bennett and the State, Bennett is ordered to:*

- a. *Present herself for and be examined by the following medical practitioners on the following dates but in any event no later than*

.....

i. (cardio-vascular specialist)

ii.(internist)

iii.(clinical psychiatrist)

(hereafter also referred to as "the specialists")

to enable each specialist to prepare a report on whether or not Bennett is fit to stand trial and if not; by when at the latest she will

be able to stand trial for regular or continuous periods for the duration of the year. If that cannot be assessed what is the likelihood of her not being able to resume with the trial;

- 1. within the month;*
- 2. within two months*
- 3. within any other period during the course of the next six months to a year;*

on the basis that Bennett is to remain in attendance to stand trial and represent herself (which would include cross-examining witnesses) for continuous or regular periods for the balance of the year or duration of the trial which might be another year to two and a half years according to the estimates that had been provided by the parties;

- b. At least 5 days before the first of the examinations to provide with copies of all prescriptions, medical reports, diagnosis, other documents that will confirm the taking of specific medication and all other hospital and medical records in her possession or under her control;*
 - c. By no later than to give written consent to each of the specialists to obtain copies of any of the above records or information from the relevant medical practitioner, pharmacist, hospital or other medical facility*
- 2. The specialist shall present their respective, or joint reports (as the case may be) by email delivery and by no later thanto;*
- a. Bennett at*
 - b. The State at*
 - c. Porritt at*

3. *Bennett, Porritt and the State must confirm by email to the court by no later than whether or not any aspect of the reports is being challenged and if so what aspects.*
4. *If the State and each accused confirms by that date that the reports are not being challenged then the specialists need not attend court on unless the court itself so requests on receipt of the reports.*
5. *If any party challenges the reports then;*
 - a. *the specialists shall be subpoenaed to attend court on to testify*
 - b. *the party making the challenge shall deliver its own specialist reports by no later than and ensure that such specialists attend court on to testify*

17. The terms of the proposed order were short circuited by the availability of Dr Brink who could examine Bennett and form an opinion which might be acceptable to both parties without the need to engage specialists.

It was therefore with a view to obtaining certainty, as best as one could, with regard to Bennet's condition that the parties by agreement adopted a two-stage process; the first was that Bennet would be examined by Brink at the Knysna Provincial Hospital in order to enable him to furnish a report on her condition.

Although Brink's diagnosis might not be adequate for court purposes, since he like Maree was a general practitioner, it would nonetheless enable the parties to consider their position and decide on whether specialist medical practitioners should be appointed to assess Bennett's ability to stand trial.

18. In addition, because there was no adequate evidence presented to the court save for the cryptic note by Maree who did not state what the psychiatric condition might be and who was certainly not qualified in that field, the court required Bennett to satisfy it that her failure to attend court on 30 January was not due to fault on her part.

In order to achieve the necessary objectives it was therefore necessary to adjourn the enquiry under s72 (4) to 16 February 2017 and authorise a warrant for Bennett's arrest, execution of which would be suspended until that date.

It was also advisable to allow either party on good cause to extend the date of the enquiry. This was intended to cater for the possibility that a party may wish to obtain medical reports from specialists after receipt of Dr Brink's report which was due on 10 February.

19. I directed that the warrant of arrest would be held over until 23 February 2017 when Ms Bennett must appear in court, failing which the warrant would be executed. This was subject to any representations that may be made on behalf of Bennet in open court on 16 February 2017.

ORDER OF 1 FEBRUARY 2017

20. The various considerations referred to earlier and the agreement between the parties to first proceed with an examination of Bennet by Dr Brink was reduced to an order made on 1 February 2017. It was identified as the "*Terms of Postponement and Medical Examination of Ms Bennett*" and provided;

1. *In terms of section 72(4) of the Criminal Procedure Act, Act 51 of 1977, a warrant for the arrest of accused no 2, **SUSAN HILLARY BENNETT** ("Bennett") is hereby authorised. The*

execution of the warrant of arrest is suspended until 16 February 2017 at which time an inquiry will be held into her failure to attend the proceedings on 30 January 2017, subject to either party being entitled on good cause shown to extend the date.

2. *The case against accused no 1, **GARY PATRICK PORRITT** is postponed to 23 February 2017, at 09:00. His bail is extended on the same conditions as previously, and he was duly warned in open court.*
3. *Pursuant to having heard argument by counsel for both the State and the accused no 2 and pursuant to agreement being reached between them (and after affording accused no 1 an opportunity) it is ordered that:*
 - a. *Ms Bennett presents herself to be examined by Dr Brink at the Knysna Hospital on 1 February 2017. Ms Bennett must produce all relevant medical records to Dr Brink.*
 - b. *Following the examination by Dr Brink he will provide a report on or before 10 February 2017.*
 - c. *Argument will be heard on 23 February 2017 concerning whether the matter should be postponed and time periods set for certain medical experts to be appointed, subject to either party being entitled on good cause shown to extend the date.*

PROCEEDINGS ON 16 FEBRUARY 2017

21. Dr Brink prepared a report on 10 February 2017 which was forwarded to the parties and to the court ("*Doc 4*").

He was of the opinion that Bennett suffered from significant anxiety which he considered understandable having regard to "*her current legal battles.*"

22. The report also dealt with Bennet's failure to appear in court on 30 January which, based on what she described to him, Brink attributed to "*an episode of acute severe anxiety*". Brink therefore agreed with Maree's assessment that she was unable to appear in court on 30 January 2017.

23. Brink considered that at the time of his examination Bennett's severe anxiety appeared to have settled and, although she still seemed to be anxious, she was "*able to function on her normal level.*"

His diagnosis was that Bennet's current mental state was such that she can stand trial provided she continues to manage her condition with the help of her clinicians.

24. Brink added that Bennett was currently under the care of Dr Henning a private psychiatrist. This will be referred to later.

25. On receipt of Brink's report an email was sent by my clerk on the same day requesting the parties to advise, in view of the report;

- a. whether it was necessary to investigate further Bennet's non-attendance at court.
- b. whether it was necessary to undertake any further medical examination and whether Bennett can continue with the trial.

26. The email then proceeded:

"If it is contended that Ms Bennett cannot continue with the trial on 23 February or that there is a need to investigate Ms Bennett's non-attendance on 30 January then the Judge directs that this must be dealt with in Court on 16 February 2017

In any event the Judge has directed that there be appearances by counsel for Ms Bennett and the State on 16 February 2017 and unless representations are made by the State to the contrary it is the Judge's intention to release Ms Bennet from attendance on the 16th but hold the warrant of execution over until 23 February 2017 when Ms Bennett must appear in court failing which the execution of the warrant will be effected, again subject to any representations that may be made on behalf of Ms Bennet in open court on 16 February 2017.

27. There was no response from either accused to the court's letter of 10 February.

However on 13 February 2017 Adv Ferreira on behalf of the prosecution addressed a letter to Bennet and her legal representative as well as to Porritt and copied the court. The letter was a response to the email of 10 February and indicated that the State had no objection to receiving Dr Brink's report and that it was unnecessary to conduct an investigation into Bennett's non-attendance at court on 30 January.

The State also submitted that in view of Dr Brink's report the matter should commence on 23 February 2017. The accused were also reminded that the first order of business at the resumed hearing on 23 February was for them to record their position regarding the admissibility of documents that the State was producing.

28. As arranged counsel were present on 16 February.

Adv Coetzee confirmed that the issue of Bennett's non-attendance on 30 January was now explained. The outstanding issue was Bennett's future attendance at court.

Adv van den Heever who appeared without her instructing attorney advised that when she last spoke to him he was attempting to secure an appointment with a specialist psychiatrist but she had yet to receive feedback. She was unable to state what had been done in the meantime to provide an assessment of Bennett's condition. The following matters were identified;

- a. Whether the fact that Bennett representing herself was a cause of or contributed to her condition;
- b. Whether she was fit enough to represent herself and if not whether there were other possible solutions;
- c. Whether her physical or mental condition would affect her ability to attend the trial if it continued;

29. In answer to a question, Adv van den Heever said that Bennett had not simply waited until 16 February to take steps to be examined and that things had already been done between 10 to 16 February although she could not state what they were. The State contended that Bennett had been afforded enough opportunities to deal with the issues of whether she could stand trial in the future and that no adequate explanation for her failure to do so was forthcoming.

30. It was then suggested that the issue be resolved by way of Bennett filing affidavits by 20 February and the State to reply by 22 February. In turn Adv van den Heever indicated that it was unknown when Bennett would be assessed or when the result would come out.

It was however stated that the moment Attorney Cohen obtains the results of the examination he would inform the State and advise on how the matter would be dealt with. I believe this was in response to the court's concern that if there was no certainty about when Bennett could again stand trial it may be obliged to give consideration to its powers in regard to a separation or to continuing the trial in the absence of Bennett as provided for in the Criminal Procedure Act.

31. After hearing the parties and taking into account the concern expressed by the defence regarding Bennett's ability to deal with legal issues, and bearing in mind that Mr Milne was still being led in evidence, I handed down the following order on 16 February:

1. *The execution of the warrant of arrest of accused number 2, SUSAN HILLARY BENNETT ("Ms Bennett"), authorised on 1 February 2017, is suspended until 10:00 on 23 February 2017.*

2. *On 23 February 2017, this matter will proceed and the State will continue leading the evidence of Mr Milne.*

3. *The argument concerning the admissibility of evidence, the status of documents provisionally admitted will not be dealt with on the 23rd of February 2017 but will be adjourned to a date which the Court will advise the parties. The Court will give reasonable notice to the parties as to when argument is to be heard.*

4. *If there is any application to be made by Ms Bennett either for a temporary adjournment due to any medical condition or postponement for any period of time it is for the legal representatives of Ms Bennett or Ms Bennett herself to bring that application on the following basis:*

4.1. *That they are satisfied that all the facts which they wish to present before this Court are set out in the form of a statement deposed to under oath attached to the application, save that in the case of*

experts it is sufficient if their report is attached and confirmed under oath.

4.2. *The Court will not be prescriptive as to the nature of the facts, but the State will have an opportunity to respond to it in the same manner.*

4.3. *All persons who have made statements or filed reports in the manner prescribed in 4.1 and 4.2 shall be called to testify and be subject to examination and cross-examination unless the other party confirms in writing by no later than 10 days before the hearing that the contents of any statement or report can be admitted into evidence.*

PROCEEDINGS ON 23 FEBRUARY 2017

32. No representations were made on Bennett's behalf with regard to an inability on her part to attend court on 23 February, nor was there any suggestion, either then or prior to the hearing, that she would not be present at court.

33. Bennett failed to attend court on 23 February. Adv van den Heever again appeared for Bennett together with her instructing attorney, Mr Cohen. It was confirmed that they did not represent Porritt. No formal application for a postponement was made. Adv van den Heever however handed up a report (Doc 6) dated 22 February from Dr Maria Dobрева a specialist psychiatrist who practices in Pietermaritzburg. She also confirmed the contents of her report in an accompanying affidavit.

34. I first deal with the failure to bring an application for a postponement prior to 23 February despite this court having made it clear on previous occasions that it would require formal applications including one for condonation in appropriate circumstances such as where the application was only brought on the day of the hearing.

35. Adv van den Heever's submission proceeded in the basis that Dobрева's affidavit and report revealed that she only was able to see Bennett on 17 February. According to Adv van den Heever on 16 February 2017 Mr Cohen had secured an appointment with a specialist psychiatrist but had not yet received feedback with regard to Bennet's condition.

The court was informed that the session with Dobрева commenced at 08h00 on 17 February and lasted almost three hours.

36. In an affidavit which was deposed to by Porritt on the morning of 23 February he explained that *"during the period between 10 and 16 February 2017 it became apparent to me that Mrs Bennett's state of health had nose-dived and was deteriorating by the hour. I was also most distressed that she did not appear to have access to appropriate medical care where she is domiciled and was no longer capable of looking after herself"*.

37. Bennett's counsel and attorney endorsed the handing up of Porritt's affidavit and took no objection to Porritt addressing the court on behalf of Bennett with regard to her condition and his assistance to her. The affidavit was admitted as *Doc 7*.

38. In his affidavit Porritt explained why he brought Bennett from Knysna to Pietermaritzburg: He stated that: *"Pietermaritzburg is renowned for its psychiatric facilities and their specialised medical support structure. I thus resolved to move her to ensure that she could be properly cared for"*.

Porritt also explained the great difficulty in arranging an appointment for Bennett with Dobрева because of her busy practice. He personally could not arrange an appointment and attorney Cohen was contacted to assist. He was able to secure an appointment only on 17 February. Porritt then arranged for Bennett to fly up to Pietermaritzburg, explaining that his son paid for the flight.

39. The affidavit of Porritt set out that he was shocked at Bennett's condition *"which was far worse than I had ever anticipated."*

It will be recalled that Dobрева saw Bennett on 17 February. According to Porritt's affidavit she dumped all Bennett's drugs, prescribed far stronger ones, stated that it would be a crime if she did not also prescribe anti-depressants and *"would have liked to have had Mrs Bennett admitted to a private care facility for proper treatment"*

40. It is therefore evident from the allegations contained in Porritt's affidavit as read with Dobрева's report that Bennett's condition had apparently taken a turn for the worse after Brink had seen her. It will be recalled that Brink found her condition to have improved from that stated by Maree, that she was already able to function on her normal level and would be fit to stand trial if she continues to manage her condition with the help of her clinicians. According to Porritt the worsening of Bennett's condition was evident some time prior to 16 February.
41. It was of concern that according to Porritt's affidavit Dobрева had already stated on 17 February that Bennett required a private care facility, despite Advan den Heever informing the court on 16 February that as soon as Dobрева advises on Bennett's condition he would advise the parties.
42. I was therefore satisfied that there was no explanation placed before the court as to why an application had not been made prior to 23 February when, according to Dobрева's report as read with Porritt's affidavit, the court should have been apprised of Bennett's condition by no later than 17 February.
43. Furthermore the report did not state that Bennett was unable to attend court for the purposes of complying with the conditions of her release on warning under s72 of the CPA.

It did not deal at all with Brink's report or the reference by him to Bennett being placed under the care of Dr Henning or having contacted Dr Henning for the purposes of conducting an evaluation. While the report refers to a multiaxial diagnosis all that is stated is a conclusion without setting out the

basis on how it was reached. Adv van den Heever could not assist further other than to submit that it is an opinion by a clinical psychiatrist.

44. It is necessary to once again remind practitioners that expert opinion evidence is precisely that; the opinion of a person who, in order for the opinion to qualify as adequate, must set out the underlying facts from which the conclusion is drawn.

While I accept that a more informal approach is adopted in criminal courts to the presentation of expert reports they nonetheless must qualify as expert testimony for ultimately it is the court that must determine whether or not the evidence is admissible and, if so, the weight it should carry; more particularly in a case of this nature where the court appears to be faced with the possibility of having to make far reaching decisions regarding the future course of the trial based on a prognosis of Bennett's state of health.

45. The evidence presented revealed that Bennett was able to fly from Knysna to Pietermaritzburg without a confirmed appointment and without having arranged to see any other specialist or physician yet no explanation was provided for her not being able to fly from Pietermaritzburg to Johannesburg to meet the conditions of her release on warning.

46. For these several reasons I was not satisfied that there was any reasonable possibility that Bennett's failure to attend court on the 23rd excluded fault on her part.

47. There were a number of other issues which required addressing: I continued to express concern that the issues concerning Bennett's health related not only to her failure to attend court when warned to, but if her condition was such as to prevent her from being able to meaningfully participate in the proceedings then it was necessary to ascertain if this was temporary or indefinite and respectively whether the trial should continue in her absence or there should be a separation of trials. These considerations would have

regard to the relevant provisions of the CPA and her constitutional right to a fair trial as well as Porritt's rights.

48. Adv Coetzee suggested that s 159A could be invoked and, aside from a transcript of evidence, an audio visual recording could be provided, the latter at State expense.
49. Although stating that they did not represent Bennett in the main trial the defence submitted that Bennett was on medication, needed rest and could not engage in anything until at least the end of March. Insofar as an application may be brought under s 159(2)(a) of the CPA for a separation of the trial or that the trial proceed in her temporary absence Adv van den Heever said that Bennett wished to be present when evidence is led.
50. Moreover Porritt accepted that there might be other major delays if Bennett had a relapse and that he could not proceed separately without Bennett being present. He claimed that the proceedings were very much over his head and that he was *"hugely dependent on the input of Mrs Bennett"*.

Porritt's affidavit makes a number of submissions regarding his fair trial right and which may have to be considered when applying the CPA as read with the Constitution to the unique situation that arises in this case. They may also have to be taken into account in the way this matter is managed going forward. In particular he states that *"the death of Bennett would, to the knowledge of the State, be hugely beneficial to the State and prejudicial to me. In fact, it would have a deleterious effect on my right to be tried fairly"*

One of the instances given is that Bennett *"would be a crucial exculpatory witness for me"*

51. Picking up from the contents of his affidavit Porritt added that Bennett was under acute financial pressure and had no time to earn a living. In the affidavit Porritt stated that due to the extreme financial strain experienced by Bennett;

“as a direct consequence of these proceedings having been ordered to take place in Johannesburg, Mrs Bennett is unable to afford medical aid. Her medical aid has long since lapsed and, needless to say, the ongoing stress of such a situation, exacerbated by the knowledge of her fragile heart and hypertension conditions which could precipitate a crisis at any moment, is self-evident. Were I in a position to financially assist, I would willingly do so, but unfortunately this is not the case”

He added that she was not immediately fit to attend at court and may have a relapse.

52. In these paragraphs Porritt was referring to Bennett’s heart condition which he had earlier described as follows:

“Mrs Bennett suffers from a serious congenital heart condition and hyper tension.”

After describing how both her parents had died from the same ailments Porritt continued that Bennett’s twin brother underwent a double heart bypass a few years ago and added:

“So too did Mrs Bennett. Mrs Bennett’s carotid arteries are 70% closed on the one side and 50% on the other”

53. Porritt then proceeded to set out the potential effect of the air-flights between Johannesburg and Knysna which he claims can only detrimentally affect her.

54. *Prima facie*, the State is entitled to test the allegations since it is common cause that Bennett was able to fly from Knysna to Pietermaritzburg to attend a clinical psychologist arranged for her by Porritt, had travelled to and from Hong Kong in about July and had also travelled to and from Johannesburg for the trial without demur.

Nor was there any application for condonation in not bringing the application for a postponement sooner. The court had made it plain to Adv van den Heever on the previous postponement that it required a properly motivated application of this nature.

55. The State however made a proposal which was put then to Bennett during a telephonic discussion with her legal representatives. Since she was not amenable to the proposal the court indicated that it would hear the parties on whether the arrest warrant should be executed on the basis that she would be placed immediately in the care of medical staff in Pietermaritzburg and in Gauteng until she appeared before this court on the following Tuesday. The court also indicated that if the warrant was to be executed then it would be only on the Monday to avoid Bennett being detained over the weekend

56. Adv van den Heever requested the court not execute the warrant immediately but allow Bennett to attend court on her own volition on 1 March 2017. This was acceded to on condition that Adv van den Heever obtained an undertaking from her client to attend after Porritt had conferred with her.

57. The undertaking was given. Furthermore Bennett's failure to place any acceptable evidence which met the requirements of s 72(4) of the CPA also impacted on her ability to meaningfully participate in the proceedings and on the possible application of ss159 or 160.

It therefore appeared appropriate to give Bennett and her legal team one further opportunity to produce admissible evidence on their own volition that there was a reasonable possibility that she was not at fault in failing to attend court and for the court to be given a proper prognosis of her ability to participate in the proceedings in future.

58. I accordingly ordered that:

1. *The execution of the warrant of arrest of accused number 2, SUSAN HILLARY BENNETT ("Ms Bennett"), authorised on 1 February 2017, will be executed at 10:05 on 1 March 2017 unless she is in Court 6D at 10:00.*
2. *This matter is postponed to 1 March 2017 and Accused no 1's bail is extended on the same conditions as before.*

PROCEEDINGS ON 1 and 2 MARCH 2017

59. Bennett appeared in court on 1 March 2017. She was represented by Adv van den Heever and Attorney Cohen.

60. Adv van den Heever handed up an affidavit of Dobрева deposed to on the previous day, 28 February, which was on the same day that she reassessed Bennett.

61. The affidavit of Dobрева was to the effect that;

- a. She assumed the role of treating psychiatrist at Bennett's request and therefore has been providing not only medication but also therapeutic support

The effect of the medication has resulted in impaired concentration, drowsiness, dizziness, fatigue, nausea, headaches amongst others".
She however did not disclose the nature of the additional symptoms.

- b. Although Bennett had been taking medication for 11 days she is not in a fit state , either psychologically or emotionally, to attend court or to participate in these proceedings
- c. In view of her medical history and present state of mind *"the degree of stress involved poses an unacceptable risk of a stroke or heart disease"*
- d. She did not consider it necessary for Bennett to undergo further psychiatric assessment at this point in time *"as this would cause further unnecessary trauma and anxiety for her, due to the personally invasive nature of such an examination"*
- e. She cannot over-emphasise the necessity for a complete disengagement from the court proceedings *"for at least a month, during which time Mrs Bennett will have the opportunity and time to recover from her current burnout/depressive episode, which has been grossly aggravated by the ongoing court proceedings"* (emphasis added)
- f. In her professional opinion, a failure to provide Bennett with the required rest period in combination with the prescribed medication *"could be life threatening and result in the necessity for her hospitalisation"*

62. Dobрева's affidavit concludes by advising that a further consultation has been scheduled for 27 March 2017 after which she will be able to report further on Bennett's progress.

63. It is evident that once again Dobрева expresses conclusions without providing reasons and expresses an opinion in a field of medicine which appears to be outside her professed area of expertise.

64. Adv Coetzee argued that there were two matters before the court.

Firstly it was argued that the court had before it an enquiry under s 72(4) and that in the absence of an explanation Bennett was in wilful default which also amounted to a contempt of court which subjected Bennett to at least the payment of a fine. In the alternative it was submitted that the court should proceed with the enquiry and hear *vive voce* evidence.

Secondly, the State contended that Bennett had to indicate whether she was applying for a postponement of the hearing. If so, then it was submitted that she had failed to set out a substantive basis. The State argued that the trial had been delayed since January 2017 and that the interests of justice, the interests of the prosecution and of Porritt required that the matter proceed, alternatively that it should proceed in the absence of Bennett with suitable conditions regarding the transcription of the record and the provision of an audio visual recording.

It was also pointed out that the defence had agreed previously that Bennett should be examined by a psychiatrist in the courts jurisdiction

65. On this occasion I allowed Adv van den Heever the latitude to go beyond the confines of Dobрева's affidavit. She stated from the bar that Bennett was unable to give instructions, informing the court that Bennett speaks with a slur, is unfocused, is clearly ill and could not even concentrate on simple questions. It was submitted that Bennett had a mental condition as set out by Dobрева which would remain symptomatic for at least a month. The defence therefore sought a postponement until 8 May 2017.

66. It was at this stage that I expressed concern as to whether the provisions of s 77(1) of the CPA would apply if Bennett's inability to understand the proceedings in order to make a proper defence was attributable to mental illness or mental defect as those terms are to be understood.

Adv van den Heever contended that what she had described in relation to her interaction with Bennett did not amount to Bennett being incapable of understanding the proceedings. While I was not convinced of that, if regard is

had to the affidavits of Dobрева and Porritt, the starting point remained whether the cause of Bennett's condition was attributable to mental illness or mental defect as required by s 77(1).¹

67. Adv van den Heever submitted that it was the medication which accounted for Bennett's symptoms, not any mental condition. I considered that it was necessary to hear argument as to what was meant by the relevant terms of the section, appreciating that the first was defined in s 1 of Mental Health Care Act 17 of 2002 whereas the other was not.

68. In response to the State's contention that Bennett had previously agreed to being referred to a psychiatrist Adv van den Heever contended that it was agreed in relation to the context at the time but what that meant was not explained.

69. It was also submitted on Bennett's behalf that she was entitled to claim medical privilege. When pressed it was contended that the State could not for instance access Bennett's records, even if it wished to challenge the evidence of Dobрева, despite the experts being able to.

Eventually Adv van den Heever claimed that the State could not use the records for any purpose other than to deal with Bennett's condition. Adv Coetzee submitted that this may prove to be problematic if Bennett's records suggested that she was malingering. The court indicated that the tried and tested method used by attorneys in road accident cases should be applied with reference to the consent there used to inspect medical records and reports.

¹ S 77(1) of the CPA provides:

'77 Capacity of accused to understand proceedings

(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'

Initially defence counsel contended that other problems would arise if this approach was adopted but they could not be rationally sustained when it was pointed out that the right to object to a line of cross examination or the receipt of a specific document could still be raised at appropriate time.

70. The defence then informed the court that there were no medical records to produce. This is somewhat problematic because according to Porritt's affidavit Bennett had a double heart by-pass, had been on a host of medication and according to Brink she had been treated by a psychiatrist in the Knysna area. This may become an issue later. Nonetheless it remains necessary at this stage to cater for the production of all relevant hospital and medical records.
71. The position as expressed by her counsel was that Bennett was incapable of giving proper instructions to her legal representatives and that she should only be subjected to examination after she can do so. The purpose of the examinations is to establish whether she is capable of standing trial and this will no doubt be among the issues considered by the relevant specialists.
72. Since Maree had suggested that Bennett's position might improve by 12 March and Brink subsequently considered that she was fit to stand trial on 23 February but that now she cannot do so until at least the end of March, the possibility cannot be ruled out that her recovery may only take place some time after the reports are presented at the hearing on 31 March.
73. If present indications are anything to go by then if the reports are in dispute the determination of whether Bennett can or cannot stand trial may be the subject of protracted debate bearing in mind that there are conflicting opinions without an explanation to account for the divergence between Dobрева's findings and those of Brink.
74. Insofar as the question of whether the trial can continue in Bennett's absence is concerned, Adv van den Heever stated that their mandate was limited only to issues regarding Bennett's ability to stand trial due to her health. I indicated that since she was engaged pro bono she could commit more of the

outstanding time to this aspect of the case otherwise she and attorney Cohen would be requested by the court to assist Bennett as *amici* bearing in mind that the issues might become intrinsically interwoven. After conferring with attorney Cohen the court was informed that they would be acting as *amici*

75. Adv Coetzee submitted that the State would have no objection if Dr Henning gave an opinion subject to Bennett's agreement. It was contended on behalf of Bennett that Dr Henning had not treated her. Accordingly the concern as regards obtaining Bennett's consent would fall away if she had not been treated by him. At today's hearing Bennett confirmed that she has no objection to Dr Henning examining her provided it is confined to issues relating to her mental condition to stand trial.

Porritt once again wished to make submissions. This was not objected to by Bennett. The contents of his previous affidavit were repeated in part. He added that Bennett had reacted badly to the hypertension drugs. When Porritt repeated the inadvisability of Bennett flying because of her heart condition and that he knew of this a long time ago, it was indicated that Bennett had in fact flown to Hong Kong in July to be with her daughter which suggested that she was able to manage the condition when required.

76. Porritt referred to an episode the previous morning when Bennett became dizzy and passed out. He stated that she cannot look after herself. It appeared to be for this reason that her one daughter has flown out from Hong Kong to assist her and that the other daughter will be arriving soon from Spain. He indicated that Bennett had to be taken off Statin medication which was for her cardiovascular condition. It also appeared that Bennett was due to return to Knysna the following week.

77. Porritt confirmed that he wished the trial to proceed and stated that Bennett wished to participate.

78. The court enquired from Porritt what his position would be if the case was to continue in Bennett's absence. Porritt looked uncertain and I accordingly

indicated that attorney Cohen as co-trustee with Porritt's wife of the trust that had decided to provide him with legal representation from mid-April this year, might assist in the legal argument or that since they were already acting as *amici* for Bennett they could do so for Porritt as it would generally cover the same submissions. After conferring they confirmed that they would act as *amici*.

79. During his submissions Porritt again made reference to the financial plight which hamstrung him and Bennett. This was mentioned in the context of the fair trial right. The difficulty is that the Supreme Court of Appeal has previously indicated in a judgment that both accused were obliged to comply with the Legal Aid Board's financial disclosure requirements and that they had not done so. Moreover the State has disputed the accused's contentions that they have financial difficulties. If the accused wish to raise it formally then they must do so and explain why it was not done previously and deal with why they did not pursue legal aid in the manner as indicated by the SCA.
80. I requested the parties to prepare argument on whether the evidence before the court triggered s 77 and whether the trial should proceed in the absence of Bennett either under s 158 or s 159 of the CPA. It was made clear that the court did not consider, if s 77 was triggered, that Bennett should remain confined to a mental institution as this may itself offend her constitutional rights. The case was adjourned to the following day for argument.
81. On 2 March Adv Coetzee indicated that the State and Bennett's legal representatives had reached an agreement to postpone the case to 31 March 2017 on certain conditions. I indicated the court's concern that effectively one and a half months of court time allocated to this case would go by without any evidence led. While I accepted that the status of Bennett required certainty not only in respect of the s 72(4) application but now also in respect of s 77(1) the question of whether the trial should proceed in the absence of Bennett needed to be resolved.

82. The State however indicated that it was agreeable to a postponement provided there were sufficient guarantees and that the State accepted, at that stage, it could not argue that the trial should proceed in the absence of Bennett. It mentioned that there effectively were only one and a half weeks of court days that will be lost until the court resumed on 31 March. While the State claimed not to be happy with the arrangement it was trying to be pragmatic.

83. The court was uncomfortable with the situation as the uncertainty might not be resolved when the court resumed. The parties however referred me to para 2 of the draft prepared by the State and to which Adv van den Heever had agreed. It reads:

"In the event of accused no 2 and/or her legal representatives contending on 31 March 2017 that she is suffering from any medical condition that impairs her faculties to such an extent that she cannot meaningfully contribute to her defence then the parties have agreed, and this Court orders that in terms of this agreement accused no 2 will be referred for observation as envisaged by section 77 of the Criminal Procedure Act on 31 March 2017"

84. The defence indicated that it did not agree to the further terms set out in the draft. Although, as already indicated, these had effectively been agreed upon previously Adv van den Heever submitted that it was done in a different context. The difficulty I foresee is that if there is now a change in position in a way that is not explained, that this may again arise if the court itself does not make appropriate orders.

85. The court therefore had to consider the interests of the proper administration of justice, the need to fulfil its functions under s72 (4), ensuring that a s 77(1) situation does not arise while also being conscious of the need to have sufficient certainty with regard to the condition of Bennett for the purposes of

considering whether or not there should be a separation of the trial or whether the trial should proceed in the temporary absence of Bennett. To these ends, and after hearing argument, the court was satisfied that it should direct how evidence is to be gathered.

CONSIDERATIONS FOR TERMS IMPOSED RE POSTPONEMENT OF TRIAL

86. The first consideration is that despite three court appearances Bennett has not provided an explanation as to why she did not attend court to comply with the terms of her warning under s 72(4).

87. The second consideration is that since the last adjournment in December, the court is none the wiser as to whether Bennett's mental condition is no different to any other accused who must endure stress and anxiety which results in depression to a severe or lesser degree. The only suggestion that might separate Bennett is that she is suffering from a cardio vascular condition aggravated by high blood pressure which is affected by her alleged high levels of anxiety.

88. The third consideration is that the defence team did not deal at all with Bennett's cardiovascular condition. Porritt said that it was most severe yet Adv Van den Heever did not suggest that going forward there is any need for a cardiologist to examine Bennett, despite the agreement reached previously. On the present proposal the effect would be that the court would remain unaware of the impact, if any, on Bennett's ability to stand trial due to her heart condition, blood pressure and the extent to which they may be aggravated by her symptoms of depression. This is most unsatisfactory.

89. Finally the court has afforded the defence legal team innumerable opportunities to present the evidence they wish to support Bennett's inability to attend the proceedings and to advise the court whether her absence will be temporary or indefinite.

The failure to suggest that a specialist cardiologist examine Bennett does not engender the confidence this court would have liked that there will be enough evidence presented to this court to fulfil its obligations under s 72(4) or to chart the course that the trial proceedings should take if Bennett continues to be incapacitated.

90. The failure by the defence team to assist the court with the evidence it requires despite being afforded the opportunity to initiate and effectively control the process necessitates that this court undertakes the s 72(4) enquiry in a manner that is both fair to Bennett and to Porritt, which addresses any legitimate concerns that Porritt may have regarding the prospect that his fair trial rights might be infringed in the future and the need to proceed with a trial which commenced only some 13 years after the indictment was served, and where there are numerous State witnesses who are kept in limbo. Mr Milne has waited since 30 January to continue with his testimony.

91. It appears that the order I make must ensure that on 31 March there is certainty with regard to whether Bennett has satisfied the requirements of s 72(4), whether she can continue to stand trial and, if not, whether her condition will be of a short duration or indefinite. The order must also direct a procedure whereby the issue of whether the trial should proceed in the absence of Bennett, and if so under what conditions, is resolved on 31 March.

92. Insofar as the court having sufficient information to fulfil its duties under s 72(4) is concerned and in order to determine Bennett's ability to stand trial as well as her mental capacity for the purposes of ensuring that the court does not allow a trial to proceed where the provisions of s 77 (1) are triggered, it is necessary to ensure that all necessary information is provided in order to enable a proper examination of Bennett's physical and mental condition.

93. The court is also concerned that Bennett complies with the orders so as to ensure that the matter will be expedited without the need of applications and counterapplications which might result in unnecessary delay. This is achieved by requiring the production of documents by Bennett and making herself

available for examination, either as currently or as previously agreed, and suitably modified to secure the proper administration of justice in a matter that is still expected to be of long duration.

94. There is a clear need for a cardiologist to examine Bennett.

Bennet apparently informed Brink that Dr Lochner had treated her for her heart condition. However counsel for Bennett advised the court that Lochner would only be available to consult for the first time with Bennett in December 2017. In view of what has been set out in this judgement such a delay in examining Bennett is unacceptable. It is for this reason that Brink is to refer Bennett to another cardiologist in the area between Port Elizabeth in the east and George in the west but preferably one nearer to where Bennet resides in Knysna.

95. Since on the record Dr Henning is a psychiatrist practicing in Knysna, and Bennett has now confirmed that she is agreeable to being examined by him, I believe that the court should require that he or she provides a report prior to Bennett attending Dobreva.

96. If Bennett's status cannot be resolved on 31 March then it will be necessary to determine whether the trial should continue in her absence. It will therefore be necessary to hear argument, including argument on the constitutionality of doing so both from the perspective of Bennett and of Porritt. Since Adv van den Heever and Attorney Cohen elected to be appointed as *amici* for Bennett and were so appointed in respect of Porritt, they will prepare argument on whether the trial should continue in the absence of Bennett. Argument will be heard on 31 March or the following day and they must make themselves available.

COSTS ATTENDANT ON MEDICAL EXAMINATIONS

97. The question of costs arise in relation to the examinations that will be undertaken by Doctors Brink, Henning, and the cardiologist referred by Brink.

98. The prosecution previously indicated that it wished to undertake an independent examination of Bennett. While they had selected Brink with the agreement of Bennett, Henning and the cardiologist are effectively appointed as a consequence of the exigencies that arise.

Nonetheless it appears appropriate that at this stage the State should bear these costs.

BENNETT'S RECORDS

99. No proper examination and report can be provided unless the medical practitioners have access to all medical, hospital and other similar records relevant to an assessment of Bennett's ability to stand trial.

100. It is also necessary that Dr Lochner, who had treated Bennett for her heart condition, makes available all his medical records and reports relating to her treatment, including radiologist reports. These are to be provided to the cardiologist referred by Brink who will examine Bennett.

OTHER MATTERS

101. In order to ensure that the issues identified can be determined at the hearing commencing on 31 March 2017 all the medical practitioners who are to examine Bennett will be subpoenaed to attend court on that date. I have already referred to the need for Dr Lochner to provide his medical records including any reports to the cardiologist who will be examining Bennett.

102. It is recorded that Porritt was in attendance when this *ex tempore* judgement was delivered on 6 March 2017 and received the order in this matter. He is therefore aware that the order affects him. In particular Porritt is aware, as are his legal representatives who have been appointed by the court as *amici* for him,

that they will also present argument on his behalf in support of his position as previously advised that there should not be a separation of the trial or that the trial should not otherwise continue in Bennett's absence.

SUBPOENA OF PRACTITIONERS AND OBTAINING CARDIOLOGIST'S RECORDS

103. When delivering this *ex tempore* judgement I indicated that it will be necessary to explain the basis on which the medical practitioners are being subpoenaed.

104. The order of 16 February 2017 provided that if Bennett sought an adjournment or postponement due to any medical condition then an application was to be brought in which, *inter alia*, the report of experts could be provided subject to being confirmed under oath. More to the point, it was also provided in para 4.3 of the order that all persons who had made statements or filed reports on behalf of either party "*shall be called to testify and be subject to examination and cross-examination*" unless the other party allowed the report to be admitted into evidence.

105. The procedure adopted by Bennett through her legal representatives was to try and meet the terms of that order to the limited extent of handing up the report of Dobрева which was confirmed under oath. It is therefore evident that Bennet accepted that Dobрева would have to be called by her to testify *viva voce* unless the State accepted her report. It is evident that the State does not accept at present Dobрева's statements or report.

106. In the case of Dobрева therefore the conduct of Bennet's legal team is consistent with securing her attendance as a witness although it has been unnecessary to subpoena her as yet. The situation therefore approximates

the court's entitlement to examine a witness or person under the provisions of s167 but does not do so sufficiently in order to invoke that section.²

107. The court however has the power under s186 of the CPA to subpoena or cause to be subpoenaed any person as a witness but is obliged to do so *"...if the evidence of such witness appears to the court essential to the just decision of the case."*³

108. In *S v Masooa* 2016 (2) SACR 224 (GJ) I had occasion to deal with case law on section 186 and have again taken into account the case law referred to there as well as the manner in which I applied it.

109. This case concerns the court's obligation to firstly hold an enquiry with regard to Bennet's non-appearance on 23 February 2017 as required by s72(4), to consider whether Bennett's mental capacity to follow proceedings falls under s77(1), to determine the likelihood of Bennett's ability to attend court on 31 March 2017 and its impact on the continuation of the trial in her absence either temporarily or by way of a separation under ss158 and 159. In doing so I must bear in mind the constitutional issues that arise.

These considerations make it essential that the identified medical practitioners be subpoenaed for the just decision of these issues and, by reason of the materiality of these issues, to the just decision of the case.

² Section 167 provides:

Court may examine witness or person in attendance

The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.

³ The full text reads.

186 Court may subpoena witness

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

110. The parties have been given an opportunity to deal with the calling of medical practitioners. If regard is had to the submissions made at the various hearings, and which have been set out to a great degree in this judgement, there was unanimity in regard to this court receiving evidence from a cardiologist, from Brink and from Dobрева.

Bennet confirmed that an internist was unnecessary. She also confirmed that there was no objection to Dr Henning being engaged, save for the potential prejudice of possible disclosures in relation to matters unrelated to Bennett's physical or mental condition to stand trial. It is axiomatic that all reports are to be confined to the issue as identified in the order I make.

111. By reason of the delay that has already arisen, the undefined period before which both Maree and Dobрева indicate that Bennet may yet be able to stand trial and having regard to the proper administration of justice it is necessary to secure certainty with regard to Bennett's condition in an expeditious and fair manner. Bennett has been given the opportunity of approaching medical practitioners of her choice and she has no objection to Dr Henning also examining her. In this regard I should add that Bennett was also requested to advise whether she wished Dr Maree to examine her again. She declined.

ORDER

112. I accordingly make the following order:

1. *In terms of section 72(4) of the Criminal Procedure Act, Act 51 of 1977, the execution of the warrant authorised for the arrest of accused no 2, **SUSAN HILLARY BENNETT** ("Bennett") is further suspended until 10:00 on 31 March 2017 at which time an inquiry will be held into her failure to attend the proceedings on 23 February 2017*

2. Bennett is released on warning to appear before court in person on 31 March 2017 at 10:00.

It is noted that on 2 March 2017;

- a. the case against accused no 1, **GARY PATRICK PORRITT** was postponed to 31 March 2017, at 10:00 his bail being extended on the same conditions as previously, and he was duly warned in open court.
 - b. Porritt was in agreement that his right to a fair trial within a reasonable time has not been infringed by the postponements since January 2017.
3. Bennett shall present herself to be examined by:
 - a. Dr Brink at the Knysna Provincial Hospital on 7 March 2017 as arranged and such further examinations as he may require.
 - b. Dr Henning, a psychiatrist between the dates of 17 to 23 March 2017 inclusive
 - c. An available cardiologist who will be referred by Dr Brink and who is in practice in the area from George to Port Elizabeth but preferably nearer to where Bennett resides in Knysna between the dates 17 to 23 March 2017 inclusive.
 - d. Dr Dobrev a psychiatrist in Pietemartitzburg on or before 27 March 2017 as previously arranged between them and referred to in Dobrev's affidavit of 28 February 2017
4. Each of the medical practitioners shall be provided by Bennett with all relevant medical and hospital records by no later than 17 March 2017 to enable them to properly compile a report as set out in the following paragraphs, it being for the relevant medical practitioner to determine what records may be excluded but subject to the court ultimately considering

whether such records should have been taken into consideration or not for the purpose of the examination.

5. *Each report shall set out separately the records which the practitioner considered and what was conveyed by Bennett, the tests or examinations such practitioner undertook if any, the purpose of the tests and their results, the opinion and the reason for the opinion with regard to;*
 - a. *The ability of Bennett to stand trial as from 31 March 2017 and if not by when she can reasonably be expected to stand trial.*
 - b. *And in addition in the case of the cardiologist;*
 - i. *The effect of her blood pressure on her heart condition;*
 - ii. *To what extent Bennett's stress levels and the diagnosis contained in Dobрева's affidavits as well as Bennett's blood pressure may affect her ability to stand trial and whether they can be managed by suitable medication;*
 - iii. *What medication she should be on for her heart condition and for blood pressure and if there is a conflict between the medication prescribed by Dobрева and that required for her heart condition or blood pressure and how that can be resolved*
 - c. *And in addition in the case of the psychiatrists whether their field of expertise covers any of the additional issues that the cardiologist is to consider and if so to deal with them mutatis mutandis*
6. *Each medical practitioner will provide his or her medical report by no later than Wednesday 29 March 2017*
7. *The following persons are subpoenaed to attend court on 31 March 2017 and to produce all medical and hospital records which they have been provided with or which are in their respective possession;*
 - a. *Dr Brink at the Knysna Provincial Hospital, Main Street, Knysna*

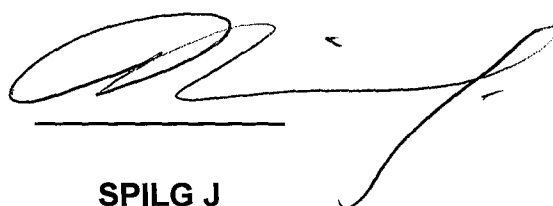
b. Dr Dobрева at 23 Hyslop Road, Pietermaritzburg.

c. The cardiologist that will be referred by Dr Brink at the address of his or her rooms

d. Dr Henning at Neuro Clinic, Gloucester Avenue, George

They will each be required to give vive voce evidence unless the court excuses them from doing so and this order is to be served on them

- 8. All the necessary costs of Dr Brink, Dr Henning and the cardiologist referred by Dr Brink are to be born at this stage by the State*
 - 9. Dr Lochner who treated Bennett for her cardiovascular condition is to provide copies of his medical and any hospital records as well as radiological reports to the above doctors by no later than 13 March 2017*
 - 10. In the event of Bennett or her legal representatives contending on 31 March 2017 that she is suffering from any mental illness or mental defect as referred to in s 77(1) of the Criminal Procedure Act 51 of 1977 ('the CPA') that impairs her faculties to such an extent that she cannot meaningfully contribute to her defence then the parties have agreed, and it is so ordered, that on 31 March 2017 and in terms of this agreement between the parties, Bennett will be referred for observation as envisaged by s 77 of the CPA.*
- It is specifically ordered that if a referral takes place on 31 March 2017 that Bennett will be dealt with on an out-patient basis.*
- 11. At the hearing on 31 March 2017 the court will also hear argument on whether the trial should continue in the absence of Bennett. Heads of argument are to be presented on 31 March 2017*



SPILG J

DATE OF HEARINGS	30 January; 1,16 and 23 February; 1, 2 and 6 March 2017 and ,6 March 2017
ORDER & EX TEMPORE JUDGMENT:	6 March 2017
REVISED	10 March 2017
FOR ACCUSED no 1	In person save in respect of issues under ss158 and 159 of CPA (then same as for accused no 2 as <i>amici</i>)
FOR ACCUSED no 2	Adv AM van den Heever Adv I Phalane (on 6 March only) Frank Cohen Attorneys (pro bono save for appointment of Adv and den Heever and Frank Cohen as <i>amici</i> in respect of issues under ss 158 and 159 of CPA)
FOR THE STATE:	Adv EM Coetzee SC Adv JM Ferreira Adv PJ Louw