CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/01

FRANS BARNARD POTGIETER	Applicant
versus	
LID VAN DIE UITVOERENDE RAAD: GESONDHEID, PROVINSIALE REGERING GAUTENG	First Respondent
SUPERINTENDENT, WESKOPPIES HOSPITAAL	Second Respondent
NASIONALE MINISTER VAN GESONDHEID	Third Respondent

Heard on : 20 September 2001

Decided on : 8 October 2001

JUDGMENT

SKWEYIYA AJ:

[1] On 11 June 2001 Bertelsmann J in the Transvaal High Court (the High Court) declared section 68(4) of the Mental Health Act 18 of 1973[1] (the Act) to be invalid in the following terms:

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[1] The complete provisions of section 68 of the Act are:

"**68. No liability in respect of act done in good faith under this Act.—**

(1) A person who in good faith and with reasonable care performs any act under any provision of this Act shall not be civilly or criminally liable in respect thereof.

(2) In any proceedings against any person in respect of any such act the burden of proving that he acted without good faith or without reasonable care shall lie upon the plaintiff.

(3) Any proceedings taken against any such person for any such act may, upon application to the court in which they are taken, be stayed if the court is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care, or that the proceedings are frivolous or vexations.

"1. Artikel 68(4) van Wet 18 van 1973 word ongrondwetlik en ongeldig verklaar.

2. Hierdie ongeldigverklaring geld vir en is van toepassing op alle aksies wat

(i) op of voor 27 April 1994 ingestel is; en

(ii) wat nog nie voor 27 April 1994 in terme van artikel 68(4) verjaar het nie; en

(iii) wat nog nie ten tye van die uitreiking van hierdie bevel finaal afgehandel is as gevolg van 'n geldige uitspraak van 'n bevoegde hof, of deur 'n geldige skikking nie.

3. Hangende en onderworpe aan die bekragtiging van die ongeldigverklaring van artikel 68(4) van Wet 18 van 1973 word 'n bevel

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(4) No such proceedings shall be commenced after the expiry of three months after the act complained of, or, in the case of a continuance of the cause of action, after the expiry of three months with effect from the termination thereof: Provided that in estimating the said period of three months so limited for the commencement of proceedings, no account shall be taken of any time or times during which the person wronged was lawfully under detention as a mentally ill person or was ignorant of the facts which constitute the cause of action.

(5) Nothing in this section shall be construed as depriving any person of any defence which he would have independently of this section."

ten gunste van die applikant uitgereik in terme van bedes 1 en 2 van die kennisgewing van mosie teen eerste en tweede respondente."[2]

He also ordered the respondents to pay the applicant's costs jointly and severally, the one paying, the others to be absolved.

[2] Mr Potgieter, the applicant, has asked this Court to confirm the High Court order under section 172 of the Constitution and there is no opposition to his request. He was represented in

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[2] "1. Section 68(4) of Act 18 of 1973 is declared unconstitutional and invalid.
2. This declaration of invalidity is valid for and applies to all actions that were
(i) instituted on or before 27 April 1994; and
(ii) have not yet prescribed before 27 April 1994 in terms of section 68(4); and
(iii) have not yet at the time of issuing of this order been finally disposed of in accordance with a binding decision of a competent court or a valid settlement.
2. Pending and subject to the confirmation of declaration of invalidity of section 68(4) of Act 18 of 1973 an order is issued in favour of the applicant in terms of prayers 1 and 2 of the notice of motion against the first and second respondents." (my translation)

this Court by Mr Du Plessis whose written submissions have been of assistance to the Court.

[3] Section 68(4) limits to three months the period within which legal proceedings may be instituted against any person in respect of any act performed under any provision of the Act. The provisions of section 68 provide what appears to be extraordinary protection.

[4] Mr Potgieter is employed in the Presidential Protection Unit in Pretoria. Following allegations of family violence against him, three of his colleagues took the applicant to the magistrates' offices in Pretoria. He stayed in the vehicle with one colleague. The other two went into the offices, returned with documents and the applicant was then taken to the district surgeon. There he was asked certain questions. Thereafter he was detained at the Lyttleton police cells for two days. After that he was taken to the Weskoppies psychiatric hospital where he was detained for a further 11 days and then released. He returned to work upon his release. The applicant was purportedly dealt with in terms of sections 8 and 9 of the Act. He avers that the action of those involved was unlawful. He proposes to sue them for damages in delict. To do that, he needs information contained in his medical records in the possession or under the control of the respondents.

[5] In March 2001, Mr Potgieter launched application proceedings in the High Court for an order granting him access to his medical records in order to be able to make an informed and well-considered decision. The High Court held that he was entitled to have access to his records in terms of his right of access to information under section 32 of the Constitution.[3] Since one of

[3] Section 32(1) provides:

the points argued in the High Court was that Mr Potgieter could no longer take legal action because of the provisions of section 68(4), the High Court, of its own accord, raised the question whether the limitation imposed by this sub-section was constitutional.[4] The court found that the provisions of section 68(4) were a drastic restriction of a person's right of access to a court of law guaranteed by section 34 of the Constitution.[5] But for section 68(4), Mr Potgieter would have had three years in which to bring his claim. Moreover, the court also found that the sub-section infringes several constitutionally protected rights in a manner which could not be justified in an open and democratic society and declared it unconstitutional.

[6] The period of three months is much shorter than that which, but for the provisions of section 68(4), would have applied in terms of the Prescription Act 68 of 1969. A limitation of time within which litigation has to be instituted and the requirement of notice before institution of such litigation are not infrequent in statutes relating to claims against organs of state and its employees. The rationale for their existence has been the subject of comment in many cases which have come before the courts. However, in enacting a statutory limitation, the legislature

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"Everyone has the right of access to—
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights."

4 For ease of reference, sub-section 68(4) provides that "[n]o such proceedings shall be commenced after the expiry of three months after the act complained of, or, in the case of a continuance of the cause of action, after the expiry of three months with effect from the termination thereof: Provided that in estimating the said period of three months so limited for the commencement of proceedings, no account shall be taken of any time or times during which the person wronged was lawfully under detention as a mentally ill person or was ignorant of the facts which constitute the cause of action."

5 Section 34 provides:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

must allow a real and fair opportunity to a party aggrieved by actions of the state or those of its employees to enforce his or her rights.[6]

[6] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at para 12.

[7] In the light of the decisions of this Court in *Mohlomi*[7] and *Moise*,[8] I have no doubt that the three month period prescribed in section 68(4) is neither adequate nor fair. The limitation is particularly outrageous and drastic, having regard to the category of persons it strikes. It constitutes a material limitation of the rights under section 34 of the Constitution. No attempt was made by the respondents to justify the limitation and in the light of the decisions in *Mohlomi* and *Moise*, above, the limitation was clearly not reasonable and justifiable. Section 68(4) is therefore constitutionally invalid.

[8] The High Court basing itself on the judgment of this Court in *Mohlomi*, sought to make the order retrospective to 27 April 1994 (the date when the interim Constitution came into effect). *Mohlomi* was decided under the interim Constitution. The facts in this matter relate to events which occurred at the time of the present Constitution (the date on which it came into

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7 Id at para 14 where it was held that section 113(1) of the Defence Act 44 of 1957 (which provided for a 6 month period of prescription) was inconsistent with section 22 of the interim Constitution (the Constitution of the Republic of South Africa, Act 200 of 1993), a provision whose meaning is in effect the same as section 34 of the final Constitution.

8 *Moise v Transitional Local Council of Greater Germiston and Others* 2001 (8) BCLR 765 (CC) at paras 14 and 16 where it was held that section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, requiring that a local authority be given written notice of legal proceedings within ninety days as from the day on which the debt became due, was unconstitutional as it was a material limitation of an individual's right of access to a court under section 34 of the final Constitution.

effect being 4 February 1996). Section 172(1)(b) of the Constitution gives a court the power to make an order that is just and equitable, including one limiting retrospectivity and one suspending it. On the strength of the reasoning and order in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[9] the High Court was fully entitled to make the order retrospective to 27 April 1994.

[9] In formulating the order, however, the learned judge used language to regulate its retrospective application that was inappropriate, and in effect applies only to actions instituted before 27 April 1994. It is necessary, therefore, to reformulate the terms of the order, and I have done so.

[10] The applicant had to come to this Court to secure confirmation of the High Court's order in terms of section 172(2) of the Constitution and is therefore entitled to his costs.

[11] The following order is made:

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9 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 96, 97 and 106.

(a) The order of constitutional invalidity made by the High Court is confirmed in the following terms:[10]

> "i. Artikel 68(4) van Wet 18 van 1973 word onbestaanbaar met die Grondwet en ongeldig verklaar.
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> ii. Sodanige ongeldigverklaring is terugwerkend tot 27 April 1994 en is van toepassing op alle hangende verrigtinge wat voor 27 April 1994 of sedertdien ingestel is en wat ten tye van hierdie bevel nog nie finaal afgehandel is nie, hetsy deur 'n uitspraak van eerste instansie of op appèl hetsy deur 'n geldige skikking."

(b) The respondents are, jointly and severally, to pay the costs of this application.

Chaskalson P, Ackermann J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J and

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10 i. Section 68(4) of Act 18 of 1973 is declared to be inconsistent with the Constitution and invalid.
ii. Such declaration of invalidity is made with retrospective effect to 27 April 1994, and will apply to and govern all pending proceedings instituted either before or since 27 April 1994 which at the time of this order have not yet been finally determined by judgments delivered at first instance or on appeal or by settlements duly concluded. (My translation)

SKWEYIYA AJ

DuPlessis AJ concur in the judgment of Skweyiya AJ.

SKWEYIYA AJ

For the applicant: J du Plessis instructed by Van Andel-Brink Attorneys, Pretoria.

For the respondents: No appearance.