

**FRANS BARNARD POTGIETER AND LID VAN DIE UITVOERENDE RAAD:
GESONDHEID, PROVINSIALE REGERING GAUTENG EN ANDER**

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This case concerns the constitutionality of s 68(4) of the Mental Health Act 18 of 1973 (the Act). This section gives a person only 3 months within which to sue for damages for conduct under the Act.

In February 2000 the applicant, Mr Potgieter, was detained at the Lyttleton police station for 2 days before being detained at Weskoppies psychiatric hospital for a further 11 days. He was subsequently released and returned to work. Mr Potgieter contends that those involved in his detention acted unlawfully and he plans to sue them for damages. To do that, he needs information contained in his medical records in the possession of the respondents. He approached the High Court for an order granting him access to this information, which the court granted on the basis of his right of access to information (s 32 of the Constitution).

One of the defences in the High Court was that Mr Potgieter did not need such access as he could no longer sue the respondents because of s 68(4). This led the court to question whether the limitation imposed by this provision was constitutional. It found the section to be a drastic restriction of a person's right to have a legal dispute resolved by a court of law (s 34 of the Constitution) and declared it constitutionally invalid, subject to confirmation by the Constitutional Court (in terms of s 172 of the Constitution).

But for s 68(4), Mr Potgieter would have had 3 years to start legal proceedings. In the light of earlier decisions of the Court, it was clear that 3 months did not give him a real and fair opportunity to argue his case in a court of law. Acting Justice Skweyiya, writing for a unanimous Court, held that the section provides extraordinary protection to the state and its employees infringing s 34 of the Constitution in a way that cannot be justified. The High Court order declaring s 68(4) unconstitutional was accordingly confirmed. It was further ordered that the declaration of invalidity would apply to all cases whether they arose before or after 27 April 1994 and which had not yet been finally determined.