REPORTABLE

CASE NO.: SA 27/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ANNETTE GEORGINA GAWANAS **APPELLANT**

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA **RESPONDENT**

Coram: Strydom AJA, Langa AJA *et* O'Regan AJA

Heard on: 11/07/2011

Delivered on: 03/04/2012

APPEAL JUDGMENT

STRYDOM AJA:

[1] The appellant issued summons in the High Court in terms of which she claimed damages from the respondent in an amount of N$741 400. The appellant alleged that she was wrongfully and unlawfully detained in the Mental Health Centre, Windhoek Central Hospital for the period 13 January 2003 till 15 December 2003. The claim was principally based on the *Lex Aquilia* and, in the alternative, on the infringement of her

constitutional rights to personal liberty (Art. 7 of the Constitution); her dignity (Art. 8 of the Constitution); to be free from arbitrary detention (Art. 11 of the Constitution) and/or that she was denied administrative justice (Art. 18 of the Constitution).

[2] In regard to the main claim the respondent denied that the appellant was detained unlawfully and wrongfully. Respondent pleaded that the appellant was detained in terms of a court order which was issued in terms of the provisions of sec. 77(6) of the Criminal Procedure Act, Act 51 of 1977 and Chapter 3 of the Mental Health Act, Act 18 of 1973 (the Mental Health Act). For the same reasons it was denied that there was an unlawful and wrongful infringement of the appellant's constitutional rights.

BACKGROUND

[3] The appellant was charged with the crime of child stealing but it was found that she was incapable of understanding criminal proceedings in order to properly defend herself. This was found to be as a result of a mental illness or defect as provided by the Criminal Procedure Act, Act 51 of 1977. In terms of sec. 9(3) of the Mental Health Act a reception order was issued by a magistrate and the appellant became a President's patient on 9 August 1999 which led to her being taken up in the Mental Healthcare Centre in Windhoek.

[4] In the Mental Healthcare Centre (the Centre) the appellant was, *inter alia,* treated by Dr Japhet, a qualified Psychiatrist. On the 11 April 2002 the appellant was brought before the hospital board who recommended that she be released. Ss. 29(4), (5), (6)

and (7) of the Mental Health Act set out the procedure to be followed to obtain the discharge of a President's patient not charged with murder, culpable homicide or a crime involving serious violence. The official *curator ad litem*, the Prosecutor-General, determined that the appellant was a patient who fell within these provisions."

[5] Obtaining the recommendation of the hospital board was the first step to be taken towards the release of a patient. On 11 April 2002, the Hospital Board made such a recommendation and the appellant was temporarily released on leave from the 17 April 2002 till 17 July 2002. The reason for her release on leave, according to Dr Japhet, was to see if the appellant would be able to cope on her own. However, when she returned from leave she was not as well as when she left the Centre on the 17 April. Dr Japhet testified that she was again psychotic and it would have been inappropriate to release her in that condition. Dr Japhet testified that this relapse was due to the appellant not taking her prescribed medicine regularly or at all. The doctor testified that her disorder was of a genetic nature and that her condition could only be controlled by regular medication.

[6] Dr Japhet testified further that by September 2002 the appellant's condition was again such that she could be sent on leave and for the period 18 September 2002 until 13 January 2003 she was released on leave. When she returned, Dr Japhet stated that she was fine. This the witness repeated on more than one occasion. Notwithstanding the fact that the appellant was fine in January 2003, the process to obtain her discharge as a President's patient was only again taken up on the 24 June 2003 when the

recommendation of the hospital board, together with that of the official curator *ad litem*, the Prosecutor-General, were forwarded to the Minister of Justice. This only followed after various letters had been written to Dr Japhet by the legal representatives of the appellant, the Legal Assistance Centre.

[7] Once the matter was taken up by the Ministry of Justice further delays occurred. From the correspondence attached to a statement of facts it seems that the Ministry was of the opinion that only the President could discharge a President's patient and that the Minister of Justice had no power to do so. This, so it seems, was based on the stance that there was no delegation to the Minister of Justice to discharge the appellant and that such delegation must first be obtained from the President.

[8] After further correspondence between Ms Hancox, of the Legal Assistance Centre, and the Ministry the appellant ceased to be treated as a President's patient on the 15 December 2003 by order of the President.

[9] This opened the door for a Judge of the High Court to finally release the appellant. This happened on 17 April 2004.

[10] When the matter came to trial the parties handed up an agreed statement of facts and the learned Judge was requested to firstly determine the issue of liability and to let the issue of damages stand over. Attached to the statement of facts were copies of

correspondence between Ms Hancox, of the Legal Assistance Centre, and the various government institutions involved in the release of the appellant.

[11] The statement of facts did not in any material way change the stance of the parties as set out in their pleadings. It contained a list of undisputed facts which confirmed the dates on which the various steps were taken for the release of the appellant and it was also accepted that all government officials acted at all times within the course and scope of their employment with the respondent. These included the Minister of Justice and officials within his Ministry; the Minister of Health and Social Services and officials within his Ministry and the hospital board and government officials employed by the respondent acting for and on behalf of the said Board.

[12] The issues to be determined by the Court *a quo* were set out in the statement of facts and were the following:

> "4.1 Defendant denies that the period as from the date of the recommendation made by the Hospital Board on 11 April 2002 until the date on which the State President ordered that Plaintiff cease to be treated as a State President's Patient on 15 December 2003, some 20 months and 5 days, constitutes an excessive and/or unreasonable delay of administrative action.
>
> 4.2 Defendant denies therefore that Plaintiff was wrongfully and unlawfully detained from 13 January 2003 to 15 December 2003, a period of 11 months and 3 days.
>
> 4.3 In amplification, Defendant pleads that Plaintiff was lawfully detained by virtue of a Court Order in terms of the provisions of Section 77(6) of the Criminal

Procedure Act, Act 51 of 1977 and Chapter 3 of the Mental Health Act, Act 18 of 1973, on account of the fact that Plaintiff was found to be incapable of understanding criminal proceedings so as to make a proper defence by reason of a mental illness or mental defect.

4.4 Defendant denies that any of its organs or employees or officials acted wrongfully or in negligent breach of their duty of care and that they failed to:

4.4.1 act expeditiously and to take steps to secure or facilitate a decision and/or make or cause an order for the release of plaintiff in terms of section 29(4)(b) of Act 18 of 1973 and not to unreasonably delay the aforegoing;

4.4.2 safeguard and uphold Plaintiff's constitutional rights, *inter alia,* under Articles 7, 8, 11(1) and 18 of the Namibian Constitution.

4.5 Defendant denies that the plaintiff has suffered general damages in any amount or that Plaintiff is entitled to an award of monetary compensation in terms of Article 25(3) and 25(4) of the Namibian Constitution."

THE FINDINGS BY THE TRIAL COURT

[13] In regard to the delictual claim the Court concluded that the officials did not act unlawfully or wrongfully, seemingly because the appellant was detained in terms of a valid court order issued in terms of the provisions of Chapter 3 of the Act. The Court nevertheless also found that reasonable explanations were given by the Board for any delay in taking the matter further, and that there was no unreasonable delay in the Office of the Minister of Justice. In the circumstances the appellant did not prove that a legal duty was owed to her.

[14] In regard to the alternative claim based on the Articles of the Constitution the trial Court concluded that the claim should fail for the same reasons. Bearing in mind the history prior to our independence, the trial Court found that Articles 7, 8 and 11(1) related to detention *in communicado,* detention without trial or unlawful detention, all practices designed to enforce the obnoxious laws and policies of apartheid. Committal to a mental institution bears no resemblance to such practices, and such detention can therefore not be said to be a deprivation of personal liberty, an insult to dignity or arbitrary.

COUNSEL'S SUBMISSIONS ON APPEAL

[15] The appellant was represented by Mr Tötemeyer who also represented the appellant at the trial. Regrettably there was no representation for the respondents.

[16] Counsel in a full and able argument interpreted the various relevant provisions of the Act and, with reference to the time periods it took to obtain the release of the appellant, submitted that an order by the Minister of Justice, whereby the appellant was no longer treated as a President's patient, pre-eminently involved the exercise of a public power by a public authority. As this authority is exercised in terms of a statutory enactment it falls within the ambit of the definition of an administrative act. See, *inter alia, Administrator, Transvaal, and Others v Zenzile and Others,* 1991(1) SA 21 (A) at 34B – C.)

[17] Counsel further submitted that the decision by the Minister of Justice was a pre-requisite for the ultimate release of the appellant by a Judge. The decision by the Minister therefore constitutes administrative action which is subject to the provisions of Article 18 of the Constitution which requires fair and reasonable action by administrative officials. The failure to take administrative decision within a reasonable time (especially where a statutory duty to act exists) would be unfair and unreasonable. Counsel submitted that the claim of the appellant could succeed under the *Lex Aquilia* without the need to rely on the wider scope provided for in the various articles of the Constitution.

THE APPEAL

[18] A reading of the provisions of Chapters 3 and 4 of the Mental Health Act makes it clear that once a magistrate is satisfied, on the evidence presented to him or her, that a person is mentally ill to such a degree that he or she should be detained as a patient he may issue an order that such person be received, detained and be removed to an institution. (Sec. 9(3) and sec. 28 of the Mental Health Act.)

[19] However, it cannot be denied that the compulsory detention of a person in a mental institution inevitably impairs the personal rights of the detainee and in particular his or her right to liberty (Article 7 of the Constitution) and dignity (Article 8 of the Constitution). Although the Court may have been correct that one of the considerations that informed the adoption of Articles 7 and 8 of the Constitution was caused by detention without trial during the apartheid era, the principles of liberty and dignity are far wider in their scope. A person compulsorily detained in a mental institution is physically

restrained and his or her right of freedom of movement has been taken away. He or she is subject to certain discipline enforced by the institution where he or she is detained. (See *Minister of Justice v Hofmeyr,* 1993(3) SA 131 (A).) I conclude therefore that compulsory incarceration in a mental institution where a person is mentally fit does impair the liberty and dignity of a person.

[20] The question that arises crisply in this case is what obligations are imposed upon the respondent once the court order to detain a person has been made in terms of section 9(3), to secure the release of the patient once the patient is medically fit for release. That question is answered by the provisions of section 29(4) – (7). These sections provide that the Minister may order the discharge of President's patients who have not been detained in respect of a charge of murder, culpable homicide or a charge of serious violence, after the Minister has obtained a report from the hospital board concerned and the official *curator ad litem.* The Minister's order is then forwarded to the superintendent of the hospital where the prisoner is detained, who shall in turn furnish a report on the patient's condition to the official *curator ad litem*, who shall transmit the documentation to the registrar of the Court. The documentation is then placed before a judge in chambers. The question that arises is what obligations are placed upon the Minister, the hospital board, the superintendent and the official *curator ad litem* by these provisions. Guidance in answering this question is to be found in the decision of the South African Appellate Division in *Simon's Town Municipality v Dews and Another,* 1993(1) SA 191 (A).

[21] In that matter employees of the Municipality undertook the cleaning of a fire belt on vacant land belonging to the Municipality. The fire got out of hand and spread to the adjacent properties of the claimants where it caused extensive damages. The Court *a quo,* having found that the employees of the Municipality were negligent, found for the plaintiffs but nevertheless granted leave to appeal to the Municipality. The basis of the appeal was the Municipality's contention that sec 87 of Act 122 of 1984 afforded legal immunity where it or its employees had acted, in good faith "in the exercise of a power or the carrying out of a duty conferred or imposed by or under this Act". The following principle was stated by Corbett CJ, in response to this submission, at p 196:

> "A further important principle is that, even where the statute does authorise interference with the rights of others, the person or authority vested with the power is under a duty, when exercising the power, to use due care and to take all reasonable precautions to avoid or minimise injury to others. Failure to carry out this duty has been described as 'negligence', but, as pointed out by Prof J C van der Walt in Joubert (ed) *Law of South Africa* vol 8 para 30, in this context the word is used in a special sense; and
>
> > '(t)he presence of "negligence" in this special sense in the exercise of a statutory power is, however, a conclusive indication that the defendant has exceeded the bounds of his authority and has therefore acted wrongfully.'
>
> See also Neethling, Potgieter and Visser *The Law of Delict* at 91-2; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse*, Reg 6th ed at 105-6; Boberg *The Law of Delict* vol 1 at 771-3. In my view, these writers all correctly state that jurisprudentially the consequences of the repository of the statutory power having exercised it without due care and without having taken reasonable precautions to avoid or minimise injury to others, are that the repository must be taken to have exceeded the limits of his authority and accordingly to have acted unlawfully. Save for a fleeting remark

> in *Kenly Farms (Pty) Ltd v Minister of Agriculture* 1984(1) SA 406 (C) at 410G, so far as I am aware there has hitherto been no judicial pronouncement specifically to this effect. I am nevertheless satisfied that the analysis is sound and that it accords with modern distinctions in our law of delict between fault and unlawfulness. The principle of statutory authority renders lawful what would otherwise have been unlawful; and if the implied limits of the statutory authority are not observed the repository of the power acts without authority, or in excess of his authority, and consequently unlawfully."

[22] I am of the opinion that the principle set out in the *Simon's Town Municipality* case, *supra,* also applies to the present instance.

[23] In the present case the defence of the respondent was that it was acting in terms of a valid court order which was still operative and that therefore it had authority to continue to detain the appellant. This meant that there could be no question that the detention of the appellant was unlawful at any stage. The court order, issued in terms of a statute, the Mental Health Act, therefore authorized the respondent to detain the appellant even in circumstances where doctors considered she was fit for release. As long as there is a valid court order the detention was not unlawful. This, in my opinion, is no less than a plea of immunity for as long as there is a court order.

[24] This cannot be correct because it means that a person can be detained for as long as the order subsists. It is so that the order authorizes the institutions of the Government to interfere with the rights of a person so certified but as was stated in the *Simon's Town Municipality* case that is not a *carte blanche* to such institutions to act as they please. The fact is that the Mental Health Act provides in detail the steps to be

taken to obtain the release of a person detained in terms of an order by a magistrate, and once a person so detained is fit for release, a decision left to the health authorities and the court, the steps prescribed by the Mental Health Act must be complied with reasonably. Those authorities that are mandated to obtain the release of a patient are therefore under a duty to act cautiously and reasonably in order to minimize or avoid further injury to such patient. Where this is not done they will have overstepped their authority and a valid court order will not assist them.

[25] I can therefore not agree with the learned Judge *a quo* that for so long as there is a court order in terms whereof a patient is detained, detention will always be lawful. This presupposes that as long as there is a court order a wrongful detention will still be lawful and it could therefore be for any length of time. Although a court order is necessary to detain a person the court has no role to play in setting in motion the various steps for release of a patient as was the case with the appellant.

[26] I therefore agree with the submissions made by Mr Tötemeyer that there was a statutory duty upon the Board and its personnel and the Minister of Justice and his personnel to act reasonably. In determining what is “reasonable” in the circumstances a court will take into account the provisions of Article 7 (the protection of liberty of the individual) and Article 8 (respect for the dignity of the individual) and, in particular, bear in mind, as noted above, that the compulsory detention of a person in a mental institution, where that person is mentally fit, will be a limitation of that person’s liberty and dignity.

[27] I can also not agree with the contention of the learned Judge *a quo* that protection by these Articles was not designed to include unlawful detention in terms of the Mental Health Act and was framed and meant to deal only with unlawful arrests of a particular type. That is too narrow an interpretation of such important provisions of our Constitution. Our case law suggests that, in the absence of other considerations, the provisions contained in Chapter 3 of our Constitution should be interpreted widely "so as to give to individuals the full measure of the fundamental rights and freedoms referred to". (Per Lord Wilberforce in *Minister of Home Affairs and Another v Fisher and Another,* [1980] AC 319 at 329 and applied with approval by this Court in *Minister of Defence v Mwandinghi,* 1993 NR 63 (SC) at 70G.) A detention order, by itself, is not necessarily in conflict with those provisions. However, in this instance the problem lies in the fact that according to the doctors attending her, the appellant was fit for release and the question is whether the role players acted reasonably in order to obtain the release of the appellant.

[28] In the present instance the process for the release of the appellant was started on 11 April 2002 when she was presented to the hospital board, which, so it seems, was satisfied that the process could be taken further. The appellant was then released on leave to see if she was able to cope on her own. However, when she returned on 16 July 2002, she was again psychotic and Dr Japhet testified that it was clear that she did not take her medicine regularly as was prescribed for her. The release of the appellant was then put on hold. This was done without involvement of the hospital board so that the Board's recommendation still remained.

[29] After further treatment, the appellant was again released on leave on 16 September 2002. Dr Japhet testified that when she then returned to the hospital on 13 January 2003, “She was fine.” Although Dr Japhet testified that there were still some problems in regard to the appellant he ended his evidence by stating that the appellant was generally speaking fine and this statement covered the period 13 January 2003 until her release.

[30] The problems referred to by this witness, bearing also in mind his statement that the appellant was fine, must have been regarded as of a minor nature. In the one instance the situation immediately improved after he had had a talk with the appellant, and in the other instance the problem was solved after her medicine was changed. Neither of these two problems were described by Dr Japhet as psychotic episodes and the relative ease with which these problems were solved also show that they were not regarded as such. It was also the evidence of Dr Japhet that since the return of the appellant on 13 January 2002 until her release in April 2004 there were no further relapses by the appellant.

[31] I am satisfied that up to 13 January 2003 the actions by the hospital staff and the explanation given by Dr Japhet why no further steps were taken to obtain the release of the appellant, were reasonable. I also did not understand Mr Tötemeyer to submit otherwise. Mr Tötemeyer’s complaint was that after the appellant had her relapse, after the first period of leave, it was not, in terms of administrative law, correct for Dr Kanyama, to take it upon himself, to decide to take no further steps in regard to

the release of the appellant. Counsel submitted that the matter should then again have been brought before the hospital board for decision. Counsel may be correct but nothing turns upon this issue and I need not decide the point. In any event, because of the relapse of the appellant the date of the hospital board's recommendation has become irrelevant with regard to the computation of the period for which she was unlawfully detained. It, however, still served the purpose of setting in motion the release procedure.

[32] The recommendation by the hospital board for the release of the appellant, together with a similar recommendation by the *curator ad litem*, was only sent to the Minister of Justice on 24 June 2003. By that time the legal representatives of the appellant had written various letters to Dr Japhet to urge him to speed up the release of the appellant. There was no reply to any of these letters although Dr Japhet testified that he drafted answers which he handed to Dr Vries, the Superintendant of the hospital. If that is so there is no explanation why these letters were not sent to the legal representatives of the appellant.

[33] I am of the opinion that the respondents did not present a reasonable explanation why they waited until nearly the end of June before they forwarded their recommendation to the Minister of Justice for his consideration. The learned Judge *a quo* referred to an excerpt from the evidence of Dr Japhet and concluded that because of her condition it would have been unwise to release the appellant. However, under cross-examination Dr Japhet was specifically referred to the period 13 January 2003,

when the appellant returned from leave, to 25 June 2003, when the letter by the hospital board was sent to the Minister of Justice which set in motion the release of the appellant, and he was asked whether there was any change in her condition during that period. The witness testified that the appellant was generally doing fine. From the evidence it is not always clear whether Dr Japhet referred to the condition of the appellant after she had returned from the first period of leave or the second period. The following excerpt from the cross-examination of Dr Japhet cannot be reconciled with his attempts to justify the sending of the recommendation of the Board only on the 24 June 2003. The following questions were asked by Mr Tötemeyer:

> "Q: Now you gave evidence that after the patient came from leave that was in July 17th 2002 there were some problems?
> A: Yes.
>
> Q: But on 18th September 2002 she was sent on leave again?
> A: Yes.
>
> Q: Was she then fine?
> A: She came back fine. She was fine when she was sent and she was fine when she came back.
>
> Q: So it is fair to say that she actually then followed the conditions?
> A: Exactly.
>
> Q: By attending treatment at Tsumeb at the hospital?
> A: She had taken the medication. She did that.
>
> ….

Q: Was she then fine, that is now 25th June 2003?
A: She was fine.

Q: So there was no change in her condition as from 13th January or 18th January 2003 until 25th June 2003 as far as you are aware?
A: She was generally doing fine."

[34] On this evidence it seems that for all intents and purposes the appellant was fine from January 2003 up and until 25 June 2003 and even further until 15 December and up to her eventual release in April 2004. I therefore conclude that the hospital board did not act reasonably in delaying from January 2003 until 24 June 2003 before they sent their recommendation to the Minister of Justice.

[35] Once the hospital board sent their recommendation, together with that of the official *curator ad litem,* to the Minister of Justice, there was again a spate of correspondence between the staff of the Ministry and the legal representatives of the appellant. From the correspondence it seems that the Ministry was uncertain whether any action was required from them to secure the release of the appellant. At one stage there was even reference that for them to act they needed a delegation. The uncertainty of the Ministry continued even after the legal representatives of the appellant referred them to a precedent where the Minister of Justice, in similar circumstances, had approved the release of a President's patient in terms of the provisions of the Act. Only after they were threatened with legal action did the Ministry react and obtain a discharge

from the President, which, in terms of the Act, was the wrong procedure prescribed by the provisions of sec. 29 of the Act.

[36] In the light of the provisions of the Act it is difficult to understand the attitude of the staff of the Ministry of Justice and why it took them almost six months to obtain the discharge of the appellant as a President's patient, and then in terms of the wrong provisions of the Mental Health Act.

[37] As previously pointed out sec. 29 of the Act provides for the discharge of a President's patient. It distinguishes between patients held with reference to a charge of murder, culpable homicide or a charge involving serious violence, on the one hand, and a President's patient detained as such not in terms of a charge of murder, culpable homicide or involving serious violence. In regard to the first category only the President can order the discharge of the patient. In regard to the second category the Act provides as follows:

> "29(4) The Minister may order the discharge of a President's patient either absolutely or conditionally or that he cease to be treated as such-
>
> (a) on receipt of authority for such an order under subsection (2);
>
> (b) in the case of a President's patient detained as such in respect of a charge not referred to in subsection (1)(a), after obtaining a report from the hospital board concerned and a report from the official curator *ad litem.*

> (5) It shall be the function of the official curator *ad litem* to decide for the purposes of subsections (1)(a) and (4)(b) whether any charge with reference to which a person is detained as a President's patient, involves or does not involve serious violence."

[38] The reference to subsections 1(a) and (2) in subsection (4) are references to President's patients detained on a charge of murder, culpable homicide or serious violence. In those instances the Minister may order their discharge only on authority of the President. They therefore fall into the first category set out herein above. It is common cause that the official curator had determined that the appellant was not detained in regard to a charge involving serious violence.

[39] Furthermore, section 1 of the Act, the definition section, makes it clear which Minister must act in terms of sec. 29. It states as follows.

> "Minister means the Minister of Health, except in Chapter 4, where it means the Minister of Prisons in sections 28 and 30 to 41 inclusive, and the Minister of Justice in section 29;"

[40] In the light of the above provisions, the Minister and his staff should not have had any doubt as to what, in terms of the Act, the Minister's duties were. The Act empowers specifically the Minister to grant a discharge of a President's patient who falls within the second category, set out herein above, and the issue whether the Minister needed a delegation, before he could act, is farfetched. Again I am of the opinion that there is no reasonable explanation for the delay to act in order to discharge the appellant as a

President's patient which was a necessary step in the process before a judge could order the release of the appellant.

[41] Judging from the correspondence, originating from the Ministry to the legal representatives of the appellant, which was always signed by a staff member in the Ministry, the learned Judge *a quo* was of the opinion that the Minister himself might have been unaware of the fact that action was required on his part. That may be so but it is clear from the pleadings that blame for the delay is also laid at the door of the staff of the Ministry and if they were causing the delay they were liable.

[42] I am also satisfied that looking at the question of negligence that a *diligent paterfamilias* would have, in the circumstances described above, foreseen the possibility of his conduct causing loss to another person, in this instance the appellant, and would have taken reasonable steps to avoid such possibility. (See *Kruger v Coetzee,* 1966(2) SA 428 (A) at 430E – F.)

[43] For the reasons stated above I am satisfied that the respondents owed the appellant a legal duty to take reasonable steps to secure her release once her medical condition had improved to the point that her doctors considered her continued detention in an institution unnecessary. Detention seems to me to be in a niche of its own as far as forseeability is concerned. Where a person is unlawfully detained the person causing that can hardly be heard to say that harm was not foreseeable. The liberty of an individual and protection against arbitrary arrest and detention form the cornerstones of

any Constitution based on human rights and respect for the individual. Without such protection there can be no free and democratic society. In regard to Namibia this Court has found that the right to liberty, set out in Art. 7, gives rise to a substantive right which guarantees personal liberty. (See the unreported case of *Jacob Alexander v The Minister of Justice and Others,* delivered on 9 April 2010.)

[44] I conclude that the respondent was liable in terms of aquilian liability for its omission to take reasonable steps to secure the release of Ms Gawanas, once her doctors considered her continued detention in the institution unnecessary. In the circumstances, it is not necessary to consider the claim for damages based on the Constitution.

[45] However, it does not follow that the delay caused by the officials renders the respondent liable for the whole period from 13 January 2003 till 15 December 2003. The process whereby a President's patient is discharged and released is, to a certain extent, time-consuming. It is first of all not possible to predetermine the dates of discharge and release as those depend on whether the patient is fit to be released. Only once that is determined by the hospital board can the process be set in motion, but once this decision is made by the Board they must act expeditiously. The process further involves inputs by the official curator, the Minister of Justice and a judge, each of whom may call for further reports on the condition of the patient. On a question by the Court Mr Tötemeyer submitted that three months would be a reasonable period in which to complete the process.

[46] I agree with counsel. A period of three months would afford those involved in the process ample time to consider, and if necessary, to call for further information to assist them. Depending on the circumstances of each case, the period of three months must not be regarded as being cast in stone and circumstances may arise which would reasonably extend such period or even shorten it. In this matter we have had the benefit of hindsight and bearing in mind that in each instance the parties involved in the process have supported the discharge and release of the appellant a period of three months is reasonable. If one further allows for a period during which the appellant was monitored, on her return from leave, it seems further reasonable that the period of three months to start at the beginning of February and run to the end of April. That leaves a period of seven and a half months during which the appellant was detained unlawfully.

[47] From what is set out above it follows that I am of the opinion that the appellant was detained unlawfully for a period of seven and a half months from which it further follows, that the respondent is liable to compensate her such loss she may have suffered as a result of that unlawful detention. The question whether the damages proved, if any, are causally connected to the harm suffered by the appellant is, in my opinion, best left for decision by the trial Court who will be in possession of all relevant facts.

[48] In the result the following orders are made:

1. The order by the Court *a quo* is hereby set aside and the following orders are substituted therefore:

    1.1 It is declared that:

        (a) The respondent acted wrongfully by omitting to take reasonable steps to secure the release of the appellant from 13 January 2003 until 15 December 2003; and

        (b) Given the period of time that an application to release would ordinarily have taken, the period of wrongful detention is calculated to be a period of seven and a half months.

2. This matter is referred back to the High Court of Namibia to be heard by any judge in order to be determined in the light of order 1.1 above.

3. There is no order for costs.

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STRYDOM AJA

I agree

_____

LANGA AJA

I agree

_____

O’REGAN AJA

COUNSEL ON BEHALF OF THE APPELLANT:	**MR R TÖTEMEYER**
INSTRUCTED BY:	**LEGAL ASSISTANCE CENTRE**
COUNSEL ON BEHALF OF THE RESPONDENT:	**NO APPEARANCE**