CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/97

DOUGLAS MICHAEL DE LANGE	First Appellant
versus	
FRANCOIS J SMUTS NO	First Respondent
E M FREY NO (LIQUIDATOR, PAARL OLIVE FARMS CC)	Second Respondent
C R S GOODEN NO (LIQUIDATOR, PLATTENBOSCH FARMS CC)	Third Respondent
H M SANGIORGIO NO (LIQUIDATOR, TIERFONEIN BOERDERY CC)	Fourth Respondent
THE MASTER OF THE HIGH COURT	Fifth Respondent

Heard on: 20 November 1997

Decided on: 28 May 1998

JUDGMENT

DIDCOTT J:

[110] I share the view taken by Ackermann J that section 66(3) of the Insolvency Act (24 of 1936) is constitutionally valid where it empowers a magistrate presiding over a meeting of creditors to issue a warrant for the committal to prison of anyone who refuses or fails,

when lawfully required, to do what the subsection specifies. In my opinion, however, the same goes for the corresponding empowerment of an officer who presides over a meeting although he or she is not a magistrate but another official designated under section 39(2) of the statute. On that point I therefore dissent from the judgment which Ackermann J has prepared and from the order proposed by him. I believe that we should instead declare the whole of section 66(3) to be unobjectionable.

[111] Section 66(3) lists the three grounds on any of which somebody present at a meeting of creditors may be committed to prison. The first is the failure of the person to produce a book or document which he or she has been summoned to produce. The second is the person's refusal to be sworn as a witness once he or she must submit to interrogation. And the third, arising should the person testify, is either a refusal to answer a lawful question or a failure to do so fully and satisfactorily.

[112] That third ground was considered by Tebbutt J in *Nieuwoudt v Faught NO en Andere*.[1] His judgment, in which King J concurred, examined section 66(3) and its context closely. He then came to this conclusion about the effect which the subsection had in dealing with the failure to answer questions fully and satisfactorily. What that part hit, he held, was an unwillingness to answer pertinently and completely. A general lack of credibility did not count. Nor even did the apparent untruthfulness of the answer given

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[1] 1987 (4) SA 101 (C) at 109B - 114C.

to a particular question, unless the response was such obvious nonsense that it amounted to an intentional refusal to answer. Unwillingness, it seems to me, is no less an element of the other refusals and failures which the subsection mentions. For its target appears to be obstructive behaviour rather than that which is otherwise unsatisfactory.

[113] The witness may, of course, present an excuse for any of the refusals or failures that are described, and should no doubt be invited to do so. Not many good excuses seem, however, to be available. The most obvious that occur to me at once are these. The witness was not a person liable to be interrogated or summoned to produce books or documents, and had been treated as such by mistake. The required information, oral or documentary, was privileged and thus protected from disclosure. Or the witness did not have the information and could not find or obtain it, even if allowed time for an attempt. The enquiry into the soundness of those and all other excuses must usually be factual in the first place and quite simple in the second. I do not see why a junior magistrate with short experience on the bench, let us say, should by virtue of his or her office be thought peculiarly competent to decide the matter, let alone by comparison with an official on the Master's staff, when one presides, who has been trained in the due administration of estates and become well versed in the ways of the insolvency world.

[114] I agree with Ackermann J that, in the light of the clearly legitimate and important purposes described by him that are served by section 66(3) and its related provisions, a

committal to prison under the subsection does not amount to an invasion of the personal freedom "arbitrarily or without just cause" which section 12(1)(a) of the Constitution (Act 108 of 1996) forbids. We are then left with the proposition that the person so committed is nevertheless "detained without trial" in conflict with section 12(1)(b) once the warrant gets issued by a presiding officer who happens not to be a magistrate.

[115] Those words, the words "detained without trial", ought not in my opinion to be construed separately. They comprise a single and composite phrase which expresses a single and composite notion and must therefore be read as a whole. Both the usage of the phrase in this country and the provenance here of the notion are unfortunately familiar to us all. Neither should be viewed apart from our ugly history of political repression. For detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former government. The process was an arbitrary one, set in motion by the police alone on grounds of their own, controlled throughout by them, and hidden from the scrutiny of the courts, to which scant recourse could be had. And it was marked by sudden and secret arrests, indefinite incarceration, isolation from families, friends and lawyers, and protracted interrogations, accompanied often by violence. Detentions without trial of that nature, detentions which might be disfigured by those or comparable features, were surely the sort that the framers of the Constitution had in mind when they wrote section 12(1)(b).

[116] A committal to prison of the kind now in question bears no resemblance to a detention with such evil characteristics. It is not a legacy of apartheid and has nothing to do with either that era or the supposed security of the state. Nor does it serve any other political purpose. Indeed, the state has no interest in the proceedings but to oil the statutory machinery constructed for the proper administration of insolvent estates. No dispute about the occasion for any committal concerns it. The parties to that are private individuals, the trustee and the creditors on one side, the insolvent and recalcitrant witnesses on the other, between whom the presiding officer acts as a referee. The proceedings are open to the public. Legal representation is allowed. The person committed to prison, should that happen, can obtain a release at any time by undertaking to supply all the information required. If the undertaking is withheld, or furnished unsuccessfully, he or she may apply immediately to the High Court under section 66(5) for a discharge from custody, which it will grant on finding the committal to have been, or the continuing imprisonment to be, wrongful on any score. The application would doubtless be brought before and treated by it as a matter of urgency, in accordance with the practice invariably observed once personal liberty is at stake. A loss of liberty might admittedly have been suffered in the meantime. But the same occurs whenever someone arrested and detained on a criminal charge remains in custody until the opportunity arises for a release on bail, and longer still if bail is denied. Yet that can hardly be called detention without trial. Even so brief a period of imprisonment would be avoided by a witness, however, were the presiding officer or the High Court itself to suspend forthwith

the warrant of committal, pending its decision on the application. That course was followed in this very case, after all, and is highly likely to be taken in all similar ones.

[117] I therefore conclude that, whether or not the presiding officer is a magistrate, an imprisonment ordered in terms of section 66(3) cannot rightly be stigmatised, for the purposes of section 12(1)(b), as a detention without trial.

[118] A word or two had better be said in that connection about *Nel v Le Roux NO and Others,*[2] where we considered section 189 of the Criminal Procedure Act (51 of 1977) which provided for the imprisonment of recalcitrant witnesses in criminal proceedings. One of the criticisms levelled at the section was that it allowed a witness to be "detained without trial", a remedy likewise prohibited by section 11(1) of the interim Constitution (Act 200 of 1993). We seem to have accepted that an imprisonment might fall foul of section 11(1) in circumstances not going the length of the infamous detentions that I have described. But the supposition does not obstruct me from taking a different view now since, in the particular circumstances postulated by section 189, we dismissed the objection in any event.

[119] Nor, to my mind, is our earlier judgment in point anyhow. Section 189 has a dual purpose, coercion in the first place and punishment in the second. The imprisonment

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2 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

which it sanctions is specifically called a "sentence" in four places and "punishment" in one. That is something meted out only in a criminal trial and by the court hearing it. A committal in terms of section 66(3), on the other hand, cannot truly be rated as punishment. Its object is not that, but coercion alone. That is why the intended duration of the imprisonment lasts until the coercion works whereas, whenever imprisonment punishes, its period is fixed in advance. Punishments are imposed for crimes. Section 66(3) creates none. That is done elsewhere, in section 139(1) of the statute which makes it an offence to behave in a way warranting a committal and prescribes a sentence of imprisonment as one that may be passed on the offender, even if the same conduct has resulted already in his or her prior imprisonment under section 66(3). Yet double punishment can scarcely have been envisaged. Imprisonment is common, to be sure, to committals and punishments. But it is all they have in common. To equate them on that account would sound rather like regarding the penalties exacted by customs and revenue officials as the fines resembled in their effect, and therefore as punishments.

[120] The conclusion to which I have come disposes straight away, in my opinion, of the reliance placed by counsel on section 12(1)(b). I ought to comment nevertheless on an important consideration that the reasoning of Ackermann J takes into account under the same heading. It is the general principle, which I accept without question, that nobody should be deprived of personal liberty in a manner that is procedurally unfair.

[121] In examining whether imprisonment under section 66(3) meets that requirement I do not think it necessary to classify either the committals or the enquiries leading to them as judicial, quasi-judicial or administrative proceedings, since the principle operates whichever label they may aptly bear. Nor do I find it helpful to investigate what is done in foreign jurisdictions about recalcitrant witnesses, or even how other statutes of ours deal with coercion when the need for its use arises within their areas. Such investigations may tend to distract our attention from where it should now be focussed, on the particular purposes that section 66(3) has been designed to achieve and on the particular circumstances prevailing in this country which are relevant to those purposes. In that situation, I believe, the threat of a subsequent prosecution under section 139(1) would not suffice by itself as coercion, however satisfactorily its counterparts may happen to work elsewhere. Here the threat is too remote. The notorious delays in the progress of prosecutions see to that, delays which were experienced even before the current congestion in the criminal courts prolonged them and, given our systems and procedures, are likely to remain inevitable despite any reduction in their duration that may realistically be expected. One cannot safely brush aside the delays as mere inconveniences. They would gravely damage the efficient administration and liquidation of insolvent estates if we had to rely on the prospect of prosecutions as the sole means by which witnesses might be compelled to co-operate in the process. A threat much more immediate is essential, a swift one taking effect before assets of the estate disappear or information about its affairs becomes unobtainable.

[122] The use of committals rather than prosecutions in the endeavour to overcome recalcitrance has the result, of course, that the coercion thus exerted is not controlled by the safeguards against procedural unfairness which are prescribed for criminal trials. That does not mean, however, that witnesses threatened with committals enjoy no such protection. For the common law entitles them to the procedural fairness on which the rules of natural justice insist.[3] Those certainly cover the right to be told precisely what is wanted of them in case they do not realise that already from the history of their attendance, the right to be warned about the potential consequence of not complying, the right of each to oppose the application for a warrant, and his or her right to be heard in opposition to the application. To that list the statute adds, in section 65(6), the right to be legally represented during the proceedings and, in section 66(5), the right of recourse to the judiciary in the event of a committal. I can therefore see nothing unfair in the way in which the proceedings are required or allowed to be run. Nor does Ackermann J, not surprisingly since he finds no fault with committals ordered by magistrates and the procedure followed then is exactly the same as that observed whenever others officiate.

[123] Ackermann J believes it to be procedurally unfair, even so, for anybody but a magistrate to issue a warrant of committal. His reason has to do with the very source of the decision. He considers that, in accommodating the performance by others of so grave

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3 Cf *Schulte v Van der Berg and Others NNO* 1991 (3) SA 717 (C) at 720 A-B; *Receiver of Revenue, Port Elizabeth v Jeeva and Others; Klerck and Others NNO v Jeeva and Others* 1996 (2) SA 573 (A) at 579 I-J.

a function, the structure for the conduct of the proceedings is intrinsically flawed because it does not conform to a couple of cardinal principles, the separation of powers and the rule of law.

[124] The separation between the executive and the judiciary is not total in South Africa. We need look no further than the magistracy to see a striking illustration of an overlap. Besides their judicial work magistrates attend to a host of administrative tasks that fall within the exercise of executive power, moving readily and frequently from the bench to the bureaucracy and back.

[125] Ackermann J maintains, however, that sending people to jail should always be the function of the judiciary alone; that the reason lies in the judicial independence and impartiality which is fundamental to the separation of powers, indeed to the rule of law itself; that presiding officers who are not drawn from the ranks of the magistracy possess no such qualities; and that both principles are harmed by their lack of those in issuing warrants under section 66(3). That seems to concentrate on form at the expense of substance. Presiding officers situated outside the magistracy are unlikely to be less independent or impartial in doing their duty than those located within it. They, like magistrates, must make up their own minds about committals. Not to do so, but to obey the instructions, succumb to the pressure or defer to the wishes of departmental superiors, would be an improper exercise of their powers and a reviewable irregularity. It seems

fanciful, in any event, to imagine a superior wanting to influence the decision of a presiding officer on the case for a committal. The executive has no interest to promote or protect in that area. And no reason of policy, good or bad, suggests why it should care what happens there. Then one has the ultimate safeguard against an irregularity of that or any other sort, which is the immediate opportunity for an approach to the High Court and the consequent intervention of the judiciary. In all those circumstances, I consider, section 66(3) contains nothing that infringes or imperils either the rule of law or the doctrine of separate powers.

[126] No dangerous precedent would be set, in my opinion, by a ruling along the lines that I accordingly favour. Interferences with personal liberty are always scrutinised intensively and controlled strictly by this Court and others. Section 12(1)(a) ensures that the supervision will continue. It will be exercised in accordance with the merits or demerits of each particular interference. So nobody need fear that such a ruling might be applied in the future to any case distinguishable from the present one.

for J. Didcott
A Cachalia

Kriegler J concurs in the judgment of Didcott J.

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Heard on: 20 November 1997

Decided on: 28 May 1998

JUDGMENT

MOKGORO J:

[127] My views have been informed by the opportunity I have had to read the judgments of Ackermann, Didcott, O'Regan and Sachs JJ. I respectfully disagree with the view of Didcott J that section 66(3) of the Insolvency Act[1] (the Act) is wholly unobjectionable.

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[1] Act 24 of 1936.

However, I associate myself with much in his interpretation (and Sachs J's intimations in that direction[2]) of section 12(1)(b),[3] and to the extent that he construes "detention without trial" to have a particular historical and political meaning,[4] I agree with his view. Like O'Regan J, though, I am also in respectful disagreement with the view of the matter taken by Ackermann and Sachs JJ: I do not in these circumstances distinguish between judicial officers officiating under appointment of the Master in quasi-judicial proceedings, and non-judicial appointees of the Master officiating in a similar capacity.[5] This case is in my respectful opinion not about office, but about process. I however have a narrow point of disagreement with O'Regan J. Whereas her emphasis is on a judicial forum where fairness is presumed, my emphasis is more centrally on the fairness required of process, regardless of office or forum. In arriving at the same decision as she does, I have merely taken a different route which I will explain below.

[128] Section 12 protects the freedom and security of the person. I hold it as uncontroversial that a decision which deprives persons of their freedom or their security is policed by at least the twin notions of procedural and substantive fairness. Procedural fairness ordinarily refers to the manner in which a decision is made, and it involves scrutinising the steps that are followed and the checks and balances put in place prior to

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2 At paras 172-3.

3 Of the Constitution of South Africa, 1996. See quotations and references to s 12(1) at paras 15-6 of Judge Ackermann's judgment.

4 At paras 115-7.

5 See for example at paras 59-61, 75.

the decision being taken. The notion of substantive fairness, I believe, is a tool that generally helps us to focus our attention on the reason, grounds or basis of the decision. Considerations of procedural and substantive fairness are therefore instruments that operate in an interactive way to protect an adjudicator from the real possibility of making an unjust decision. Procedural fairness is a hedge that society places around public decision-making[6] in an effort to ensure that the rule of law is upheld and seen to be upheld. Where an interest of paramount importance is at issue, then stringent procedures are called for: indeed, we expect them to be more precise than when a lesser interest is implicated, and our contemplation of the substance of the matter will influence our attitude toward the procedure required. It may, however, be stated that while there are often clear examples of substantive and procedural issues that might be contrasted, sometimes the line is too fine to be drawn.

[129] The notions of procedural and substantive fairness accord with virtually universally held views on the subject, and were already well-established principles of justice in our pre-constitutional era.[7] These principles, then and even more so now, are respectful of the fundamental premise that decisions affecting paramount human interests be made for good reason and in a fair manner. In giving meaning to section 11(1)[8] of the interim Constitution,[9] this Court upheld this viewpoint in the cases of *Bernstein and*

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6 For example, the decision to dismiss an employee must comply with both standards.

7 See for example Baxter, L *"Administrative Law"* (Juta & Co Ltd, Johannesburg, 1984) p 541-68.

8 The precursor to section 12 in the 1996 Constitution. See paras 15-6 of the main judgment.

9 Constitution of the Republic of South Africa Act 200 of 1993.

others v Von Wielligh Bester NO and others,[10] *S v Coetzee & others*,[11] and *Nel v Le Roux NO and others*.[12] The dicta in these cases are succinctly set out in paragraphs 17 to 21 of the judgment of Ackermann J and I refer to them as they are cited therein so far as they develop the point that fairness in adjudication includes considering both the merits and the process. However, I do not come to the same interpretive conclusion as to the necessary construction to be placed on section 12(1)(b) of the 1996 Constitution that that judgment does.

[130] Whether procedural and substantive fairness are implicit in section 12(1) as a whole or not,[13] I find them at least present in the specified inclusion of section 12(1)(a) which provides that:

> "12.(1) Everyone has the right to freedom and security of the person, which includes the right -
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> (a) not to be deprived of freedom arbitrarily or without just cause;"

I agree with the view that the phrase "without just cause" constitutes the substantive fairness leg of the inquiry, but go further to find in the requirement "not to be deprived of freedom arbitrarily" the additional constitutional protection of procedural fairness, subject, of course, to the knowledge that it is sometimes difficult to draw a clear distinction between what is procedural and what is substantive.

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10 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC).

11 1997 (4) BCLR 437 (CC); 1997 (3) SA 527 (CC).

12 1996 (4) BCLR 592 (CC); 1996 (3) SA 562 (CC).

13 See paragraph 22 of the main judgment for the way in which the majority handle this issue.

[131] When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own matter[14] and that the other side should be heard,[15] aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone is entitled to an impartial judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation. When the clear basis for committing a person to prison is coercive rather than punitive, warning lights begin to flash.

[132] Procedural fairness is, however, not confined to the twin maxims referred to

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14 "*Nemo iudex in sua causa*".

15 "*Audi alterem partem*".

above.[16] The exact content has eluded judicial definition. In *Van Huyssteen v Minister of Environmental Affairs and Tourism*,[17] Farlam J considered its content for the purpose of Administrative Justice. While interpreting the content of section 24(b) of the interim Constitution,[18] he came to the conclusion that:

> ". . . a party entitled to procedural fairness under the paragraph is entitled, in appropriate circumstances, to more than just the application of the *audi alterem partem* and the *nemo iudex in sua causa* rules. What he [or she] is entitled to is, in my view, what Lord Morris of Borth-y-Gest described as 'the principles and procedures . . . which, in (the) particular situation or set of circumstances, are right and just and fair'."

Whatever its precise content, the interest implicated will determine the standard of procedural fairness. If the interest implicated is as important as personal liberty, the standard of procedural protection must be high.

[133] The disturbing consequence[19] that section 66(3) of the Act has is that a person arraigned in the Act's terms may be confined to prison, or have the confinement renewed

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16 See note 14 and 15 above.

17 1996 (1) SA 283 (C), at 304-6. See the authorities mentioned therein.

18 This section provides:

> "24. Administrative Justice. - Every person shall have the right to -
> (a) . . .
> (b) Procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
> (c) . . .
> (d) . . ."

19 For an interpretation of the way in which section 66(3) operates within the context of the Act more generally, see paras 13-4; 33-5 of Ackermann J's judgment, but especially paras 144-7, and 150 of the judgment of O'Regan J.

in circumstances where the usual safeguards that imprisonment would demand are not afforded the examinee. The imprisonment may be for an indeterminate period. There is no process of automatic review.[20] It occurs in a summary fashion where there has not been adequate time to prepare.[21] And since this is not a criminal trial there is no constitutional right to legal representation at State expense, notwithstanding the fact that the imprisonment, something ordinarily reserved for criminal sanction, occurs.[22] Whether these factors are procedural or substantive is not the important consideration. What is important is that the section 66(3) process does not allow for sufficient or adequate safeguards before inroads are made into an important right such as freedom and security of the person. The sum of all these factors is sufficient to constitute a violation of the right, in my view.

[134] In scrutinising other statutes for equivalent provisions relating to the way in which contempt of proceedings is dealt with,[23] one observes that in every instance where the

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20 In section 302-4 of the Criminal Procedure Act 51 of 1977, for example, the statute provides for automatic review of sentences that include imprisonment for a period longer than three months if the judicial officer has not held the rank of magistrate or higher for a period of seven years; or six months if the judicial officer has held the rank of magistrate for longer than seven years.

21 The examinee attends the meeting with the knowledge that he or she will be required to answer questions lawfully put to him or her, and is able to prepare on those issues. However, under section 66(3), he or she is imprisoned, not for an answer given, but for an unwillingness to provide an answer.

22 Any guarantee of legal representation during the proceedings is subject to the common-law advances on the interpretation of what constitutes procedural fairness, having regard to the fact that such an important interest is concerned.

23 I referred to the following statutes: Magistrates Court Act 32 of 1944; Supreme Court Act 61 of 1984; Heraldry Act 18 of 1962; Publications Act 42 of 1974; Commission on Gender Equality Act 39 of 1996; Independent Electoral Commission Act 150 of 1993; Powers and Privileges of Parliament Act 91 of 1963; Abolition of Civil Imprisonment Act 91 of 1963; Credit Agreements Act 75 of 1980; Constitutional Court Complementary Act 13 of 1995; Vexatious Proceedings Act 3 of 1956; Financial

forum which was held in contempt was something other than a court of law, the statute first creates an offence, and only after procedural safeguards afforded by a trial and conviction before a court of law, is the offender liable to imprisonment. The formula replicates itself again and again: contempt is offensive, so offensive that it may result in incarceration, but only after the intervention of a properly constituted trial procedure which is seen to be fair for the purposes of incarceration.[24] While I do not hold that only a court of law can uphold procedural fairness required by my interpretation of section 12(1)(a), what is clear is that these other statutes require the intervention of a fair trial procedure prior to confinement, which is not the case with section 66(3). Instances of detention[25] in the absence of a criminal conviction authorised in our law might fall into at least two identifiable categories: on the one hand there are the well-known instances of arrest that precede a trial. Here the person *must* be brought to trial or else released, and a court of law, again with the safeguards of fair procedure, decides on the conditions of a continued confinement if there is to be any. On the other hand, there are those instances, other than those where it occurs for the reasons set out in the interpretation of

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Markets Control Amendment Act 74 of 1996; Prevention of Public Violence and Intimidation Act 139 of 1991; Child Care Act 33 of 1960; 74 of 1983; Income Tax Act 58 of 1962; Labour Relations Act 66 of 1995; Development Facilitation Act 67 of 1995; Land Reform (Labour Tenants) Act 3 of 1996; Restitution of Land Rights Act 22 of 1994; Human Rights Commission Act 54 of 1994; Public Protector Act 23 of 1994; Water Act 54 of 1956; Defence Act 44 of 1957; Promotion of National Unity and Reconciliation Act 34 of 1995 and the Pension Funds Act 44 of 1957.

24 The application of procedural fairness required in adjudication, as was considered in *Bernstein*, above n 10 and *Nel*, above n 12, and developed by our common law, would require fair administrative procedure to be applied in administrative proceedings and fair trial procedures in criminal proceedings.

25 Here I referred to: Magistrates Court Act 32 of 1944; Supreme Court Act 61 of 1984; Aliens Control Act 96 of 1991; Aliens Control Amendment Act 76 of 1995; Health Act 63 of 1977; Mental Health Act 18 of 1973.

detention without trial in terms of section 12(1)(b) and analysed in the judgment of Didcott J, where persons can be detained without any prospect of a trial. These are also the well known instances of prohibited aliens,[26] mental patients[27] or persons placed under quarantine.[28] In these instances, each confinement is limited in time to establish a procedure that regulates the fairness or otherwise of any continued confinement. In the case of the first-mentioned category, a prohibited immigrant may only be held for a maximum period of forty-eight hours.[29] He or she is then to be released, unless the detention is for purposes of deportation, in which case the period of detention is limited to thirty days. Any extension will then only be granted on the approval of a High Court Judge, where subsequent identical renewals will be required every ninety days. In the case of detainees in terms of the Mental Health Act,[30] they may only be detained on the strength of a reception order issued by a magistrate, where the validity of the order is limited to a maximum period of forty-two days. In addition, a magistrate may only issue the reception order after satisfying himself or herself as to the jurisdictional facts, while being assisted by two medical practitioners. Persons placed under quarantine[31] are released as soon as the danger of infection is passed, and it is at least tenable to draw a distinction in this case on the strength of the danger to the public that communicable

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26 As defined by the Aliens Control Act 96 of 1991.

27 In terms of the Mental Health Act 18 of 1973.

28 Under the provisions of the Health Act 63 of 1977.

29 Above n 26, section 55.

30 Above n 27, sections 9-11.

31 In terms of a regulation passed under the powers granted by section 33 of the Health Act, above n 28.

diseases present. Without pronouncing on their constitutionality, a comparison of these procedures with the one created by the Insolvency Act, shows that they seem to differ in important respects, namely the duration of the imprisonment, and the safeguards that surround the detention.

[135] This Court had the occasion to examine provisions in relation to contempt proceedings in *Bernstein*[32] and *Nel*.[33] Passages in those judgements purport to require that a benevolent construction be given to the provisions of statutes.[34] Application of this principle allows for, for example, the following statement in *Nel*:[35]

> "This illustrates a conceptual confusion which characterised the applicant's argument in other respects as well. The only issue before us is whether, on a proper construction of section 205, it expressly or by necessary implication infringes any of the rights relied upon by the applicant. If the section, properly construed, compels the presiding officer to act or apply the provisions in a way which would infringe any of the rights relied upon, then the constitutionality of the section in respect of that right is properly before us. This would also be the case if the presiding officer were prohibited by the section from acting or intervening in a way which would prevent a particular infringement which would inevitably follow in the absence of such intervention. What is certainly *not* before us is a consideration of a multitude of questions relating to hypothetical decisions or rulings

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32 Above n 10.

33 Above n 12.

34 *Bernstein* above n 10 at paras 43 to 47; *Nel* above n 12 at paras 16 to 22.

35 Above n 12, para 18.

> which may (not must) be made in applying the provisions of section 205 and the question whether such *rulings* or *decisions* would or might infringe any of the examinee's Chapter 3 rights or not."

And in *Bernstein*[36] it was expressed as follows:

> "I have no doubt that our Supreme Courts will continue to develop that body of law having due regard to the spirit, purport and objects of the Constitution's chapter of fundamental rights. It is accordingly not open to argue that, because the provisions of sections 417 and 418 are general in terms and contain no express limitations as to their application, the constitutionality of these sections is to be adjudicated on the basis that they permit anything which is not expressly excluded. It is trite law that a statutory power may only be used for a valid statutory purpose. The constitutionality of sections 417 and 418 must therefore be assessed in the light of the control which the Supreme Court exercises over their implementation."

There are, however, important differences between a meaning that might be attributed to these statements, and their interpretation within the context of the 1996 Constitution. Section 35(2) of the interim Constitution states that:

> "No law which limits any of the rights entrenched in this Chapter shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be

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36 Above n 10, para 46.

> construed as having a meaning in accordance with the said more restricted interpretation."[37]

This section required that law be looked at through a particular lens in the construction of its meaning. It was a manifestly benign lens. However, no such similar provision is to be found in the interpretive injunctions of section 39 of the 1996 Constitution which is now applicable. Instead, section 39(2) is less permissive:

> "When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit purport and objects of the Bill of Rights."[38]

At this stage I wish only to say that "promoting" is not equivalent to "reading in". If that were so, many statutes would not have been invalidated. Furthermore, the problem with the section 66(3) process is that its valid purposes are different from and more intrusive than the procedures considered in *Bernstein* and *Nel*. Even if the section 66(3) procedure is used for its valid purposes as the common law or our constitution requires, its standard of safeguards simply fails the test for the protection of personal liberty.

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37 Ackermann J, above n 14, section 35(2).

38 I agree that Section 35(3) of the interim Constitution may have a similar effect to section 39(2), but absent the assistance of the equivalent of section 35(2), the construction of section 39(2) under the 1996 Constitution is substantially weaker, in my view, than section 35(3) under the interim Constitution.

[136] In *Bernstein*[39] contempt of proceedings in terms of section 417 and 418 of the Company's Act[40] constituted an offence.[41] Only after conviction for the offence could the person in contempt be imprisoned. It thus fits the formula for confinement described above, and is therefore distinguishable from the section 66(3) procedure . It also complies with the sentiments in relation to the necessity of a fair procedure expressed in this judgment. In that decision we held:

> "The sanction of imprisonment for ignoring, or failing without sufficient cause to give effect to a subpoena issued under section 417 or 418 of the Companies Act, is a reasonable and necessary sanction. So too is the power to cause a person in breach of such a subpoena to be arrested and brought before the Master or other person appointed to

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39 Above note 10.

40 Act 61 of 1973.

41 In particular, subsection 5 of section 418 of Act 61 of 1973 provides:

> Any person who -
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> (a) has been duly summoned under this section by a Commissioner who is not a magistrate and who fails, without sufficient cause, to attend at the time and place specified in the summons; or
> (b) has been duly summoned under section 417 (1) by the Master or under this section by a Commissioner who is not a magistrate and who-
>
> (i) fails, without sufficient cause, to remain in attendance until excused by the Master or such Commissioner, as the case may be, from further attendance;
> (ii) refuses to be sworn or to affirm as a witness; or
>
> (iii) fails, without sufficient cause -
> (aa) to answer fully and satisfactorily any question lawfully put to him in terms of section 417 (2) or this section; or
> (bb) to produce books or papers in his custody or under his control which he was required to produce in terms of section 417 (3) or this section,
>
> shall be guilty of an offence.

conduct the enquiry. *Imprisonment follows in accordance with the normal procedural safeguards, therefore neither section 11(1) nor section 25 is impaired*; and it is not a sanction which is disproportionate to the offence, therefore sections 11(1) and 11(2) are not impaired. The sanctions are necessary to enforce the legislation, and in so far as they have to comply with Section 11(1) read with Section 33, they clearly do so."[42] (My emphasis).

[137] In *Nel*,[43] dealing with section 205 of the Criminal Procedure Act, and therefore under circumstances and within a context where fair procedure obtained, we held:

"The section 11(1) right relied upon by the applicants is the "right not to be detained without trial.".The mischief at which this particular right is aimed is the deprivation of a person's physical liberty *without appropriate procedural safeguards*." (My emphasis)

Leaving open the question of what constituted appropriate procedural safeguards, *Nel* further held:

"It is unnecessary for purposes of this case to decide whether this "entity" to which I have referred must in all cases be a judicial officer who ordinarily functions as such in the ordinary courts."[44]

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42 Above n 10, para 55.

43 Above n 12, para 14.

44 Above n 12, para 15.

However, it is the pattern of Ackermann J's judgment in the instant case that seeks to conclude that this entity must be a judicial officer that I have disagreement with: I reaffirm that this case is about process and not office. The light by which I navigate this case is captured in the saying of Lord Acton that "[t]here is no worse heresy than that the office sanctifies the holder of it".[45] The mere fact without more, that a person committing the recalcitrant witness to prison is in name a judicial officer, in my view, is, in itself, not an adequate safeguard that the committal is acceptable in an open and democratic society that has such high regard for individual liberty. While it is true that the "judicial authority of the republic vests in the courts",[46] that is so, not due to the presence of the judicial officers, but because of the rule of law which is upheld there. Any normative procedure of a court that does not comply with the rule of law loses its legitimacy, and in so undermining the rule of law, may well infringe section 12.[47] This is because process has both instrumental and intrinsic value.

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45 See Collins *Dictionary of Quotations*, Jeffares and Gray (ed) (Harper-Collins, Glasgow 1995) page 1.

46 Section 165 of the 1996 Constitution,

47 The Courts mentioned in section 166 of the 1996 Constitution, and a court created in terms of section 166(e), for example, whose formal procedures flagrantly disregard the principles of natural justice for the purposes of confinement would offend, in my opinion, the content of section 12 of the Constitution, and may be unconstituional, notwithstanding the fact that its presiding officers were accorded the status of judicial officers.

In connection herewith, the dicta in *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) para 10, although made in a different context, is telling:

> "No legal system can guarantee that no innocent person can ever be convicted. Indeed, the provision of corrective action by way of appeal and review procedures is an acknowledgement of the ever-present possibility of judicial fallibility. Yet it is one thing for the law to acknowledge the possibility of wrongly but honestly convicting the innocent and then provide appropriate measures to reduce the possibility of this happening as far as is practicable; it is another for the law itself to heighten the possibility of a miscarriage of justice by compelling the trial court to convict where it entertains real doubts as to culpability and then to prevent the reviewing court from altering the conviction even if it shares in the doubts."

[138] Accordingly, Section 66(3) infringes section 12(1)(a) and it now remains to seek grounds of justification in favour of permitting this infringement. As has been so regularly affirmed by this Court, the policy considerations that are relevant in the justification process are to be balanced in a reasonable and justifiable way, taking into account all the relevant factors, and especially those enumerated in section 36(1).[48] The right whose boundary is trespassed secures values of great importance: there are surely few human interests that are more important than physical security and freedom of the person. The purpose of the limitation being argued for here boils down to one of commercial substance: while not seeking to undermine the legitimacy of the purposes of the Insolvency Act in general, what does it say of a society when commercial interests weigh heavier than personal liberty and security? It surely does not matter that the person is in fact a miserable thief or an embezzler of other people's money: the means by which the limitation of a right-holder's personal liberty occurs can be more judiciously guarded.

[139] In this particular case, several less intrusive means present themselves: for example, the questions that an examinee fails to answer can be dealt with in the way that other statutes do.[49] Admittedly creating a separate offence and going through the trial procedure may not expedite the process, but it is the price we pay for living in a society that has committed itself to the preservation of liberty. Alternatively, the legislature may

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48 See the discussion of this section in paragraph 163 of the judgment of O'Regan J. I however am cautious about concluding that section 36(1) is the equivalent of the test laid down in *S v Makwanyane* referred to therein.

49 It already does this in section 139(1) of the Act, see paragraph 14 and footnote 13 referred to therein.

opt for a model that could, in turn, expedite these procedures without great difficulty, with surely the equivalent coercive end-result, and in a way that matches the limitation's purpose in a manner consonant with the interest that the right protects.

[140] In the view that I take of the matter, my decision does not rest on the status or classification of the process as judicial or quasi-judicial.[50] The definitive difference between judicial and quasi-judicial proceedings is something that is not easy to settle upon. In *Rex v Beukman*,[51] after referring to the then existing authorities,[52] the learned Acting Judge held:

> ". . . it is clear from the decisions in our Courts that (a judicial proceeding) is not confined to proceedings in a Court of justice. . . . All these authorities indicate in my view that although the term "judicial proceedings" is not confined to proceedings in a Court of law yet it must refer to proceedings in which rights are legally determined and liability imposed by a competent authority upon a consideration of facts and circumstances placed before it."

In *S v Carse*[53] the learned judge states: "It is clear that judicial proceedings do not mean only proceedings in a court of law." These judgments therefore resist confining judicial

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50 O'Regan J for example finds that these proceedings are of an administrative nature by virtue of the fact that their primary purpose is an investigatory, or evidence gathering one.

51 1950 (4) SA 261 (O), at 263 E-F.

52 *R v De Beer* 1937 TPD 362; *R v Werner* 1939 EDL 41; *R v Asslam* 1936 CPD 527; *R v Hassa* 1939 NPD 161; *R v Bhayla* 1939 NPD 162; *Dabner v SAR&H* 1920 AD 583; *Hashe and Others v Cape Town Municipality and Others* 1927 AD 380.

53 1967 (2) SA 659 (C), at 665 A.

proceedings to proceedings before a court of law. I reiterate, with respect: this matter is not about forum; forum does not necessarily determine fair process.

[141] When responding to the question: "what is it about courts of law that justifies their being the site where far-reaching decisions are made ?", I find it difficult to accept that it is exclusively either the judicial status of their presiding officers or the nature of the forum that warrants the reverence we display toward them. Instead, in my view, it is the way procedure there serves the rule of law. In the case of the section 66(3) proceedings, however, the defining criteria here are the fairness or otherwise of the process under scrutiny, the nature of the right involved, and the existence of less intrusive means to effectively match means with end. Accordingly, but for the reasons set out in this judgment, I concur in the finding of O'Regan J that section 66(3) is unconstitutional.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/97

DOUGLAS MICHAEL DE LANGE	First Appellant
versus	
FRANCOIS J SMUTS NO	First Respondent
E M FREY NO (LIQUIDATOR, PAARL OLIVE FARMS CC)	Second Respondent
C R S GOODEN NO (LIQUIDATOR, PLATTENBOSCH FARMS CC)	Third Respondent
H M SANGIORGIO NO (LIQUIDATOR, TIERFONEIN BOERDERY CC)	Fourth Respondent
THE MASTER OF THE HIGH COURT	Fifth Respondent

Heard on: 20 November 1997

Decided on: 28 May 1998

JUDGMENT

O'REGAN J:

[142] I have had the opportunity of reading the judgment written by Ackermann J in this case. I agree with him that section 66(3) of the Insolvency Act, 24 of 1936 ("the Insolvency Act") is in conflict with the provisions of section 12 of the 1996 Constitution to the extent that it permits a person presiding over a creditors' meeting who is not a

judicial officer to order the imprisonment of a person who refuses to testify or produce documents to the meeting. He holds however, in paragraphs 76 to 83 of his judgment, that where a magistrate presides over the meeting of creditors, there is no breach of section 12. I am in respectful disagreement with this aspect of my colleague's decision for the reasons given in this judgment.

[143] Section 12(1) of the 1996 Constitution provides that:

> "Everyone has the right to freedom and security of the person, which includes the right –
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
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> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

I agree with Ackermann J at paragraph 22 of his judgment where he states that, amongst other things, this section protects individuals from the deprivation of physical freedom save where there is a good reason for the deprivation and where appropriate procedural safeguards exist. I also agree with Ackermann J that there can be no doubt that in this case there are good reasons for the deprivation of freedom which section 66(3) authorises. The real difficulty lies in the question of whether there are appropriate procedural safeguards accompanying that deprivation. Of course, there is no rigid rule as to what procedural safeguards are appropriate in the context of section 12(1). The procedural

safeguards required will depend on the nature of the deprivation and its purpose. It is necessary therefore to examine the nature of deprivation of freedom occasioned by section 66(3) as well as its purpose. This analysis requires an understanding of the role and nature of creditors' meetings in the insolvency process.

[144] The Insolvency Act requires that whenever a final order of sequestration has been granted two creditors' meetings be held.[1] The meetings are presided over either by the Master of the High Court, or a public service official designated by the Master, or a magistrate (in districts where there is no Master's Office) or an officer of the public service designated by a magistrate.[2] Notice of the meetings is given in the *Government Gazette*.[3] The purpose of the meetings is to permit creditors to appoint a trustee; to prove their claims against the insolvent estate; to provide the trustee with directions in connection with the administration of the estate and to receive the trustee's report.[4] The presiding officer may summon any person to the meetings whom the officer considers may be able to give material information concerning the insolvent or his or her affairs.[5] The presiding officer may administer the oath to persons summoned in this way and permit the trustee or any creditor who has proved a claim against the estate to interrogate

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1 Section 40(1) of the Insolvency Act, 24 of 1936. Other creditors' meetings may also be held in terms of sections 41 and 42 as well as section 119(5) of the Insolvency Act.

2 Section 39(2) of the Insolvency Act, 24 of 1936. In a district where there is no Master's office, and the magistrate does not preside, the presiding officer must note the reason for the magistrate's absence (section 39(4)).

3 Sections 40(1) and (2) and section 40(3)(b) of the Insolvency Act, 24 of 1936.

4 Sections 40(1) and (3) of the Insolvency Act, 24 of 1936.

5 Section 64(2) of the Insolvency Act, 24 of 1936.

such person concerning all matters relating to the insolvent or his or her affairs. The presiding officer must disallow any irrelevant question.[6]

[145] Where a person summoned to the meeting attends, but fails to bring the required documents, or refuses to be sworn in as a witness by the presiding officer, or refuses to answer a particular question put to her or him, or does not answer the question fully or satisfactorily, section 66(3) empowers the presiding officer to issue a warrant committing that person to prison until he or she has undertaken to do what is required.[7] Section 66(4) then provides that a person may be repeatedly imprisoned as often as may be necessary to compel the person to do what is required of him or her.

[146] Section 66(5) permits a person who has been imprisoned in terms of section 66(3) to apply to a High Court for discharge from custody. The court is empowered to order the discharge if it finds that the person was wrongfully committed to prison or is being wrongfully detained. Section 66(6) confers a judicial immunity upon any presiding officer of a creditors' meeting who exercises the powers of committal conferred upon the officer by section 66.

[147] There can be no doubt that the power conferred upon presiding officers of

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6 Section 65(1) of the Insolvency Act, 24 of 1936.

7 It should be observed that in *Nieuwoudt v Faught NO en Andere* 1987 (4) SA 101 (C) at 109, Tebbutt J held that section 66(3) contains a requirement of unwillingness by the witness, not merely a failure to testify.

creditors' meetings is an extraordinary one.[8] It is the power to imprison a person indefinitely until that person complies with what is required of him or her. The purpose of imprisonment, in these circumstances, is not punishment but coercion. The power to order the summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite imprisonment for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of section 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case, there is no dispute that the purpose is a legitimate one. It also seems necessary and proper however for the exercise of the power to be accompanied by a high standard of procedural fairness.

[148] In *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC), this Court had to consider the question of whether section 205,[9] read with section

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[8] See the discussion, for example, in Discussion Paper 66 of the South African Law Commission, Project 63 *Review of the Law of Insolvency — Draft Insolvency Bill and Memorandum* published on 15 November 1996 at paras 4.6, 65.18, and 101.10. The draft Bill proposed by the Commission omits the powers contained in section 66(3).

[9] Section 205 of the Criminal Procedure Act provides that:

> "(1) A judge of the supreme court, a regional court magistrate or a magistrate may, subject to the provisions of subsection 4, upon the request of an attorney-general or a public prosecutor authorized thereto in writing by the attorney-general, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the attorney-general or the public prosecutor authorized thereto in writing by the attorney-general, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the attorney-general or public prosecutor concerned prior to the date on which he is required to appear before a judge, regional court magistrate or magistrate, he shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

189[10] of the Criminal Procedure Act, 51 of 1977 was in breach of section 11(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim Constitution"). As Ackermann J has outlined in his judgment at paragraphs 15 - 16 and 22 - 24 above, section 11(1) entrenched the right to freedom and security of the person in slightly different terms to the provisions of section 12 of the 1996 Constitution. The

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(2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).
(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.
(4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order."

[10] Section 189 of the Criminal Procedure Act provides as follows:

"(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.
(2) After the expiration of any sentence imposed under subsection (1), the person concerned may from time to time again be dealt with under that subsection with regard to any further refusal or failure.
(3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1).
(4) Any sentence imposed by any court under subsection (1) shall be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case by such court, and shall be served before any other sentence of imprisonment imposed on the person concerned.
(5) The court may, notwithstanding any action taken under this section, at any time conclude the criminal proceedings referred to in subsection (1).
(6) No person shall be bound to produce any book, paper or document not specified in any subpoena served upon him, unless he has such book, paper or document in court. (7) Any lower court shall have jurisdiction to sentence any person to the maximum period of imprisonment prescribed by this section."

applicant in that case argued that the procedure in section 189 was unconstitutional in that it authorised a magistrate to sentence a recalcitrant witness to imprisonment after the magistrate has enquired into the refusal "in a summary manner". In particular, the applicant argued that the procedure permitted by section 189 did not constitute a "trial" and that therefore the section permitted "detention without trial" in breach of section 11(1) of the interim Constitution. Ackermann J speaking for a unanimous court dismissed this argument in the following way:

> "[14] The s 11(1) right relied upon by the applicants is the 'right not to be detained without trial'. The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards. In its most extreme form, the mischief exhibits itself in the detention of a person pursuant to the exercise by an administrative official of a subjective discretion without any, or grossly inadequate, procedural safeguards. The nature of the fair procedure contemplated by this right will depend upon the circumstances in which it is invoked. The 'trial' envisaged by this right does not, in my view, in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in s 25(3) of the Constitution. In most cases it will require the interposition of an impartial entity, independent of the Executive and the Legislature to act as arbiter between the individual and the State.
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> [15] It is unnecessary for purposes of this case to decide whether this 'entity' to which I have referred must in all cases be a judicial officer who ordinarily functions as such in the ordinary courts. As far as s 205 of the Criminal Procedure Act is concerned the entity is indeed a normal judicial officer who ordinarily functions in the ordinary courts. The 'court' before which the s 205 enquiry takes place is in every material respect, particularly insofar as its independence and impartiality is concerned, identical to the 'ordinary court of law' envisaged by s 25(3) of the Constitution."

[149] The procedure authorised by section 205 of the Criminal Procedure Act is quite

different from a meeting of creditors convened in terms of the Insolvency Act. Section 205 is part of the criminal justice system which seeks to ensure that persons who may be in possession of material or relevant information concerning alleged criminal offences can be compelled to make that evidence available. It serves an important function in our criminal justice process in relation to the investigation of crime. It also contains safeguards to limit the extent to which it prejudicially affects the rights of citizens.[11] Similar procedures to facilitate the investigation of crime also exist in other countries.[12] As Ackermann J held in *Nel*'s case, cited above, the court in section 205 "is in every material respect, particularly insofar as its independence and impartiality is concerned, identical to the 'ordinary court of law' envisaged by s 25(3) of the Constitution".

[150] Creditors' meetings, on the other hand, are part of a process to regulate insolvency. The primary function of the meetings is to attend to the proof of claims by creditors. A decision by a presiding officer not to admit a claim is not final. A creditor can submit it once again at a later meeting of creditors, or he or she can seek relief in a court.[13] In addition to the business of the proof of claims, the meeting may engage upon an investigation of the affairs of the insolvent. Any person who in the opinion of the presiding officer may be able to provide material information concerning the affairs of the insolvent may be required to do so. This investigative aspect of creditors' meetings

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11 See section 205(4) and the judgment of Ackermann J in *Nel v Le Roux NO* at paragraph 20.

12 Id at paragraph 22.

13 Section 44(3) of the Insolvency Act.

is a fact-finding process aimed at identifying assets of the insolvent. It can be likened to many fact-finding processes authorised by our law in a wide range of circumstances. It is therefore correct to understand a creditors' meeting as an administrative or quasi-judicial proceeding, rather than judicial proceedings, and our courts have so held on several occasions.[14] It is extremely rare as I outline below, not only in our law, but in other jurisdictions as well for agencies exercising such powers to be granted summary powers of imprisonment to coerce information from unwilling witnesses.

[151] In *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC), we were concerned with a challenge to the provisions of sections 417 and 418 of the Companies Act, 61 of 1973. We concluded that those provisions were not in conflict with the provisions of the interim Constitution. Section 418(2) of the Companies Act provides that:

> "A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417."

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14 See *S v Carse* 1967 (2) SA 659 (C) at 664H - 665A; *Joel Melamed and Hurwitz v Simmons NO and Others* 1976 (4) SA 189 (T) at 195B, though see *R v Werner* 1939 EDL 41 and discussion of that case in *S v Carse* at 665. In relation to the similar but not identical proceedings in terms of section 418 of the Companies Act, 61 of 1973, see *Receiver of Revenue, PE v Jeeva and Others; Klerck and Others NNO v Jeeva and Others* 1996 (2) SA 573 (A) at 579I.

Although not expressed in the same terms as section 66(3) of the Insolvency Act,[15] there are obvious similarities between the powers contained in the two sections. I agree with Ackermann J where he states at paragraph 84 of his judgment in this matter that in that case this Court did not apply its mind to the argument that a magistrate who exercises powers under section 418(2) of the Companies Act is acting in an administrative and not a judicial capacity and therefore may not permissibly be clothed with powers to imprison witnesses who refuse to testify to coerce them to do so. The issue raised in this case therefore does not fall within the ambit of our judgment in *Bernstein.*

[152] Our common law concerning contempt of court has long recognised the power of courts of law to imprison people at least in part to coerce them to comply with court orders. As Steyn CJ held in *S v Beyers* 1968 (3) SA 70 (A) at 80C-E:

> "Dat daar 'n gevestigde prosedure bestaan waarvolgens 'n gedingvoerder wat 'n bevel teen sy teenparty verkry het, in sy eie belang bestraffing van sy teenparty weens minagting van die Hof kan aanvra om gehoorsaamheid aan die bevel af te dwing, val nie te betwyfel nie. Dit is 'n proses van tweeslagtige aard wat volgens sivielregtelike prosedures afgehandel word. (Vgl. *Afrikaanse Pers-Publikasie (Edms.) Bpk. v. Mbeki,* 1964 (4) S.A. 618 (A.A.) op bl. 626). In navolging van die Engelse reg word die minagting dan beskryf as siviele minagting. Dit is egter ewe duidelik dat hierdie vorm van minagting nie deurgaans 'n strafregtelike inhoud ontsê is nie. Dit word telkens beskryf en behandel as 'n misdaad met geen aanduiding dat dit anders as die gemeenregtelike minagting van die hof beskou word nie. Of dit in ooreenstemming met die Engelse reg is, is minstens te betwyfel, maar na my oordeel weinig ter sake, omdat die omskrywing van die misdaad in

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15 It is not clear, for example, precisely what powers a magistrate has in terms of section 418(2) to punish recalcitrant witnesses. It is clear that a Commissioner who is not a magistrate does not enjoy the powers conferred by section 418(2); see the judgment of Tebbutt J in *Van der Berg v Schulte* 1990 (1) SA 500 (C) at 507 and following.

ons reg nie deur die Engelse reg bepaal word nie."

[153] The common law powers of the courts have been repeated and in some circumstances[16] extended by statute. Section 31 of the Supreme Court Act, 59 of 1959 provides that when a witness refuses to testify without just excuse the court may adjourn the proceedings for eight days and issue a warrant committing the witness to prison for that period. Upon resumption of the proceedings, if the witness persists in his or her refusal, the proceedings may once again be adjourned for eight days and the witness once again committed to prison.[17]

[154] Section 108 of the Magistrates' Court Act, 32 of 1944 confers upon magistrates the power to punish persons for certain acts committed in the court room during court

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16 See, in particular, section 108 of the Magistrates' Courts Act, 1944 and the commentary thereon in Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 9 ed (Juta & Co Ltd, Kenwyn 1996) Volume 1 at 394.

17 The provisions of section 31 of the Supreme Court Act, 1959 apply to the Labour Court and Labour Appeal Court by virtue of the provisions of section 184 of the Labour Relations Act, 66 of 1995. Both these courts enjoy a status equivalent to the High Court and Supreme Court of Appeal respectively (see sections 151(2) and 167(3) of the Labour Relations Act). Section 31 of the Supreme Court Act provides in relevant part:

> "(1) Whenever any person who appears either in obedience to a subpoena or by virtue of a warrant issued under section *thirty* or is present and is verbally required by the court to give evidence in any civil proceedings, refuses to be sworn or to make an affirmation, or, having been sworn or having made an affirmation, refuses to answer such questions as are put to him, or refuses or fails to produce any document or thing which he is required to produce without any just excuse for such refusal or failure, the court may adjourn the proceedings for any period not exceeding eight days and may, in the meantime, by warrant commit the person so refusing or failing to gaol unless he sooner consents to do what is required of him.
> (2) If any person referred to in sub-section (1) again refuses at the resumed hearing of the proceedings to do what is so required of him, the court may again adjourn the proceedings and commit him for a like period and so again from time to time until such person consents to do what is required of him."

proceedings.[18] So a person who wilfully insults a magistrate during the court's sitting or interrupts the proceedings or "otherwise misbehaves" is liable to be sentenced summarily or upon summons to a fine not exceeding R2 000 or to imprisonment for a period less than six months. It may be that a refusal to answer a relevant question will constitute a breach of this section.[19] It is clear, however, that this power may only be exercised when magistrates are carrying out their judicial functions as magistrates in terms of the Magistrates' Courts Act and not when they are performing administrative or quasi-judicial functions allocated to them by other legislation.[20]

[155] Section 51(2) of the Magistrates' Courts Act also provides that a person who refuses to obey a subpoena to attend court may be fined R300 or imprisoned for three

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18 Section 108(1) provides that:

> "If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held, he shall (in addition to his liability to being removed and detained as in subsection (3) of section 5 provided) be liable to be sentenced summarily or upon summons to a fine not exceeding R2 000 or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine. In this subsection, the word 'court' includes a preparatory examination held under the law relating to criminal procedure."

A magistrates' court may not punish contempt of court summarily except as authorised by this section. However, it has jurisdiction over the common law offence of contempt of court when it is brought before it by way of a summons. *Duffey v Attorney-General, Transvaal and Another* 1958 (1) SA 630 (T) at 633D-F.

19 See *R v Nzima Vuta* 1914 EDL 192; *S v Sokoyi* 1984 (3) SA 935 (NC) at 943.

20 See *Bredenkamp v Magistrate of Lichtenburg* 1948 (4) SA 920 (T); *R v Botha* 1953 (4) SA 666 (C) at 668. See also, in the context of Commissioners' Courts, *S v Thooe* 1973 (1) SA 179 (O) at 180.

months.[21] It should be noted that in both section 108 and section 51(2) the extent of the punishment that may be imposed is limited and may not be of an indefinite duration as is permitted by section 66(3). On the other hand, section 189 of the Criminal Procedure Act[22] regulates the situation in criminal proceedings before magistrates. A witness who refuses to be sworn in or to answer a particular question in the absence of a just excuse may be sentenced to imprisonment for a period not exceeding two years.[23] Section 189(2) specifically provides that after the expiration of the first sentence, a witness may be subjected to further imprisonment if he or she persists with a refusal to testify. Other institutions which enjoy similar powers are the Land Claims Court[24] and courts martial.[25]

[156] Powers of contempt to coerce recalcitrant witnesses have however generally not been conferred upon administrative or quasi-judicial bodies established by statute, even

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21 Section 51(2)(a) of the Magistrates' Courts Act provides as follows:

> "If any person, being duly subpoenaed to give evidence or to produce any books, papers or documents in his possession or under his control which the party requiring his attendance desires to show in evidence, fails, without lawful excuse, to attend or to give evidence or to produce those books, papers or documents according to the subpoena or, unless duly excused, fails to remain in attendance throughout the trial, the court may, upon being satisfied upon oath or by the return of the messenger that such person has been duly subpoenaed and that his reasonable expenses, calculated in accordance with the tariff prescribed under section 51*bis*, have been paid or offered to him, impose upon the said person a fine not exceeding R300, and in default of payment, imprisonment for a period not exceeding three months, whether or not such person is otherwise subject to the jurisdiction of the court."

22 For the text of section 189, see footnote 10 above.

23 The period is extended to five years in relation to certain offences including sedition, public violence, arson, murder, kidnapping, childstealing, robbery, housebreaking and treason (section 189(1) read with Schedule 2, Part III of the Criminal Procedure Act, 1977).

24 See section 28C read with 28F of the Restitution of Land Rights Act, 22 of 1994.

25 See item 34 in the First Schedule to the Defence Act, 44 of 1957.

where those bodies are exercising powers very similar to the powers of a court of law. Indeed, outside the provisions of the Insolvency Act under consideration now,[26] similar provisions in the Companies Act,[27] and courts martial, counsel could point to no example in our law where powers such as those contained in section 66(3) of the Insolvency Act were conferred upon any person or institution that was not a court of law. So, for example, powers of contempt are not conferred upon commissions by the Commissions Act, 8 of 1947 even where the commission is led by a judge. Section 5 of that Act stipulates that a person who wilfully obstructs or hinders the conduct of a commission shall be guilty of an offence and section 6 establishes that a person who has been summoned to give evidence at a commission and fails to do so, or refuses to be sworn, or to answer a particular question shall similarly be guilty of a criminal offence. The criminal offence will have to be prosecuted in a court having jurisdiction. The industrial court established in terms of the Labour Relations Act, 1956 (now repealed), was also not granted powers of contempt even for the purposes of ensuring compliance with its orders.[28] The Commission for Conciliation, Mediation and Arbitration established by the Labour Relations Act, 66 of 1995 also has no independent contempt powers. Instead, section 142(8) of the Act provides that certain forms of conduct shall constitute contempt

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26 These provisions are incorporated into the provisions of both the Companies Act and the Close Corporations Act, however. In terms of section 416(1) of the Companies Act, 61 of 1973 the provisions of section 66 of the Insolvency Act apply to creditors' meetings held in relation to the winding up of a company in terms of section 412 - 416 of the Companies Act, 1973. Similarly, section 66 of the Close Corporations Act 69 of 1984 incorporates the provisions of sections 412 - 416 of the Companies Act, 1973.

27 See section 418(2) of the Companies Act, 1973.

28 See *FAWU v Sanrio Fruits CC and Others* 1994 (2) SA 486 (T) at 488 and section 17(15) of the Labour Relations Act, 28 of 1956.

of the commission and section 142(9) provides that the commission may refer any contempt to the Labour Court so that that court can make an appropriate order.

[157] The reluctance to confer powers of civil contempt upon institutions other than courts of law is not peculiar to our legal system. In the United Kingdom, as well, both the legislature and the courts have demonstrated an unwillingness to confer powers of civil contempt upon tribunals or agencies that are not courts of law.[29] In the United States of America, as well, the Supreme Court has held that administrative agencies may not be given powers of coercive imprisonment.[30]

[158] It seems to me that there are sound reasons for the legislative and judicial reluctance, illustrated above, to extend powers of coercive imprisonment to institutions other than courts. Indefinite imprisonment for coercive purposes is potentially an

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29 See RSC Ord 52, rule 1(2)(a)(iii) which confers jurisdiction upon the Divisional Court to determine contempts of court committed before "inferior courts". In *Attorney-General v BBC* [1981] AC 303 (HLE), the House of Lords refused to accept that a local valuation court constituted an "inferior court" as contemplated by the Rules. The speeches of the members of the House of Lords in this case illustrate their concern that freedom of speech would be impaired if powers of contempt of court were extended to a wide range of tribunals. That concern arose naturally enough on the facts of the case before them in which the Attorney-General sought an injunction preventing the broadcast of a television programme concerning a local valuation court.

30 See *Interstate Commerce Commission v Brimson* 154 US 447, 485 (1894) where Harlan J held that:

> "The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, *and consistently with due process of law*, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." (My italics.)

This decision has been questioned by academic writers, see Note "Use of Contempt Power to Enforce Subpoenas and Orders of Administrative Agencies" (1958) 71 Harvard LR 1541 at 1552 and following.

extremely dangerous mechanism. Like imprisonment for punitive purposes, it is a form of deprivation of physical freedom which requires thorough procedural safeguards. Our Constitution provides detailed and careful procedures to be followed when a person is charged with a crime, including the requirement that the trial should take place before an "ordinary court".[31] Imprisonment for coercive purposes should be attended by substantially similar safeguards. It is probably for this reason that institutions, other than courts of law, have generally not been granted the powers of coercive imprisonment by the legislature. This reluctance is embedded in an understanding of the nature of courts on the one hand and the requirements of appropriate procedural constraints upon the exercise of the power of coercive imprisonment on the other.

[159] The requirement that it is only a court, or an institution similar to a court, that may exercise powers that involve indefinite deprivation of liberty for coercive purposes is based not only on the nature of the officer presiding but also on the institution itself. There can be no doubt that for the requirements of procedural fairness to be met, the presiding officer must be impartial and independent. Independence of a presiding officer is, as Ackermann J states in his judgment at paras 71 - 4, assured by security of tenure and financial security. But the independence and impartiality of the presiding officer is only the first aspect of judicial independence. In addition to the independence and impartiality of the presiding officer, it seems to me that the institution or proceedings over which the officer presides must also exhibit independence and impartiality in the

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[31] Section 35(3)(c) of the 1996 Constitution.

judicial sense. As Le Dain J held in *Valente v The Queen* (1985) 24 DLR (4th) 161 at 171:

> "It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government . . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal."[32]

[160] I have outlined the functions and nature of the creditors' meeting in paragraphs 144-6 and 150 above. It is a form of proceeding which does not finally determine the rights of creditors.[33] In relation to its primary purposes, the appointment of a trustee, the proof of claims, the giving of directions to the trustee and the receipt of the trustee's report, therefore, it is not carrying out judicial functions.[34] The creditors' meeting therefore does not resemble, in function or in form, a judicial body. In addition, it is not a body which is in any sense independent of the executive in the manner that the judiciary is. It is presided over by an official of the Master's office and it is attended by creditors (who have voting powers[35]) as well as the insolvent. The Master is an officer in the public service appointed in terms of section 2 of the Administration of Estates Act,

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32 See also *R v Lippé* (1991) 5 CRR (2d) 31 (SCC) at 53 (per Lamer CJC).

33 See paragraph 150 above.

34 See above n 14.

35 Section 52 read with section 48 of the Insolvency Act.

66 of 1965 who may only act within the terms of the powers statutorily conferred expressly or by necessary implication.[36] It seems to me, therefore, that it cannot be said that a creditors' meeting itself carries the hallmarks of judicial independence and impartiality required of our courts of law. The second aspect of judicial independence, the institutional aspect, is absent.

[161] Ackermann J holds that although a creditors' meeting may for most purposes constitute an administrative or quasi-judicial proceeding, the power to imprison for coercive purposes is a judicial function. He reasons further that when the meeting is presided over by a magistrate, it is permissible for that magistrate to exercise that judicial function at the meeting. I disagree. I agree with Conradie J that when a magistrate presides at a creditors' meeting, the magistrate is not acting as a judicial officer but is fulfilling an administrative function, one of many which historically magistrates have performed. As stated above, our courts have on several occasions made it plain that they consider the proceedings at a creditors' meeting not to constitute judicial proceedings. As Baker AJ held in *S v Carse* 1967 (2) SA 659 (C) at 664 - 5:

> ". . . if a tribunal has no power to settle disputes nor to determine rights as between contending parties it is not a judicial tribunal and the proceedings are not judicial proceedings. A claimant at a creditors' meeting is not a plaintiff and he is not there for the purpose of having his rights in the insolvent estate settled or determined by the presiding officer. Secs 44(3) and 45(3) make this quite clear. The presiding officer does not, in my opinion, sit as a Judge or magistrate (even though, as in the present matter, he

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36 See *Die Meester v Protea Assuransiemaatskappy Bpk* 1981 (4) SA 685 (T) at 690 and cases therein cited.

> was a magistrate). I consider his functions to be administrative in essence although, as I have said, superficially the proceedings may be judicial in appearance."[37]

The fact that a person who is a judicial officer presides over the creditors' meeting does not transform the proceedings of a creditors' meeting into a judicial proceeding. Nor can the fact that the legislature confers a power generally reserved only to courts of law upon the presiding officer at such proceedings change the overall character of the proceedings. They remain administrative or quasi-judicial proceedings, albeit ones which have been clothed with an extraordinary and, in my view, procedurally unfair and inappropriate power.

[162] I conclude, therefore, that it is a requirement of procedural fairness that no person may be imprisoned indefinitely for coercive purposes except by a court of law, or an independent and impartial institution of a character similar to a court of law. As a creditors' meeting convened in terms of the Insolvency Act is not such an institution even when it is presided over by a magistrate, it is my view that the provisions of section 66(3) of the Insolvency Act are in breach of section 12 of the Constitution.

[163] The finding that generally speaking there will be a breach of section 12(1) of the Constitution where a power to imprison a person for coercive purposes is conferred upon an institution other than a court of law or similar institution, does not preclude the possibility that the conferral of such powers may be justified in terms of section 36 of the

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37 See also *Joel Melamed and Hurwitz v Simmons NO and Others* 1976 (4) SA 189 (T) at 195 but see *R v Werner* 1939 EDL 41.

Constitution. Section 36(1) provides that:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

Although the language of section 36(1) differs from the equivalent provisions in the interim Constitution, the test to be adopted is in most respects similar to the one established by Chaskalson P in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104 where he held:

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question." (Footnote omitted.)

[164] To determine whether section 66(3) may be justifiable in terms of section 36(1), it is necessary therefore to place its purpose, effect and importance on one side of the scales and the nature and effect of the infringement it causes on the other. It is also necessary to consider whether the same goal could be achieved by less restrictive means. Counsel for the respondents argued that the purpose of section 66(3) was to further the interests of creditors in the insolvency process. I have no doubt that protecting the interests of creditors is an important and legitimate purpose.[38] Counsel argued further that section 66(3) is an extremely effective coercive tool. I do not doubt this either. Indeed, it is stated in the Master's Report to us that the powers contained in section 66(3) have never as far as can be recalled been used to incarcerate a reluctant witness. Similarly, it is recorded that the powers under section 66(2), not in issue in this case, have only been used once in the past fifteen years. This is evidence indeed of effective coercive powers.

[165] However, on the other hand, it is necessary to realise that the infringement of the procedural fairness requirement of section 12(1) is not insignificant. A person is entitled to expect that he or she will not be summarily imprisoned by a body other than a court of law for an indefinite period for coercive purposes. People in all walks of life and in a wide range of circumstances are regularly required to provide evidence to administrative agencies. It seems to me that it is an element of procedural fairness that such people have the right not to be summarily and indefinitely imprisoned by such

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38 See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at paragraph 47.

agencies without the intervention of a court, or a tribunal with the qualities of judicial independence and impartiality. It is true that where a magistrate presides over the enquiry, the extent of the breach of section 12 will be reduced because the magistrate will have the skills and experience of a judicial officer in making the order of imprisonment, but the institutional requirements of judicial independence and impartiality remain absent.

[166] On balance, although the purposes of section 66(3) are important, I am not sure that they are sufficiently important to outweigh the infringement to section 12(1) occasioned by the section. In particular, it is not clear to me that the purposes for which the powers under section 66(3) are granted are any more pressing than the purposes for which a variety of non-judicial proceedings are instituted in our law which do not enjoy powers of coercive imprisonment. I find it hard to accept that all non-judicial proceedings presided over by a magistrate but engaged upon investigation and fact-finding could automatically be given powers as sweeping as those contained in section 66(3). It seems to me that to establish justification under section 36(1) something more is needed than the importance of the fact-finding investigation. I can see no special reason which singles out creditors' meetings from other non-judicial proceedings which are engaged in the process of fact-finding.

[167] This conclusion is strengthened by the fact that, as counsel conceded, another mechanism already exists in the Insolvency Act to obtain the compliance of recalcitrant

witnesses. Section 139 of the Insolvency Act provides that a person who may have been committed to prison in terms of section 66(3) shall also be guilty of a criminal offence and subject to a fine or imprisonment. This provision is similar to the criminal offences created by the Commissions Act referred to above. Counsel argued and I accept that, unlike the proceedings under section 66(3) which are summary, the institution of a criminal prosecution under section 139 could lead to inconvenient delays. I accept that the technique of a criminal prosecution to obtain compliance may not be as efficient or as quick as the mechanism in section 66(3). It is however far less invasive of the rights of the recalcitrant witness. In addition to the criminal offence contained in section 139, however, other mechanisms could be employed. For example, one similar to that contained in section 142(8) of the Labour Relations Act, 1995, which would permit an official presiding at a creditors' meeting to refer a recalcitrant witness to court for an appropriate order to be made. Such a mechanism may be more efficient and speedy than a criminal prosecution.

[168] In determining whether the limitation on the applicant's section 12(1) right is justified, the question of whether similar provisions have been adopted in other jurisdictions is also relevant, though not determinative. Indeed, in interpreting the Bill of Rights, section 39(1) of the Constitution provides that:

> "When interpreting the Bill of Rights, a court, tribunal or forum –
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and

(c) may consider foreign law."

In his careful and thorough judgment, Ackermann J has pointed to the fact that powers to imprison a recalcitrant witness in insolvency enquiries are generally reserved to courts of law.[39] It is unnecessary to repeat the references to the foreign jurisdictions here. Suffice it to say, that in all jurisdictions to which he refers, the power to imprison a recalcitrant witness in insolvency enquiries in order to compel that witness to testify is reserved for courts of law and is not exercised by administrative or quasi-administrative institutions.

[169] It is true that section 66(5) of the Insolvency Act operates as a safeguard by permitting a person imprisoned pursuant to section 66(3) to approach a court which is empowered to consider the matter afresh. This provision is a statutory invocation of the common law interdictum de homine libero exhibendo. However, it is noticeable that there is no automatic or necessary review of the section 66(3) proceedings required by section 66(5). There can be no doubt that an automatic review would constitute a greater safeguard than the simple entitlement afforded by section 66(5) which, for a variety of reasons, an imprisoned person may not be in a position to seek.

[170] For these reasons, therefore, I am not persuaded that section 66(3) may be considered a justifiable limitation of section 12(1) of the Constitution. Counsel for the appellant did not rely on section 165 of the Constitution which vests the judicial authority

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39 See paragraphs 49 - 55 of his judgment.

of the Republic in the courts. Accordingly, I wish to express no view on the question of whether the power to imprison a person for coercive or punitive purposes forms part of the "judicial authority" contemplated by that provision.

[171] I agree, therefore, with the decision of Conradie J in the court a quo and would accordingly dismiss the appeal. As this is a minority opinion of the court, it is not necessary for me to consider the appropriate order to be made in the circumstances.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/97

DOUGLAS MICHAEL DE LANGE	First Appellant
versus	
FRANCOIS J SMUTS NO	First Respondent
E M FREY NO (LIQUIDATOR, PAARL OLIVE FARMS CC)	Second Respondent
C R S GOODEN NO (LIQUIDATOR, PLATTENBOSCH FARMS CC)	Third Respondent
H M SANGIORGIO NO (LIQUIDATOR, TIERFONEIN BOERDERY CC)	Fourth Respondent
THE MASTER OF THE HIGH COURT	Fifth Respondent

Heard on: 20 November 1997

Decided on: 28 May 1998

JUDGMENT

SACHS J:

[172] I agree with the order proposed by Ackermann J for reasons that are similar to his in philosophy but different in logic and articulation. I accept his conclusion that in entrenching the right to freedom and security of the person, section 12(1) of the

Constitution[1] either expressly or implicitly protects persons against deprivations of freedom that are substantively unacceptable or procedurally unfair.[2] In addition, I concur fully with his eloquent explanation of the special meaning that the phrase "detention without trial" has acquired in South Africa.[3] I have grave doubts, however, about the more extended interpretation on which he relies,[4] and in this respect would wish to associate myself with the clear and forceful observations on the subject by Didcott J.[5] In my view, section 12(1)(a) serves far more comfortably than does 12(1)(b) as the basis for any analysis of freedom rights in the present case. I accordingly express my support for the remarks both by Didcott J and by Mokgoro J[6] on this score, and add the following comment.

[173] Section 12 of the Constitution revises and enriches section 11 of the interim Constitution in a number of substantial ways, with the result that the text before us is manifestly different from that which this Court was called upon to analyse in *Nel v Le Roux NO and Others*.[7] In particular, the 1996 text itemises and outlaws three specific invasions of freedom and security of the person which were not expressly articulated in

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1 The Constitution of South Africa 1996.

2 Para 22 above.

3 Paras 26-7 above.

4 Para 28 above.

5 Para 115 above.

6 Paras 116-7 (per Didcott J); para 127 (per Mokgoro J).

7 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

the interim Constitution:

(a) the right "not to be deprived of freedom arbitrarily or without just cause" [12(1)(a)],

(b) the right "to be free from all forms of violence from either public or private sources" [12(1)(c)] and

(c) the right "to bodily and psychological integrity". [12(2)]

In the interim Constitution, on the other hand, the words "detention without trial" stood alone as an express bar to physical restraint by the state, and accordingly had to function as the sole textual basis for analysing the constitutionality of all forms of coercive state power involving physical restraint. Now it is just one item in an extensive and nuanced catalogue, and therefore needs to be given a specific significance which both justifies its place in the list and separates it from the other items. It accordingly reclaims its commonly accepted identity in South Africa as relating to a specific and unmistakable prohibition of the special and intense form of deprivation of liberty that scarred our recent history. So firm is the prohibition, as Ackermann J points out,[8] that even in the extreme conditions where a state of emergency is declared, rigorous constitutional conditions are imposed on the use of detention without trial.[9] I accordingly tend strongly to the view that the manner in which the phrase "detention without trial" was construed in *Nel v Le Roux*[10] needs to be revisited.

[174] In my opinion, however, it is not necessary to resolve the problems of how to

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8 Para 27 above.

9 See sections 37(6) and (7) of the Constitution.

10 Above n 7

construe section 12. As I see it, the matter falls properly to be determined by the application of the doctrine of separation of powers. Section 66(3) of the Insolvency Act gives authority to appointees who happen not to be judicial officers to send recalcitrant witnesses to jail.[11] Even though the processes followed by non-judicial but experienced appointees may in practice show the utmost procedural fairness and even if the dangers of abuse may in reality be minimal, there is a simple, profound and well-understood principle which I believe this Court should uphold, and that is that only judicial officers should have the power to send people to prison.

[175] Section 165(1) of the Constitution makes it clear that "[t]he judicial authority of the Republic is vested in the courts." The appointee of the Master or the magistrate,

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[11] Act 24 of 1936.

Section 39(2) reads as follows:

> "All meetings of creditors held in the district wherein there is a Master's office shall be presided over by the Master or an officer in the public service, designated, either generally or specially, by the Master for that purpose. Meetings of creditors held in any other district shall be held in accordance with the direction of the Master and shall b presided over by the magistrates of the district, or by an officer in the public service, designated either generally or specially, by the magistrate for that purpose."

Section 66(3) reads as follows:

> "If a person . . . fails to produce any book or document which he was summoned to produce, or if any person who may be interrogated at a meeting of creditors in terms of sub-section (1) of section *sixty-five* refuses to be sworn by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the question fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of sub-section (5)."

however, need not be a judicial officer serving in any court.[12] When such appointee is not a judicial officer, he or she should not be able to exercise what is really a crucial part of the authority reserved in democratic states to the judiciary, namely the power to punish misconduct or penalise recalcitrance by means of incarceration in a state jail.

[176] These remarks refer only to the authority to imprison someone as a penalty to mark state reprobation. The situation may be different where persons are deprived of liberty in non-punitive circumstances and where, subject to respect for fundamental rights of personality being maintained, reasons of exigency might render it constitutionally permissible for restraint first to be applied and judicial control to take place only afterwards. Thus, it is not uncommon in democratic states for custodial powers to be conferred initially on persons who are not judicial officers where the purpose to be achieved is not that of imposing a penalty, but, for example, that of securing immigration control or dealing with severe health risks. Here the medium of imprisonment is not regarded as the message, but only as the means. In these circumstances custody or physical restraint does not serve in itself as a mechanism for commanding respect for the

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12 The "courts" are declared by section 166 of the Constitution to be:

> "(a) the Constitutional Court;
> (b) the Supreme Court of Appeal;
> (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts,
> (d) the Magistrates' Courts; and
> (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts".

The officers with the power to commit to prison need not have any connection with any of the above. See n 11 above.

law. It is neither punishment for past defiance nor compulsion to future compliance but simply the only reasonable way in which a non-punitive objective of pressing public concern can be achieved. By way of contrast, the authority to incarcerate for purposes of imposing penalties for past or continuing misconduct belongs to the judiciary, and to the judiciary alone. In my view, the doctrine of separation of powers prevents Parliament from entrusting such authority to persons who are not judicial officers performing court functions as contemplated by section 165(1).

[177] The question that remains is whether magistrates functioning in terms of section 66(3) of the Insolvency Act can be said to be exercising the authority reserved to courts by section 165(1) of the Constitution. The word "court" may refer to a building, to an institution exercising judicial functions and to the persons who carry out such functions. Normally the three go together. In the present case, the issue is whether persons selected, because of their membership of judicial institutions to exercise the intrinsically judicial function of sending people to jail, are acting within the authority conferred on courts by section 165(1) of the Constitution, even though they may do so outside of the physical, institutional and procedural setting within which courts normally function. With some hesitation I come to the conclusion that, in the context of the present case, they are.

[178] The essential characteristics of the courts exercising judicial authority as contemplated by the Constitution are that "[they] are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or

prejudice."[13] Unlike other appointees, magistrates exercising powers of committal to prison under section 66(3) of the Insolvency Act will enjoy institutional independence and can be expected to apply the law impartially and without fear, favour or prejudice. Furthermore, they will exercise their powers within the matrix of the superior hierarchical judicial control to which they are institutionally and habitually accustomed.[14] The principles embodied in and the values to be protected by the separation of powers will accordingly be secured. In this respect, I agree with the broad evaluation made by Ackermann J on the character of the judicial function,[15] and support the distinction which allows magistrates to order committal to prison and denies that power to other state functionaries. For these reasons, I concur in the order he proposes.

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13 Section 165(2).

14 Section 66(5) reads:

> "Any person committed to prison under this section may apply to the court for his discharge from custody and the court may order his discharge if it finds that he was wrongfully committed to prison or is being wrongfully detained."

15 Para 86-101 above. His evaluation is made in the context of limitation of rights analysis (section 36), mine in the framework of separation of powers (section 165).