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

ACKERMANN J:

[1] This matter concerns the correctness of a declaration of constitutional invalidity of subsection (3) of section 66 ("the subsection" or "section 66(3)") of the Insolvency Act 24 of 1936 ("the Insolvency Act") made by Conradie J in the Cape of Good Hope High

Court, on 29 August 1997.[1] The subsection reads as follows:

> "(3) If a person summoned as aforesaid, appears in answer to the summons but 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 subsection (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 subsection (5)."

[2] This declaration was made and referred to this Court for confirmation under section 172(2)(a) of the Constitution of the Republic of South Africa 1996 ("the 1996 Constitution").[2] At the request of the President, the Minister of Justice was represented at the hearing by counsel who addressed written and oral argument as to why the declaration ought not to be confirmed. The Association of Insolvency Practitioners of Southern Africa initially applied to be admitted as an amicus curiae in the proceedings but did not proceed with its application.

---

1 Reported in 1997 (11) BCLR 1553 (C).

2 Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

For the procedure to obtain such confirmation pending the enactment of legislation under section 172(2)(c) of the Constitution or the promulgation of an applicable Constitutional Court rule, see *Parbhoo and Others v Getz NO and Another* 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095 (CC) paras 1 to 6.

[3] The applicant was the only member of three close corporations ("the corporations") which were finally wound up on 15 December 1994. The second, third and fourth respondents are the liquidators, respectively, of the corporations. Various provisions of the Insolvency Act, including sections 64, 65 and 66 thereof, are, by section 416 of the Companies Act 61 of 1973 ("the Companies Act") made applicable, mutatis mutandis, in various ways to proceedings under section 414 and 415 of the latter Act, to the extent that they can be applied and are not inconsistent with its provisions.[3]

[4] By section 66(1) of the Close Corporations Act 69 of 1984 ("the Close Corporations Act") the provisions of the aforementioned section 416 (as well as sections 414, 415 and various other provisions) of the Companies Act are made similarly applicable to the liquidation of a corporation in respect of any matter not specifically provided for in any other provision of the Close Corporations Act.[4] Likewise the

---

3 Section 416(1)(a) of the Companies Act provides, amongst other things, that the provisions of section 66 of the Insolvency Act apply in this way to any person who is in terms of section 414(1) of the Companies Act required to attend any meeting of creditors of any company being wound up and which is unable to pay debts, as if such person were an insolvent required to attend any meeting referred to in section 64 of the Insolvency Act. Section 416(1)(b) of the Companies Act provides, amongst other things, that the provisions of section 66 of the Insolvency Act apply in the same way to any person subpoenaed in terms of section 414(2) of the Companies Act to attend any meeting of the creditors of a company being wound up and which is unable to pay its debts or to produce any book or document at any such meeting. Section 416(1) of the Companies Act further provides that the provision of sections 65 of the Insolvency Act apply in the same way in relation to the production of any book or document or the interrogation of any person under section 415 of the Companies Act, as if such person had been subpoenaed to produce any book or document or were being interrogated under section 65 of the Insolvency Act.

4 Subparagraphs (i) and (iii) of section 66(2)(a) of the Close Corporations Act provides that, for purposes of section 66(1), any reference in a relevant provision of the Companies Act, and any provision of the Insolvency Act, made applicable by any such provision, to a "company" must be construed as a reference to a "corporation" and any reference to a "member, director, shareholder or contributory" of any company, must be construed as a reference to a "member" of a corporation.

provisions of section 39(2) of the Insolvency Act, to which reference will be made presently, are to be applied to the liquidation of a corporation.[5] Save for the order made at the conclusion of this judgment, any reference hereinafter to a provision of the Insolvency Act must be understood, unless the contrary is stated, as a reference to such provision as incorporated into the Close Corporations Act in the above manner.

[5] The applicant was summoned under section 64(2) of the Insolvency Act to attend the adjourned second meeting of creditors of the corporations on 13 and 14 January 1997. He was also required under section 64(3) to produce, amongst other things, the books of account and other financial records of the corporations. The applicant's interrogation under section 65 commenced on 14 January 1997. On that date application was made on behalf of the second, third and fourth respondents for the issue of a warrant committing the applicant to prison under section 66(3) on the grounds that he had, in breach of the injunctions of the subsection, failed to produce the books and documents he had been summoned to produce and that he had failed to answer questions lawfully put to him under section 65(1) fully and satisfactorily. The application was postponed for argument and thereafter the presiding officer (first respondent) issued a warrant on 22 February 1997 committing the applicant to prison. The warrant was therefore issued after the commencement of the 1996 Constitution on 4 February 1997 and accordingly this

---

5 See section 339 of the Companies Act which provides that in the winding up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specifically provided for by the Companies Act, and section 66(1) of Close Corporations Act.

Constitution is the applicable one. Save to observe that the warrant was subsequently conditionally suspended and that the application which Conradie J ultimately heard was launched on 9 May 1997, it is unnecessary to deal with any of the intervening or other events.

[6] In the application before Conradie J various orders were sought but only two were relevant. The one was for an order reviewing and setting aside the first respondent's decision to commit the applicant to prison. The grounds relied upon were not of a constitutional nature. The second was for an order declaring section 66(3) to be constitutionally invalid and on that ground to review and set aside the committal. The learned judge found that there was no merit in the applicant's non-constitutional review attack and in those circumstances correctly held that the issue of the constitutional invalidity of section 66(3) would, one way or the other, be dispositive of the case.

[7] In the result the learned judge held that the subsection was invalid because of its inconsistency with section 12(1)(b) of the Constitution which guarantees the right "not to be detained without trial" and held further that the limitation of this right by the subsection could not be justified under section 36(1). Although he did not express himself explicitly on this issue, the general tenor of his judgment, and in particular his reliance on the judgments of this Court in *Bernstein and Others v Bester NO and Others*[6]

---

6 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC).

and *Nel v Le Roux NO and Others*,[7] warrants the conclusion that Conradie J considered that, substantively, the "process in aid"[8] which the subsection provides to compel examinees, who are under a legal duty to do so, to testify or produce documents, was constitutionally unobjectionable. The thrust of the judgment went to determining whether the applicant had, for purposes of section 12(1)(b) of the Constitution, received a "trial"; the learned judge evidently assumed, in favour of the applicant, that committal to prison under section 66(3) constituted "detention". Conradie J held, in effect, that the only "trial" envisaged by section 12(1)(b) of the Constitution was a trial by a court of law.

[8] Section 39(2) of the Insolvency Act provides that all meetings of creditors are to be presided over by the Master or by an officer in the public service, designated by the Master; or by a magistrate or by an officer in the public service designated by the magistrate. In a district wherein there is a Master's office a magistrate does not preside.[9] In the present case the presiding officer (first respondent) was a magistrate. Conradie J held that a meeting of creditors presided over by any of these persons did not constitute

---

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

8 Id para 11.

9 Section 39(2) provides:

> "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 be presided over by the magistrate of the district, or by an officer in the public service, designated, either generally or specially, by the magistrate for that purpose."

a court of law and that consequently such meeting was not a trial for purposes of section 12(1)(b) of the Constitution. He considered that even where the meeting is presided over by a magistrate this does not constitute a court of law because a magistrate, in so presiding, is merely fulfilling an administrative function.

[9] Mr Bryan Hack, on behalf of the applicant, sought confirmation of Conradie J's order and advanced essentially two lines of argument in support thereof. The first was that the subsection unjustifiably infringes paragraph (a) of section 12(1) of the Constitution, which guarantees to everyone the right "not to be deprived of freedom arbitrarily or without just cause." It did so, the argument went, because the objectives sought to be achieved by obtaining the oral and documentary information with which the meeting and interrogation under sections 64 and 65 of the Insolvency Act are concerned do not constitute such "just cause" for depriving examinees of their physical freedom by imprisonment under the impugned provisions of section 66(3).

[10] It was submitted that the only "just cause" for which a person can be imprisoned is the prevention or punishment of crime or possibly "in the broader sense" where necessary for the maintenance of law and order, but not for any other non-punitive coercion. In developing this argument Mr Hack correctly pointed out that in South African criminal law, since the death penalty and certain forms of corporal punishment

have been declared to be unconstitutional,[10] imprisonment is the most severe punishment that the state can impose on a criminal and that both the legislature and the courts have sought to develop innovative alternative forms of punishment which are less harsh and invasive of a person's physical freedom than imprisonment.[11]

[11] He also correctly pointed out that our courts emphasise that imprisonment should only be resorted to after other appropriate forms of punishment have been considered and excluded.[12] It is also correct that in the past there has been much unwarranted deprivation of physical freedom in order to achieve particular social and political goals. This all emphasises the great importance to be attached to physical freedom, but does not by itself afford much assistance in considering the correctness of the submission that deprivation of physical freedom may only be used as punishment for a crime.

[12] The second line of argument was that the subsection infringes paragraph (b) of section 12(1) because committal of an examinee constitutes "detention" which has not been preceded by the "trial" envisaged by paragraph (b). Mr Hack contended that in all cases the requisite trial had to be a trial before a duly constituted court of law following due and proper trial procedures and that the presiding officer at a meeting of creditors is

---

10 In *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) and *S v Williams and Others* 1995 (7) BCLR 861 (CC); 1995 (3) SA 632 (CC).

11 See, for example, the provisions of section 276A of the Criminal Procedure Act in regard to correctional supervision as a form of punishment.

12 *S v R* 1993 (1) SA 476 (A) 488 F-J and *S v Williams and Others* above n 10 at para 67.

not presiding over a court regardless of whether such officer is a magistrate or not. I shall deal with these arguments presently.

[13] Before doing so it is necessary to analyse section 66(3) briefly in its context. The presiding officer at a meeting of creditors under section 64 of the Insolvency Act may, as previously indicated, be the Master, an officer in the public service or a magistrate. The presiding officer is under section 66(3) authorised to commit certain persons to prison under given circumstances. A person summoned to produce a book or document under section 64(3) who fails to do so may be committed; so may any person who is liable to be interrogated in terms of section 65(1) and who refuses to be sworn when called upon to give evidence or who refuses to answer any question lawfully put under section 65 or who does not answer the question fully and satisfactorily.

[14] Under section 66(5) persons so committed may apply to court for their discharge from custody and the court may order their discharge if it finds that they were wrongfully committed to prison or are being wrongfully detained. Subject hereto, persons are detained under section 66(3) until they have undertaken to do what is required of them. Under section 66(4), if persons who have been released from prison after having so undertaken fail to fulfil their undertaking, the presiding officer may commit them to prison as often as may be necessary to compel them to do what is required of them. In addition, any act or omission for which a person has been or might have been lawfully so

committed is a punishable offence.[13] As will be discussed more fully later, the section 66(3) committal provision is a mechanism to compel the furnishing of information so that the legitimate objectives of the insolvency law may be properly and efficiently realised. Its purpose is not in the first instance punitive. It is a form of process in aid or a form of statutory civil contempt power.

[15] The provisions of section 11 of the interim Constitution[14] need to be compared with those of section 12(1) of the 1996 Constitution.[15] Section 11 of the interim Constitution provides:

> "(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
> (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

Section 12(1) of the 1996 Constitution provides:

---

13 Section 139(1) of the Insolvency Act provides:

> "Any person shall be guilty of an offence and liable to a fine not exceeding R500 or to imprisonment without the option of a fine for a period not exceeding six months if he is guilty of an act or omission for which he has been or might have been lawfully committed to prison in terms of subsection (2) or (3) of section 66."

14 The Constitution of the Republic of South Africa Act 200 of 1993.

15 The reason why subsection (2) of section 12 of the 1996 Constitution is not the subject of comparison is because the rights that are protected therein did not feature at all in section 11 of the interim Constitution.

" Everyone has the right to freedom and security of the person, which includes the right -

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(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."

[16] Paragraphs (d) and (e) of section 12(1) of the 1996 Constitution embody a reformulation of section 11(2) of the interim Constitution and a subdivision of its contents into two parts. Paragraph (c) of section 12(1) either incorporates a new right or else makes explicit what was previously implicit; the true explanation is not relevant for present purposes. A comparison between section 11(1) of the interim Constitution with the first line of section 12 (1) of the 1996 Constitution and paragraphs (a) and (b) thereof, is of greater significance for the present enquiry because it indicates that the constitution makers wished to clarify something which had previously been implicit, namely, that a person's right to freedom could not be encroached upon arbitrarily or without just cause.

[17] Before indicating what I believe the consequences of the above changes are I wish to refer to certain dicta of O'Regan J in relation to section 11(1) of the interim Constitution, with which I agree and fully endorse. In *Bernstein's* case[16] O'Regan J observed in general terms:

---

16 Above n 6.

> "In my view, freedom has two inter-related constitutional aspects: the first is a procedural aspect which requires that no-one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable."[17]

In the same judgment my learned colleague stated the following:

> "Section 25 is the principal provision in chapter 3 that requires procedural fairness when a person is deprived of physical freedom. It contains detailed rules which must be followed to protect the rights of persons who have been detained, arrested or charged. Section 11(1), which contains no detailed procedures or rules, other than the prohibition of detention without trial, is supplementary to section 25. In cases where people are deprived of physical freedom in circumstances not directly governed by section 25, section 11(1) will require that fair procedures be followed, as was held in *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC)."[18]

[18] In *S v Coetzee & Others*[19] (a case decided under the provisions of the interim Constitution) O'Regan J, in that part of her judgment with which I concurred, stated the following:

> "[These questions] raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated [in *Bernstein's case* at paragraphs 145-147] our Constitution recognises that both aspects

---

17 Id para 145.

18 Id para 146.

19 1997 (4) BCLR 437 (CC); 1997 (3) SA 527 (CC) para 159.

> are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair."[20]

[19] In *Nel's* case[21] this Court dealt with a constitutional attack on section 205 (incorporating as it does section 189) of the Criminal Procedure Act (the CPA)[22] based on an alleged infringement of a person's right under section 11(1) of the interim Constitution "not to be detained without trial". Section 205 of the CPA provides for the compulsory examination of "any person who is likely to give material or relevant evidence as to an alleged offence" before a judge of the supreme court, a regional court magistrate or magistrate. Section 189 of the CPA, which applies to section 205, provides, amongst other things, that if any sworn witness in criminal proceedings:

> ". . . 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 varying periods of time]".

[20] A unanimous Court held that fair procedure was implicit in the trial component of the section 11(1) right[23] and further held:

---

20 Id para 159.

21 Above n 7.

22 Act 51 of 1977.

23 Above n 7 paras 11 and 12.

> "The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate 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 all circumstances require a procedure which duplicates all the requirements and safeguards embodied in section 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."[24]

The Court did not explicitly address itself to the substantive aspect of the right to freedom referred to in paragraphs 15 and 16 above, namely, that the state may not deprive its citizens of liberty for reasons that are not acceptable, because the section 11(1) challenge was not brought on this basis. It is, however, implicit in the Court's judgment that this was an essential component of the right to freedom and that the reasons or purposes for the imprisonment of an examinee under the circumstances provided for by section 205 read with section 189 of the CPA are constitutionally acceptable.

[21] Thus it was stated:

> "The imprisonment provisions in section 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so . . ."[25]

---

24 Id para 14.

25 Id para 11.

and more particularly:[26]

> "Summary proceedings for imprisoning recalcitrant witnesses, where the normal strict criminal procedure rules are not applied, are not unknown in other open and democratic societies based on freedom and equality. In the United States of America the grand jury investigation, amongst its other objects, fulfills the same function as section 205 of the CPA of obtaining information under oath from persons unwilling to assist voluntarily in a criminal investigation; both civil and criminal contempt procedures are used to coerce the recalcitrant grand jury witness into testifying. 'Civil contempt is used to coerce the recalcitrant witness into complying with the subpoena. The witness is sentenced to imprisonment or to a fine (which may increase daily), but he may purge himself by complying with the subpoena.' In the case of such civil contempt proceedings in relation to grand jury proceedings, departures from criminal procedure applicable to ordinary criminal prosecutions are permissible and even in criminal contempt proceedings 'procedures may vary somewhat from procedures applicable to ordinary criminal prosecutions.' Rule 42(a) of the Federal Rules for Criminal Procedure authorises summary criminal contempt proceedings in matters other than grand jury investigations. In Germany section 70 of the Criminal Procedure Code provides for summary proceedings against a witness who refuses to testify without legal justification. The witness is fined and on failure to pay is imprisoned. The witness may also be imprisoned without being given the option of a fine. Such and similar summary proceedings leading to imprisonment have been upheld as constitutional by the German Federal Constitutional Court."

[22] It can therefore be concluded that section 12(1), in entrenching the right to freedom and security of the person, entrenches the two different aspects of the right to freedom referred to above. The one that O'Regan J has, in the above-cited passages, called the right not to be deprived of liberty "for reasons that are not acceptable" or what may also

---

26 Id para 22.

conveniently be described as the substantive aspect of the protection of freedom, is given express entrenchment in section 12(1)(a) which protects individuals against deprivation of freedom "arbitrarily or without just cause". The other, which may be described as the procedural aspect of the protection of freedom, is implicit in section 12(1) as it was in section 11(1) of the interim Constitution.

[23] The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur "arbitrarily"; there must in other words be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or "cause" for the deprivation must be a "just" one. What "just cause" more precisely means will be dealt with below.

[24] Although paragraph (b) of section 12(1) only refers to the right "not to be detained without trial" and no specific reference is made to the other procedural components of such trial it is implicit that the trial must be a "fair" trial, but not that such trial must necessarily comply with all the requirements of section 35(3). This was the Court's

unanimous holding in respect of section 11(1) of the interim Constitution in *Nel's* case[27] and is equally applicable to section 12(1)(b) in the context of the entrenchment of the "right to freedom and security of the person" in section 12(1) of the 1996 Constitution, there being no material difference between the two provisions.

[25] In the interests of clarity it is necessary to point out that where the 1996 Constitution has, in relation to a specific subject matter, dealt with the procedural aspect of the right to liberty in a particular provision, it is to such provision that one must turn in order to determine the nature and extent of the procedural liberty right guaranteed in that particular context, and not to the general provision of section 12(1)(b). This would seem to follow from both a structural and purposive approach to the chapter 2 Bill of Rights. Thus, in order to determine, for example, what the procedural freedom rights are of persons arrested for allegedly committing an offence and of accused persons, one would have regard to the provisions of subsections (1) and (3) respectively of section 35 and of persons after their detention one would have regard to section 35(2). This will be dealt with more fully below. At the same time, however, sight must not be lost of the fact that, for example, accused persons are entitled to challenge the constitutional validity of a criminal offence with which they are charged on the substantive freedom right ground that such offence does not, for purposes of section 12(1)(a), constitute "just cause" for the deprivation of their freedom.

---

27 Above n 7 at paras 12 to 14.

[26] When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression "detained without trial" in section 12(1)(b), is the notorious administrative detention without trial for purposes of political control. This took place during the previous constitutional dispensation under various statutory provisions which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country.

[27] Even where a derogation from section 12(1)(b) right has validly taken place[28] in consequence of a state of emergency duly declared under the provisions of the 1996 Constitution,[29] and such derogation has excluded a trial prior to detention, detailed and stringent provisions are made for the protection of the detainee and in particular for subsequent judicial control by the courts over the detention.[30] It is difficult to imagine that any form of detention without trial which takes place for purposes of political control

---

28 Under the provisions of section 37(4) and (5) of the 1996 Constitution.

29 Under section 37(1), (2) and (3) thereof.

30 See section 37(6), (7) and (8) of the 1996 Constitution.

and is not constitutionally sanctioned under the state of emergency provisions of section 37, could properly be justified under section 36. It is however unnecessary to decide that issue in the present case. History nevertheless emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost inevitably flow from such judicially uncontrolled detention.

[28] Although administrative detention without trial for purposes of political control (or for that matter completely arbitrary detention without trial) might very well be the most serious infringement of section 12(1)(b), the protection afforded by the right guaranteed thereunder goes considerably further. In its ordinary grammatical sense "detention" is a word of wide meaning and relates to "keeping in custody or confinement; arrest. Used *spec* of the confinement of a political offender . . . bodily restraint."[31] In legal use its meaning is determined by the context and can relate to a variety of physical restraints.[32] In fact section 66(3) of the Insolvency Act itself describes the committal to prison as being "detained". The context in which it is used in section 12(1)(b) does not require it to be given a strained or limited meaning. It applies to the restriction of physical movement. For purposes of this judgment it is unnecessary to decide the nature or extent of the space to which the restriction must apply; for whatever limits might apply to either,

---

31 The primary meanings given in the *Oxford English Dictionary*.

32 See, for example, *Stroud's Judicial Dictionary* 5ed (1986) 698 and Claassen *Dictionary of Legal Words and Phrases* (1975) vol 1 402.

the committal of a person to prison pursuant to the provisions of section 66(3) clearly falls within them and constitutes detention.[33] I can see no difference in principle between the nature and extent of the spatial confinement under section 66(3) and that under section 189 of the CPA where "imprisonment" is ordered and whose confinement this Court found in *Nel's* case, albeit implicitly, to constitute detention for purposes of section 11(1) of the interim Constitution. I turn now to deal more specifically with the two grounds on which the constitutional validity of section 66(3) was attacked.

The Attack Based on the Substantive Aspect of the Right to Freedom.

[29] As foreshadowed above, committal to prison under section 66(3) clearly constitutes detention for purposes of section 12(1)(b) of the 1996 Constitution. It was not contended in argument, nor could it reasonably have been, that such committal constituted an arbitrary deprivation of freedom. Its clear and only purpose is to compel examinees to comply properly with their obligations to supply the information, books and documents required by the relevant provisions of the Insolvency Act.

[30] The only real issue on this part of the case is whether the objective of committal to prison under section 66(3) constitutes "just cause" for such committal. It is not possible to attempt, in advance, a comprehensive definition of what would constitute a

---

33 Nor is it necessary to attempt to draw the dividing line between "detention" in the section 12(1)(b) right and restrictions on "freedom of movement" as guaranteed in section 21(1). It is recognised that it is not always easy to distinguish between the right to physical liberty of the person and the right to freedom of movement (See Bailey, Harris and Jones *Civil Liberties* 3ed 777).

"just cause" for the deprivation of freedom in all imaginable circumstances. The law in this regard must be developed incrementally and on a case by case basis. Suffice it to say that the concept of "just cause" must be grounded upon and consonant with the values expressed in section 1 of the 1996 Constitution[34] and gathered from the provisions of the Constitution as a whole. I wish to say no more about "just cause" than is necessary for the decision of the present case.

[31] It seems to me that, on first principles, and in the context of the Constitution and its underlying values, the objective of the detention under the subsection does constitute "just cause" for the committal and consequent deprivation of freedom. In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional state) "citizens as well as non-citizens are entitled to rely upon the state for the protection and enforcement of their rights.[35] The state therefore assumes the obligation of assisting such

---

34 Section 1 provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

35 It is not suggested that this only occurs in a constitutional state with a rigid and completely written constitution but we are here dealing with our Constitution and it is therefore unnecessary to consider the position in any other form of democratic state.

persons to enforce their rights, including the enforcement of their civil claims against debtors."[36]

[32] This it does through its courts and legal system generally and by its insolvency laws in particular. These laws constitute a last resort for creditors to enforce valid claims against their debtors and they also ensure a fair and just distribution of debtors' assets among competing creditors in the event of such debtors' liabilities exceeding their assets.[37]

[33] The section 66(3) committal to prison is also a form of process in aid to ensure that the legitimate goals of the insolvency laws are achieved and creditors protected. This form of process is sometimes referred to as "civil contempt". The purpose of the provisions of sections 64, 65 and 66 of the Insolvency Act is, amongst others, to enable trustees of insolvent estates to establish what the assets of the estate are and what has happened to them; to recover such assets and all claims due to the estate; and to acquire all information that might be required by the trustees or the creditors.[38] Almost invariably

---

36 Compare the following comments of Mahomed DP in *Du Plessis and Others v De Klerk and Others* 1996 (5) BCLR 658 (CC): 1996 (3) SA 850 (CC) para 79:

> "[the common law's] continued existence and efficacy in the modern State depends, in the last instance, on the power of the State to enforce its sanction and its duty to do so when its protection is invoked by the citizen who seeks to rely on it."

37 See, generally, De Wet en Yeats *Kontraktereg en Handelsreg* 4ed 420-1 and Smith *The Law of Insolvency* 3ed 1-4.

38 See in this regard *Nieuwoudt v Faught NO en Andere* 1987 (4) SA 101 (C) 106-7.

the trustee comes to the administration of the insolvent estate with little or no knowledge thereof or of the dealings of the insolvent. Full knowledge of these matters is essential for the protection of creditors and the winding up of the estate. The insolvent is often the only or most important person who can furnish the necessary information.

[34] It is of compelling public interest that such information be obtained and the recalcitrant insolvent compelled to furnish it as well as to produce relevant books and documents to that same end or to furnish information as to where such books and documents are to be found. The public interest in this regard is no less compelling than in the case of the winding up of a company and the necessity of compelling the insolvent to furnish such information no less than in the case of the director of a company in the process of being wound up. The reasons therefore in the latter instance have been fully explained in the judgments of this Court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[39] and *Bernstein's* case[40] and it is unnecessary to repeat them here. In the case of insolvency it is likewise in the interest of the general body of creditors that all the assets of the insolvent be established and recovered and collusive dealings and impeachable transactions with particular creditors exposed. To this end it is vital to ensure that insolvents and other persons who are in a position to give important information on such matters do not evade supplying it.

---

39 1996 (4) BCLR 441 (CC); 1996 (2) SA 621 (CC).

40 Above n 6.

[35] Although insolvency proceedings are civil in nature, the public interest in compelling the insolvent to disclose all such information regarding the insolvent estate would in many instances be even greater than in the case of a witness at a criminal trial who is compelled to testify by the provisions of section 189 of the CPA, because the insolvent is very often the only source of particular information. Where the examinee under section 66(3) is not the insolvent, the public interest in coercing such person to testify would be at least as compelling.

[36] Just as in the case of sentencing a witness to imprisonment in proceedings under section 189 of the CPA[41], a committal to prison under section 66(3) is no more than process in aid of the essential governmental objective of compelling persons who are under a legal duty to testify to do so. The examinees under section 66(3) also "carry the keys of their prison in their own pockets"[42], for the effect of the concluding part of the subsection is that the detention of an examinee comes to an end when the examinee "has undertaken to do what is required of him."

[37] Section 66(3) has, as far as I am aware, only been the referred to in one case,[43] which does not, for present purposes throw any light on the nature of the detention

---

41 *Nel's* case above n 7 para 11.

42 Id.

43 *Nieuwoudt's* case above n 38. This notwithstanding the fact that section 66(3) has been in existence since the inception of the Insolvency Act. Its predecessor, the Insolvency Act No. 32 of 1916, embodied a similar provision in section 133.

following committal. In principle, however, the underlying purpose and nature of the committal proceedings under section 66(3) are essentially the same as the imprisonment under section 189 of the CPA. Just as in the case of the committal proceedings under section 189 of the CPA,[44] the section 66(3) committal also cannot be regarded as a criminal proceeding, does not result in the examinee being convicted of any offence and the detention of an examinee cannot be regarded as a criminal sentence or be treated as such.

[38] This is really placed beyond doubt when regard is had to the special penal provision of section 139(1) of the Insolvency Act, already referred to, which makes an act or omission, for which a person has or might have been lawfully committed to prison under section 66(3), a punishable offence. Imprisonment under section 189 of the CPA and committal to prison under section 66(3) are for present purposes indistinguishable.

[39] It is significant that the use of committal to prison as a means to enforce the disclosure of information in insolvency proceedings is not considered constitutionally or otherwise objectionable in other open and democratic societies based on dignity, equality and freedom. This is the case, for example, in England,[45] Australia,[46] Canada,[47] the

---

44 See *Nel v Le Roux NO and Others* above n 7 para 11 and the authorities there cited.

45 In terms of the Insolvency Act 1986 ("the Act") bankrupts have a wide range of obligations to provide information in different contexts and failure to make proper disclosure is regarded as civil contempt of court and liable to be punished by committal to prison. (See generally the annotation to section 288 of the Act in *Halsbury's Statutes of England and Wales*, 4ed vol 4 and *Halsbury's Laws of England* 4ed (Butterworths, London 1974) vol 9 para 101). In this way bankrupts can, for example, be punished by

United States of America[48] and Germany.[49] No authority was cited to us, and we are

committal to prison for failing to comply with their obligations to submit statements of affairs (section 288(1) and (4) of the Act); for failure to attend their public examinations (section 290(3) and (5)); for failure to deliver possession of their estates or to deliver up possession of relevant books, papers and records (section 291(1) and (6)); and for failure to give the trustee such information as to their affairs as the trustee may reasonably require (section 333(1)(a) and (4)).

46 Under section 54(3) of the Australian Bankruptcy Act 1966 the failure by a bankrupt to file a statement of affairs is punishable as contempt of court (see *Re Maher; Maher v Official Trustee in Bankruptcy* (1993) 118 ALR 519 (Federal Court of Australia) 523). Provision is made in the Act for public examinations. Under sections 264A, 264C and 264D thereof, failure to attend an examination under the Act, refusal to be sworn or to give evidence, prevarication and evasion is punishable as a statutory offence. Punishment for contempt includes imprisonment. (See McDonald, Henry and Meek *Australian Bankruptcy Law and Practice* 5ed Part XIV p 8734 and following; D Rose *Lewis' Australian Bankruptcy Law* 10ed by D Rose, The Law Book Company Ltd, Sydney (1994) 192-4 and following; and *Re Maher; Maher v Official Trustee in Bankruptcy*, above).

47 In Canada, if a witness refuses to answer a question at an official receiver's examination such witness may, if the refusal is persisted in after the propriety of the question has been confirmed by court and the witness ordered to answer the question, be committed for contempt of court. (See Holden and Morawetz *The 1996 Annotated Bankruptcy and Insolvency Act* (Carswell, Ontario 1995) 364 and the authorities there cited.)

48 In the United States of America the courts have jurisdiction under the relevant bankruptcy legislation to commit to prison a witness who refuses to answer a question in bankruptcy proceedings. (See, Bankruptcy Rule 9020. See generally *Michaelson v United States ex rel. Chicago, St Paul, Minneapolis & Omaha Ry. Co.* 266 US 42 (1924)). The only matter of contention concerns the issue whether in addition to the United States District Courts, the United States Bankruptcy Courts have this power. This will be alluded to later in this judgment.

49 Section 2(2) of the German Basic Law (GG) provides as follows:

> "Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person is unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden."

(Everyone has the right to life and physical integrity. Personal freedom is inviolable. These rights may not be encroached upon save pursuant to a law.)

(This, and all other translations off the Basic Law, are from the official translation, Press and Information Office of the Federal Republic of Germany October 1994.)

Section 100 of the Konkursordnung ("KO") (The Insolvency Act) provides that persons who have been declared insolvent are obliged to furnish full information concerning the circumstances of their insolvency to the trustee, the creditors' committee and (by order of court) to the creditors' meeting. Section 101(2) provides, amongst others, that insolvents may be committed to prison if they do not fulfil the obligations imposed on them by law. Section 807 of the Zivilprozesordnung ("ZPO") (Civil Procedure Act) provides a mechanism whereby a debtor, who has had writ of execution issued or a judgment taken against him or her by only one creditor, is not subjected to the usual execution procedures if the writ or judgment cannot be satisfied. In such event however, the debtor is obliged to furnish documents and a formal declaration concerning his or her financial circumstances. This obligation is enforceable by committal

unaware of any, where committal to prison under such circumstances has been regarded as infringing an insolvent's constitutional rights.

[40] As indicated above, committal to prison under section 66(3) serves a compelling and indispensable public purpose. There is no less severe measure which would adequately guarantee that the required information would be forthcoming from the examinee. A mere fine would often be ineffectual, inasmuch as the examinee might well prefer to pay a fine rather than supply the necessary information. To make it effective the fine would have to be very substantial and in the case of the insolvent it would be counterproductive and undesirable to execute such fine against the insolvent estate. There is in addition the important feature that recalcitrant examinees who are committed to prison can immediately obtain their own release by deciding to furnish the information they are obliged to give.

[41] A further significant safeguard to the examinee's rights is provided by section 66(5) which stipulates the following:

> "Any person committed to prison under this section may apply to the court for his

---

to prison under section 901 ZPO. In BVerfGE 61, 126 (135) the German Constitutional Court held that these committal provisions did not infringe the basic right to personal freedom under section 2(2) of the Basic Law. The Court held, at 135, that the committal mechanism was essential; there was no less invasive measure which would guarantee the result in the same way. It was also held that there was proportionality between the severity of the infringement on the debtor's right and the importance of the reasons for justifying the infringement. It was emphasised (at 136) that the debtors could easily fulfil their obligations and avoid imprisonment; if they possessed no disposable property they suffered no disadvantage and if they were solvent and only wanted to hide property, they deserved no protection.

> 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."

This postulates an unrestricted reconsideration of the grounds for the examinee's committal and continued detention. In this sense the imprisonment mechanism is very closely tailored to the purpose it is intended to serve and goes no further than is absolutely necessary to achieve its objective. In the result I conclude that the important public objective sought to be achieved by the enforcement mechanism under consideration, when regard is had to its narrow formulation and in-built safeguards, constitutes "just cause" under section 12(1)(a) of the 1996 Constitution for depriving section 66(3) examinees of their freedom. The applicant's substantive freedom attack on the subsection must accordingly fail.

The attack based on the Fair Procedure aspect of the Right to Freedom

[42] Having come to the conclusion that the concept of "fair" is implicit in the "trial" guarantee of section 12(1)(b) of the 1996 Constitution, this part of the attack requires addressing the crucial question of what is to be understood by "fair trial". In particular it raises the question whether, as contended for by Mr Hack, this "fair trial" guarantee requires that the officer presiding at the meeting of creditors and issuing the warrant committing the examinee to prison under section 66(3) must be a member of the judicial arm of the state, acting as such at the time. This is a matter not covered by the judgment

in *Nels's* case.[50]

[43] This question, though simple, raises profound issues concerning the nature of the constitutional state and the separation of powers which must ultimately be resolved within the context of the 1996 Constitution. It is essential, in my view, to consider our constitutional history prior to the introduction of the interim and 1996 Constitutions in the process of determining what the purpose of the 1996 Constitution is in regard to these and related matters and ultimately in determining the correct construction of the fair trial guarantee in section 12(1)(b).

[44] One of the values expressed in section 1(c) of the 1996 Constitution as being foundational to the South African democratic state is the "[s]upremacy of the constitution and the rule of law" and in section 2 it is enacted that the Constitution is the "supreme law of the Republic and that "law or conduct inconsistent with it is invalid". In section 7(1) the Bill of Rights is stated to be the "cornerstone of democracy in South Africa", section 7(2) obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights" and chapters 4 to 8 provide for a clear separation of powers between the legislature, executive and judiciary. We are here concerned only with the separation of powers as between the judiciary and the executive, to the extent that it is relevant to the

---

50 Above n 7 paras 14 and 15.

present enquiry, and not that between the legislature and the executive.[51]

[45] When formulating in section 12(1) the "right to freedom and security of the person" and including therein (in paragraphs (a) and (b) respectively) the right "not to be deprived of freedom arbitrarily or without just cause" and "not to be detained without trial" the Constitutional Assembly chose to do so in broad and unqualified terms. It did not, in the description or definition of these rights, exclude from the ambit of their protection specific cases of detention, as was done in article 5.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this Convention, the following forms of detention are, amongst others, excluded from the "right to liberty and security of person":

> "the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law ",[52]
>
> "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants",[53]
>
> "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".[54]

---

51 The latter was canvassed in *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC); 1995 (4) SA 877 (CC).

52 Article 5.1(b) of the Convention.

53 Article 5.1(e) of the Convention.

54 Article 5.1(f) of the Convention.

Situations such as these will be adverted to later in this judgment. The broad protection in our Constitution must moreover be evaluated in the light of the foundational constitutional commitment to the rule of law.

[46] Dicey[55] in propounding his concept of the rule of law, explains that in the first instance it means:

> ". . . that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."

Wade's interpretation[56] of this aspect of the rule of law is that:

> ". . . disputes as to the legality of acts of government are to be decided by judges who are independent of the executive. In Britain, as in the principal countries of the Commonwealth and in the United States of America, such disputes are adjudicated by the ordinary courts of law. Although many disputes may be taken before special tribunals ('administrative tribunals'), these tribunals are themselves subject to control by the ordinary courts and so the rule of law is preserved".

Mathews[57] has reformulated Dicey's first proposition as follows:

---

55 Dicey *Introduction to the Study of the Law of the Constitution* 10ed (MacMillan, London 1959) 188.

56 Wade and Forsyth *Administrative Law* 7ed (Clarendon Press, Oxford 1994) 25 - 26 (footnote omitted).

57 Mathews *Freedom, State Security and the Rule of Law* (Sweet & Maxwell, London 1988) 20 (footnote omitted).

> "Government according to the rule of law means that with a view to the protection of the basic rights enumerated in the second proposition below [the basic freedoms of person, conscience, speech, information, movement, meeting and association], the relevant laws shall take the form of pre-announced, general, durable and reasonable precise rules administered by regular courts or similar independent tribunals according to fair procedures."

[47] It must be borne in mind that we are here dealing with the rule of law in relation to personal freedom. In the sphere of personal freedom, particularly, the 1996 Constitution must be seen as a decisive rejection of and reaction against the severe erosion of the rule of law in relation to personal freedom in the apartheid era by a government which fits very closely Dicey's description, quoted in the preceding paragraph, namely one "based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of restraint." The nature and extent of these inroads is detailed by Mathews[58] who reminds us that as recently as 1988 internal security law made provision for no less than six forms of what may be called administrative detention, three which fell into the category of preventative detention and three into that of pre-trial detention. The singular importance of the judiciary as the protector of constitutional guarantees, seen also as a manifestation of the separation of powers doctrine, is well illustrated by the judgment in *Minister of the Interior and Another v Harris and Others*.[59]

[48] In attempting to give flesh to fundamental constitutional concepts and values such

---

58 Above n 57 in Chapter 7.

59 1952 (4) SA 769 (A), in particular 784D-H, 786H-787C, 788H-789A, 792E-793D and 796C-H.

as the separation of powers and the rule of law, it is instructive to note how other democratic countries based on freedom and equality regulate detention or committal to prison in circumstances comparable to those of the present case, and to what extent the intervention of a judicial officer is considered essential. At the end of the day it is of course our Constitution which has to be construed and its values applied in the South African context.

[49] Under the bankruptcy legislation of the United States of America the power to commit to prison someone who refuses to answer questions[60] is reserved to a judicial tribunal; the debate is about which tribunal or court. Judges of the federal courts of general jurisdiction are appointed under Article III of the US Constitution.[61] The jurisdiction of certain specialist courts such as the United States Bankruptcy Court has been established by Congress under Article I. In the case of bankruptcy courts Congress is empowered to "establish . . . Laws on the subject of Bankruptcies throughout the United States."[62] Unlike federal judges, judges of the bankruptcy courts lack life tenure

---

60 This power is also referred to as "civil contempt" power.

61 Article III section 1 provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Federal judges appointed under Article III are sometimes referred to as "Article III judges".

62 US Constitution art I s 8 cl 4.

(they are appointed for a term of 14 years) and complete salary protection (their salaries are set by statute but may be reduced during their term of office). Nevertheless Title 28 of the United States Code accords them a significant measure of judicial independence.[63]

[50] Under Bankruptcy Rule 9020[64], bankruptcy court judges are permitted to make "determinations" of contempt which, in the absence of timely objection, become final.

---

63 Appointment and Removal

28 U.S.C s 152 governs the appointment and removal of bankruptcy judges. Under Section 152(a), bankruptcy judges are appointed for a fixed term of 14 years. Bankruptcy judges may be removed from office under section 152(e) "only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council in the circuit in which the judge's official duty station is located." Further, "removal may not occur unless a majority of all the judges of such council concur in the order of removal . . . [and] before any order of removal may be entered, a full specification of charges shall be furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such charges."

Salary Protection

Under 28 U.S.C s 153, the salaries of bankruptcy judges are set at a uniform annual rate equivalent to 92% of the salary of a judge of United States District Court. Of course, unlike the salaries of Article III judges, the salaries of bankruptcy court judges may be diminished during a judge's 14-year term via amendment to section 153. It seems unlikely, however, that section 153 could be amended in a fashion intended to punish an individual bankruptcy judge for an unpopular decision. It is far from clear that such an amendment — intended, whether explicitly or by implication, to punish an individual judge or an identifiable group of judges — would withstand constitutional attack as a "bill of attainder"; i.e., a legislative punishment proscribed by article I, section 9, clause 3 of the Constitution. See e.g. *United States v Lovett*, 328 US 303 (1946) (striking down a bill of attainder statute denying compensation to three government employees found by the House Un-American Activities Committee to be engaged in "subversive activity").

64 The relevant part of Bankruptcy Rule 9020 reads as follows:

> "(a) **Contempt Committed in Presence of Bankruptcy Judge**. Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.
> (b) **Other Contempt.** Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after hearing on notice. . . ."

If objections are timeously filed, the matter is sent to the United States District Court for de novo review. The United States Courts of Appeal have divided over whether bankruptcy court judges may exercise civil contempt power although the weight of authority seems to support an affirmative answer.[65] What this debate does emphasise, however, is that civil contempt power is a judicial one and cannot be exercised by the executive.

[51] In Canada committal for contempt on refusing to answer questions at a bankruptcy examination is a matter for the court. The court reviews the matter and if it determines that the questions in issue are proper will order the witness to attend the examination and answer the questions. If the witness still refuses a motion can be made to commit the witness for contempt.[66]

[52] Section 104 II 1 of the German GG provides that only a judge may decide on the permissibility and continuation of detention.[67] Section 104 II 2 GG provides that where

---

65 In *Plastiras v Idell (In re Sequoia Auto Brokers Ltd.)*, 827 F 2d 1281, 1289 (9th Cir 1987) it was held that neither 28 USC s 157 nor 11 USC s 105 impliedly conferred civil contempt power on bankruptcy judges. The case therefore turned on whether the enabling statute conferred such power. In *Mountain America Credit Union v Skinner (In re Skinner)*, 917 F2d 444, 447-9 (10th Cir 1990), the contrary view was taken, the court disagreeing with the 9th Circuit. in *Plastiras* and holding that the power to order civil contempt is clearly implicit in 11 USC s 105(a). It considered this view to be in accord with the weight of authority (See e.g. *Burd v Walters (In re Walters)*, 868 F 2d 665 (4th Cir 1989), *Kellog v Chester*, 71 Bankr 36, 37 (ND Tex 1987) and the other authorities there cited. In *Skinner* the court further held, following *Burd v Walters*, that the grant of such authority by Congress was not unconstitutional, an issue it was unnecessary to decide in *Plastiras*.

66 See Holden and Morawetz above n 43.

67 Section 104 II 1 GG provides:

such detention is not based on the order of a judge a judicial ruling shall be obtained without delay. This is, however, only permitted in exceptional cases where a constitutionally permissible objective can simply not be achieved if a judicial decision had to precede the deprivation of liberty.[68]

[53] As indicated above[69] the refusal by a bankrupt to furnish information in given circumstances is dealt with in England by means of committal for contempt. Although the general rule, as stated in Halsbury's *Laws of England*[70] is that "[a]nything to be done under or by virtue of the Insolvency Act 1986 or the Insolvency Rules 1986 by, to or before the court may be done by, to or before a judge or registrar", paragraph 2(i) of the "Practice Direction" in [1988] 3 All ER 984, which direction applies to insolvency proceedings in relation to individuals, requires that applications for the committal of any person to prison for contempt "shall be made direct to the judge and unless otherwise ordered shall be made in open court."

> "Über die Zulässigkeit und Fortdauer einer Freiheitsentziehung hat nur der Richter zu entscheiden." ("Only a judge may decide on the admissibility or continuation of detention.")
>
> The rendering by Currie *The Constitution of the Federal Republic of Germany* (University of Chicago Press 1994) 388, of "Zulässigkeit" as "permissibility" seems preferable to the official rendering of "admissibility". Since the deprivation of freedom is the most severe infringement of personal liberty (BVerfGE 10, 302 (323)), there has to be a decision by a judge about the permissibility and continuation of detention in every case (see Kunig in von Münch *Grundgesetzkommentar* 2. Aufl. Art 104 Rn 17).

68 This was expressly so held in BVerfGE 22, 311 (317). See also, Kunig in von Münch above n 67, Art. 104 Rn 21; Hill in Isensee and Kirchhof *Handbuch des Staatsrechts* VI 1344 Rn 78; and Grabitz id VI 121-2 Rn 25.

69 N 45 above and accompanying text.

70 Volume 3(2) 4ed reissue para 747 (footnotes omitted).

[54] The civil contempt provisions under the Australian Bankruptcy Act 1966[71] are not exercised by the Registrar or Magistrate conducting the examination. If persons being examined refuse to disclose information or produce documents which they are obliged to do, the examination is adjourned to the court, which can then commit for contempt. This procedure "is constitutionally necessary because of the restrictions on the powers of the Registrar and Magistrate: R v Davison (1954) 90 CLR 353."[72]

[55] In *Davison's* case the High Court of Australia found that section 24(1) of the Bankruptcy Act 1924-1950, which, when read together with certain other provisions of the Act, authorised the registrar or deputy registrar to make a sequestration order, was unconstitutional as it purported to authorize a person not constituting a court under section 71 and 72 of the Constitution to exercise part of the judicial power of the Commonwealth. In this regard the High Court held (per Nixon CJ and Mc Tiernan J):

> "In the present case the thing done is the making of an order characteristic of the courts . . . When s. 24(1) is construed with the definition of 'the court' and applied to ss. 54 and 57, it becomes clear that the function of making an order of sequestration is treated as judicial and is confided to the registrar in the same character as it is confided to the court. In other words it is the intention of the legislature that the registrar should make an order operating as an order of court. That is exactly what he has done in the present case. For upon its face the order is one which could not be made except by a court constituted as it is in conformity with s. 71 and s. 72 of the Constitution.

---

71 Referred to above n 46 and accompanying text.

72 Rose (above n 46) at 194.

> It follows that what has been done is an attempt to authorize a person not constituting a court under ss. 71 and 72 of the Constitution to exercise part of the judicial power of the Commonwealth and is not authorized by the Constitution."[73]

[56] It is true that the foreign jurisprudence is mostly of a negative nature, in the sense that no example has been found where a statute, authorising an administrative official to issue a committal order in insolvency proceedings, has been found to be unconstitutional or contrary to the particular country's core common law values. Nevertheless the fact that no such statutory provision has been cited to us, or is known to us, does strongly suggest that there are no such provisions because they would be inimical to the fundamental norms and values of such countries relating to the separation of powers and the rule of law.

[57] Viewed in the light of all these considerations I would conclude that the "(fair) trial" prescribed by section 12(1)(b) requires, apart from anything else, a hearing presided over or conducted by a judicial officer in the court structure established by the 1996 Constitution and in which section 165(1) has vested the judicial authority of the Republic.

[58] In coming to this latter conclusion I have not overlooked the argument which Mr Trengove, appearing for the respondents, pressed on us. He submitted that in the vast majority of cases creditors' meetings under the Insolvency Act are presided over by

---

[73] (1954) CLR 353 at 370-1.

officers in the public service, designated for that purpose under the provisions of section 39(2) of the Act. These officers, he submitted, are persons of integrity and suitably qualified by way of legal knowledge, skill and experience to discharge all the functions of presiding officers under the relevant provisions of the Insolvency Act with a high degree of competence.

[59] I will assume all that in favour of the respondents. Such officers do not, however, meet one fundamental and indispensable criterion. However admirable they may be in all the respects mentioned, and I do not for a moment question any of these high qualities, they are officers in the public service — in the executive branch of the state — and therefore do not enjoy the judicial independence which is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution in the following manner:

> "(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[60] In our first certification judgment dealing with the 1996 Constitution, *In re:*

Certification of the Constitution of the Republic of South Africa,[74] we stated that although it is clear that pursuant to Constitutional Principle VI the Constitution provides for a system of separation of powers among the three co-equal branches of government, "[t]here is . . . no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute."[75] I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

[61] This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided. For the moment, however, it suffices to say that whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here — i.e., the power to commit an uncooperative witness to prison — is within the very heartland of the judicial power and therefore cannot be

---

74 1996 (10) BCLR 1253 (CC).

75 Id paras 106-8.

exercised by non-judicial officers.

[62] This principle has long been established in other open and democratic societies. In the United States, for example, the sole authority of judicial officers to commit recalcitrant witnesses was established as far back as 1893.[76] The Supreme Court based its holding partly on separation of powers concerns:

> "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. Except in the particular instances enumerated in the Constitution . . . the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises."[77]

---

76 In *Interstate Commerce Comm. v Brimson* 154 US 447, 485 (1893), the United States Supreme Court considered the constitutionality of section 12 of the Interstate Commerce Act, which (1) obliged witnesses testifying before the Interstate Commerce Commission to answer all questions put by the Commission and to produce all relevant books and records, and (2) conferred upon the United States Circuit Courts authority to impose fines or imprisonment upon recalcitrant witnesses in aid of the Commission's investigations. The objection to section 12 arose in the context of the Commission's investigation into potential hidden and illegal ownership by a steel company of several railroad lines. In the course of that investigation the Commission subpoenaed the chairman of several of the rail lines in question, and asked whether a majority of shares in those lines were held by the steel company. The chairman refused to answer, the Commission requested that the Circuit Court impose contempt sanctions, and the chairman objected, on the grounds that section 12, by giving authority to the Circuit Court to enforce a subpoena of the Commission, was repugnant to the Constitution because it conferred upon the Court a power that was not judicial. The Supreme Court upheld section 12 of the Act, stating that "[w]ithout the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced."

77 Id 485 (internal citations omitted).

[63] The principle articulated in *Brimson* and implicit in the jurisprudence of other democracies is clear: only judicial officers may, consistent with the proper separation of government powers, commit recalcitrant witnesses to prison. Judicial officers enjoy complete independence from the prosecutorial arm of the state, and are therefore well-placed to curb possible abuse of prosecutorial power. However, were executive branch officials to be invested with the power to compel, upon pain of imprisonment, cooperation with their investigative demands, this necessary check on the prosecutorial power would vanish, because it would allow the executive to pass judgment on the lawfulness of its own prosecutorial decisions.

[64] There is another line of reasoning which reaches the same conclusion or which supports such conclusion. The 1996 Constitution distinguishes between criminal trials, arrests and other legal proceedings. Section 35(3) entitles every accused person to a fair trial which, under paragraph (c) must be "a public trial before an ordinary court" and in respect of persons arrested for allegedly committing an offence, their detention is dealt with under section 35(1). Section 35(2) deals with "everyone who is detained" and paragraph (d) thereof confers the right on every detained person "to challenge the lawfulness of the detention in person before a court and if the detention is unlawful, to be released" without prescribing what constitutes a lawful detention, either substantively or procedurally.

[65] However obvious it might be to underscore this, I would emphasise that in this case we are also not dealing with, nor does this judgment touch upon, the constitutional or other criteria for the valid arrest of a person for allegedly committing an offence. In respect of other legal proceedings the governing section is section 34, which entrenches the right to have any dispute that can be resolved by the application of law decided "in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[66] A recalcitrant examinee at an insolvency enquiry is not an accused person and does not, any more than the recalcitrant examinee at an examination under section 205 of the CPA,[78] have the right under section 35(3) to claim a trial before an ordinary court. The factual and legal enquiry necessary to determine whether a recalcitrant examinee at an insolvency enquiry ought to be committed to prison under subsection 66(3) is, for purposes of section 34, a dispute which can be resolved by the application of law and such examinee is entitled under section 34 to have that dispute resolved before " . . . a court or, where appropriate, another independent and impartial tribunal or forum."

[67] In *Nel v Le Roux* this Court held that the "trial" envisaged by the right not to be detained without trial did not "in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in section 25(3) of the [interim]

---

78 As was held in *Nel v Le Roux* above n 7 para 11.

Constitution" but in most cases required "the interposition of an impartial entity, independent of the executive and the legislature to act as arbiter between the individual and the state."[79] Although the Court did not refer specifically to section 22 of the interim Constitution[80] (the predecessor of the current section 34) the above finding does not diverge in substance from the provisions of either section 22 of the interim Constitution or section 34 of the 1996 Constitution. The Court left open the question whether the "impartial entity" referred to had in all cases to be "a judicial officer who ordinarily functions as such in the ordinary courts" because it held that as far as section 205 of the CPA was concerned "the entity is indeed a normal judicial officer who ordinarily functions in the ordinary courts" and that the "court" before which the section 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 section 25(3) of the [interim] Constitution."[81]

[68] When regard is had to the provisions of section 34 of the Constitution in the context of the foregoing, the question which arises is whether it can be said:

(a) that the presiding officer at an insolvency inquiry who commits a recalcitrant

---

79 Above n 7 para 14.

80 Which provides:

> "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

81 Above n 7 para 15.

examinee to prison under subsection 66(3) is, for purposes of section 34 of the Constitution, either-

(i) a "court"; or,

(ii) "another independent and impartial tribunal or forum" and if so, whether it is "appropriate" to have the issue of committal to prison decided by such tribunal or forum and,

(b) that the investigation of such committal and the committal itself by such presiding officer constitutes the "[fair] trial" required by section 12(1)(b), which is itself linked to the criterion of "appropriateness" referred to in (a)(ii) above.

[69] Section 11(d) of the Canadian Charter guarantees a person who is charged with an offence the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . . ." It is of course immediately apparent that this provision differs significantly from that of section 35(3)(c) of the 1996 Constitution which guarantees every accused a fair public trial before "an ordinary court." For the limited purpose however of deciding what an "independent . . tribunal or forum" is for purposes of section 34 of the 1996 Constitution, the views of the Canadian Supreme Court on section 11(d) of the Charter are instructive.

[70] In *Canada v Beauregard*[82] Dickson CJC summarised the essence of independence

---

82 (1986) 30 DLR (4th) 481, 491.

as follows:

> "Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.
>
> . . . .
>
> The ability of individual judges to make decisions on concrete cases free from external interference or influence continues . . . to be an important and necessary component of the principle."

In the leading case of *R v Valente*[83] three essential conditions of independence were identified, that could be applied independently and were capable of achievement by a variety of legislative schemes or formulas.[84] The first was security of tenure, which embodies as an essential element the requirement that the decision-maker be removable only for just cause, "secure against interference by the executive or other appointing authority."[85] The second was a basic degree of financial security free from "arbitrary interference by the executive in a manner that could affect judicial independence."[86] The third was "institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function . . . judicial control over the administrative

---

83 (1985) 24 DLR (4th) 161 in which Le Dain J delivered the judgment of a unanimous Court after conducting a comprehensive and illuminating review of an extensive body of relevant materials.

84 Id 176.

85 Id 180.

86 Id 184.

decisions that bear directly and immediately on the exercise of the judicial function."[87]

[71] In *Valente* the fundamental distinction between the concepts of independence and impartiality, which is particularly relevant in the present case, was emphasised in the following two passages in the Court's judgment:

> " Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' . . . connotes absence of bias, actual or perceived. The word 'independent' in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive Branch of government, that rests on objective conditions or guarantees."[88]

> "Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective

---

87 Id 187 and 190.

88 Id 169-70.

> conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees."[89]

[72] At the same time it was pointed out in *Valente* that:

> ". . . it would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of s. 11(d) must bear some relationship to that variety."[90]

Nevertheless "the essence of the security afforded by the essential conditions of judicial independence" must be provided or guaranteed, although this need not be done by "any particular legislative or constitutional formula".[91] The above approach and the principles enunciated in *Valente* were more recently confirmed again by the Supreme Court in *R v Genereux*.[92] In the latter case the requirement of independence was further elaborated by pointing out that the status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by "any other external force, such as business or corporate interests or other pressure groups".[93]

---

89 Id 172-3.

90 Id 175.

91 Id.

92 (1992) 88 DLR (4th) 110.

93 Id 128 c-d.

[73] When the above principles are applied to the present case it illustrates even more clearly why officers in the public service do not enjoy the necessary independence, notwithstanding their actual competence and impartiality, for making the judicial decision to commit a recalcitrant examinee to prison. I am far from convinced that the first two essential requirements for independence referred to in the Canadian cases, namely those of security of tenure and a basic degree of financial security free from arbitrary interference by the executive in a manner that could affect judicial independence, are present in the case of officers in the public service. It is unnecessary, however, to pronounce definitively on these requirements, for such officers undoubtedly lack the required objective structural independence and are not reasonably perceived to possess it. As indicated above, Mr Trengove's submissions only address the issue of impartiality, but not that of independence.

[74] There is a further consideration. Section 35(3)(c) of the 1996 Constitution unambiguously limits the adjudication of criminal offences to an "ordinary court." This must be kept in mind in construing the phrase "when appropriate" which qualifies the permissibility in section 34 of the Constitution of allowing the resolution of a dispute in a hearing before "another independent and impartial tribunal." These provisions and their interrelationship are not fortuitous, but rather, I am convinced, a deliberate constitutional reaction to the recent history in this country regarding detentions and deprivations of physical liberty and are aimed at affording the individual greater constitutional protection.

Although committal to prison under section 66(3) is not incarceration following upon a criminal conviction it is, from the perspective of the persons deprived of their freedom, analogous. Accordingly, when considering whether it is "appropriate" under section 34 for "another independent and impartial tribunal" to commit a person to prison under section 66(3) it strengthens the conclusion that this would only be appropriate where such tribunal were constituted, or presided over, by a judicial officer of the court structure established by the 1996 Constitution and in which section 165(1) has vested the judicial authority of the republic.

[75] In sum, officers in the public service, who answer to higher officials in the executive branch, do not enjoy the independence of the judiciary and therefore cannot, without danger to liberty, commit to prison witnesses who refuse to cooperate in proceedings, such as the present.[94] I accordingly conclude that the committal provision of section 66(3) infringes section 12(1)(b) of the Constitution, at least to the extent that a person who is not a magistrate is authorised by the subsection, read with section 39(2) of the Insolvency Act, to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65 of the Insolvency Act.

[76] I say at least to such extent, because in certain circumstances magistrates may be

---

94 I limit my holding to imprisonment; i.e., I express no opinion today regarding whether lesser sanctions, such as fines or procedural disabilities, may be imposed by administrative officers without the intervention of a judge.

designated to preside at meetings of creditors and Mr Hack submitted that even for a magistrate to issue a warrant of committal was constitutionally impermissible. The thrust of his submission was that in issuing such a warrant the magistrate was discharging an administrative and not a judicial function and in any event was not sitting in a judicial capacity as a magistrate. In this regard he placed great reliance on the following passage from Conradie J's judgment:

> "Where it is the magistrate who presides [over a meeting of creditors], it is clear that, in doing so, he fulfils one of the many administrative functions with which he is by law charged. Subsection 66(6) of the Insolvency Act confers on him the immunity which is enjoyed by a judicial officer in connection with any act performed by him in the exercise of his functions. That it should have been thought necessary to confer such an immunity on the presiding officer, even where he is a magistrate, shows that he or she is not considered to be acting as such in presiding at the meeting. There accordingly appears to be no room for an argument that the magistrate presides over a court which, while not an ordinary court such as that to which an accused has a right, is nevertheless a court of some kind or other."[95]

[77] This passage was the last step in the learned judge's process of reasoning before concluding that the subsection was in conflict with section 12(1)(b) of the Constitution. Section 12(1)(b) does not in terms require that the "trial" be before a court, but in an earlier passage of his judgment Conradie J reached just that conclusion when stating that- "Section 12(1)(b) declares, therefore, that only a court of law may deprive a person of

---

95 Above n1 at 1557 C-E.

liberty "[96] (explaining later that this is implied in the section[97]). This conclusion he based primarily, though not exclusively, on the Oxford English Dictionary definition of "trial" as being:

> ". . . the examination and determination of a cause by a judicial tribunal; determination of the guilt or innocence of an accused person by a court"

and the definition put forward in *Catherwood v Thompson*[98]:

> "In a general sense , the term 'trial' denotes the investigation and determination of a matter in issue between parties before a competent tribunal, advancing in progressive stages from its submission to the court or jury to the pronouncement of judgment . . ."

[78] These definitions do not, I believe, go as far as Conradie J suggests; the second meaning in the first quotation relating clearly only to a criminal trial and the second quotation being wide enough to encompass "tribunal". In any event the meaning of a particular word must be determined in its proper statutory context. The learned judge also appears not to have given sufficient weight to what was decided in *Nel's* case[99], or the implication thereof; there being no difference between the meaning of "trial" in section 11(1) of the interim Constitution, which was the subject of inquiry in *Nel's* case, and its use in section 12(1)(b) of the 1996 Constitution. It is nowhere suggested in *Nel's* case

---

96 Id 1556 I.

97 Id 1557 A.

98 (1958) OR (not "QR" as reported in the judgment at 1556 H) 326.

99 Above n 7.

that the envisaged trial was limited to one before an ordinarily constituted court. In this regard the following was said:

> "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 section 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.
>
> [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."[100]

[79] The proceedings under section 205, read with section 189 of the CPA, which were held in *Nel's* case to constitute a proper trial for purposes of section 11(1), do not constitute an examination or investigation of any matter or cause in issue between any parties. The purpose is to obtain material or relevant information as to an alleged offence. Yet in substance as well as in form they are judicial proceedings albeit of an inquisitorial rather than adversarial nature.[101] In this sense they are in principle no different from the interrogation under the relevant sections of the Insolvency Act which is also aimed at obtaining relevant information concerning the insolvency in question. In presiding over the examination under section 205 of the CPA, and when considering under section 189

---

100 Id paras 14 to 15.

101 Compare *R v du Toit* 1950 (2) SA 469 (A) 472 and *R v Beukman* 1950 (4) SA 261 (O) 263E - H, in which reference was made, amongst others, to an enquiry under section 96 of Act 31 of 1917 (one of the precursors to section 205 of the CPA); and see also *S v Thompson* 1968 (3) SA 425 (E) 428F.

whether to sentence an examinee to prison and in so sentencing the examinee, the presiding officer is not presiding in a court over a trial which would meet the criteria of the definitions on which Conradie J relied. Yet, despite that, we held in *Nel*[102] that it did constitute a trial for purposes of section 11(1) of the interim Constitution. In my view Conradie J took too narrow a view of the concept of trial in section 12(1)(b) of the 1996 Constitution and in so doing erred.

[80] I am also unable to agree with the learned judge's conclusion that where it is the magistrate who presides over a meeting of creditors "it is clear that, in doing so, he fulfils one of the many administrative functions with which he is by law charged" to the extent that this is applied to the committal procedure under section 66(3). It is unnecessary for purposes of this case to consider whether the officer presiding at a meeting of creditors is, in respect of other aspects of the meeting and the examination of persons thereat, performing an administrative or a judicial function. The crucial enquiry relates to proceedings for issuing a committal warrant.[103] In such proceedings the presiding officer determines whether the witness has complied with the statutory obligation to produce

---

102 Above n7 paras 12-5.

103 It has been held that the proceedings before a presiding officer at a meeting of creditors in terms of the Insolvency Act are administrative in essence though superficially judicial in appearance; see *S v Carse* 1967 (2) (SA) 659 (C) 664H-665A and *Joel Melamed and Hurwitz v Simmons NO and Others* 1976 (4) SA 189 (T) 195B. In the former case it was also held, at the place cited that "[t]he presiding officer does not, in my opinion, sit as a Judge or magistrate (even though, as in the present matter, he was a magistrate)." In neither case was the question as to what function the presiding officer fulfils when issuing a committal warrant under section 66(3) in issue or considered. On the other hand, in *Receiver of Revenue, Port Elizabeth v Jeeva and Others; Klerck and Others NNO v Jeeva and Others* 1996 (2) SA 573 (A) 579 I, the Appellate Division of the Supreme Court held that the commissioner conducting an inquiry under section 418 of the Companies Act acts in a quasi-judicial capacity.

documents and answer questions and the sanction to be imposed if this has not been done. The witness is entitled to legal representation and may apply to the High Court for his discharge from custody. This is in substance a judicial proceeding even if it is not conducted in a court of law. I have no doubt in my mind that the process of factual and legal evaluation involved in deciding whether or not to commit an examinee to prison and the act of issuing the committal warrant, are clearly judicial and nothing else.

[81] It is true that the magistrates who preside at meetings of creditors and who issue committal warrants under section 66(3), derive their authority to do so, not from the Magistrates' Courts Act,[104] but from section 39(2) of the Insolvency Act. This is no different from their position when presiding over an examination under section 205 of the CPA; here too their authority is derived from an Act other than the Magistrates' Courts Act. In neither case does this circumstance alter the fact that when sending persons to prison magistrates act in a judicial capacity; it also does not diminish their judicial independence when so doing.

[82] Conradie J, in reaching the conclusion that magistrates acting in terms of section 66(3) perform an administrative function and not a judicial function in their capacity as magistrates, also placed reliance on the fact that under section 66(6) of the Insolvency

---

104 Act 32 of 1944.

Act[105] a magistrate is granted the same immunity as presiding officers who are not magistrates:

> "That it should have been thought necessary to confer such an immunity on the presiding officer, even where he is a magistrate, shows that he or she is not considered to be acting as such in presiding at the meeting."[106]

I would repeat that we are not concerned about the capacity in which the magistrate is presiding over the meeting as a whole, but rather when the committal is considered and ordered. In the immunity provision magistrates are not mentioned by name; they are embraced therein only because, under section 39(2), they can in certain circumstances be presiding officers. Had magistrates been excluded specifically from the immunity it might well have created the impression that they enjoyed no such immunity. It is more likely, to my mind, that the formulation of section 66(6), read with section 39(2), was allowed to cover magistrates as well, in order to prevent such an incorrect impression or at least out of excessive care. I accordingly disagree with the above inference drawn by the learned Judge.

[83] I am unable to agree with this portion of Conradie J's judgment. When issuing

---

105 Which provides the following:

> "In connection with the apprehension of a person or with the committal of a person to prison under this section, the officer who issued the warrant of apprehension or committal to prison shall enjoy the same immunity which is enjoyed by a judicial officer in connection with any act performed by him in the exercise of his functions."

106 Above n 1 at 1557 D-E.

a committal warrant under section 66(3) the magistrate performs a judicial function. The magistrate is a judicial officer whose appointment is regulated by section 174(7) of the 1996 Constitution and is in all material respects an "impartial entity, independent of the executive and the legislature" who, in relation to the committal process, is interposed "to act as arbiter between the individual and the state" as required by our judgment in *Nel's* case.[107] To require the magistrate to postpone the enquiry if such an issue arises to enable another magistrate to conduct it in separate proceedings places form above substance and, in my view, such formality is not required by section 12 of the 1996 Constitution. I accordingly hold that the committal provision of section 66(3), read with section 39(2) of the Insolvency Act, infringes section 12(1)(b) of the 1996 Constitution only to the extent that a person who is not a magistrate is authorised by the subsection to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65 of the Insolvency Act.

[84] This holding, in so far as it decides that the section 66(3) provision for committal by a magistrate does not infringe section 12(1)(b), is in conformity with and flows logically from part of the judgment of this court in *Bernstein's* case[108] in which a broad attack, based amongst others on the provisions of section 11(1) of the interim Constitution and directed at the provisions of sections 417 and 418 of the Companies Act as a whole,

---

107 Above n 6 para 14.

108 Above n 6.

had to be considered. In its process in aid provisions, section 418 (which deals with examinations by Commissioners) draws a distinction between Commisioners who are magistrates and those who are not. In the case of the former, section 418(2)[109] provides, amongst other things, that a Commissioner, who is a magistrate, has the same powers of "punishing defaulting or recalcitrant witnesses, or causing witnesses to be apprehended . . . as the Court referred to in section 417." The Commissioner who is not a magistrate does not have this power; section 418(5) creates a substantive offence in respect of the defaulting or recalcitrant witness before such a Commissioner.[110] In dismissing the abovementioned attack, the Court in *Bernstein* necessarily, albeit implicitly, concluded

---

109 (2) 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.

110 (5) Any person who-

(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.

that these section 418(2) provisions in relation to a Commissioner who is a magistrate, did not infringe section 11(1) of the interim Constitution.[111] It must be pointed out, however, that in *Bernstein* the Court did not apply its mind to the contention, because it had not been argued that a magistrate who exercises these section 418(2) powers is acting purely administratively and not as a judicial officer exercising a judicial function.

[85] Section 66(3) does not in express terms prescribe the procedures to be followed before an examinee may be committed to prison. More importantly, it contains no explicit provision which obliges a presiding officer to conduct the proceedings antecedent to committal in any manner inconsistent with any norm of procedural fairness required by the constitution or the common law. The inescapable conclusion, in my view, is that whosoever is constitutionally permitted to issue a committal warrant under section 66(3), it is implicit in the provisions of the subsection that the relevant proceedings must be conducted by such presiding officer in a manner which is not inconsistent with any norms of procedural fairness required by the Constitution or the common law. That being the case, section 66(3) is in no way inconsistent with any fair procedure right protected by section 12(1) of the Constitution. This was the very approach adopted and the conclusion reached by this Court in *Bernstein's* case[112] in dismissing an attack on sections 417 and

---

111 Above n 6 at paras 51-5.

112 Above n 6 at para 46, where the following was stated on behalf of the majority of the Court:

> " . . . the courts in this country have. . . developed a considerable body of case law the design of which is to prevent the mechanism of sections 417 and 418 . . . being used oppressively, vexatiously or unfairly towards the examinee. I

418 of the Companies Act based on section 11(1) of the interim Constitution. In *Jeeva's* case[113] the Supreme Court of Appeal in effect held this to be the position at common law in relation to proceedings under sections 417 and 418.[114] The same approach was adopted and conclusion reached unanimously by this Court in *Nel's* case[115] when it rejected an attack against section 205 of the Criminal Procedure Act based on section 11(1) of the interim Constitution.[116] Neither in *Bernstein's* case, nor in *Nel's* case, did the Court, in

---

> 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." (Footnotes omitted);

and at para 47, where it was further stated:

> "A large number of . . . [the] . . . complaints . . . relate to the manner in which the examination was conducted by the Commissioner and not to any provision in the sections of the Act under attack. There is nothing in the sections which mandates that the examination be conducted in this way. In respect of all these complaints the applicants' correct remedy was to approach the Supreme Court for relief on the basis that the examination was being conducted in an oppressive, vexatious or unfair manner."

No member of the Court expressed disagreement with this approach.

113 Above n 103.

114 Id p 579 I, where Harms JA, writing for the Court, stated:

> "[the Commissioner] has the main duty to examine the witnesses. He has to regulate and control the interrogation. Should he fail in his duty to apply the procedural fairness appropriate to this forum, an aggrieved party may approach the Court for suitable relief (*Schulte v Van der Berg and Others NNO* 1991 (3) SA 717 (C))."

115 Above n 7.

116 Id at paras 12-14; 16-21.

rejecting the constitutional attack based on section 11(1) of the interim Constitution, place any reliance on section 35(2) of the interim Constitution.[117] The fact that the provisions of section 35(2) of the interim Constitution have not been repeated in the 1996 Constitution is therefore irrelevant to the decision in the present matter. In any event, they do no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect.[118] In my view the same interpretative approach should be adopted under the 1996 Constitution. I am therefore constrained to disagree with my colleague Mokgoro J where she reaches a different conclusion on this issue in her dissenting judgment.

Limitation of the section 12(1)(b) right under section 36(1) of the 1996 Constitution.

[86] Section 36(1) provides as follows:

> "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

---

117 Section 35(2) provides:

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

118 See *Bernstein's* case, above n 6, at para 59 and the authorities cited in footnotes 85 and 87.

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 section 36(1) differs in various respects from section 33 of the interim Constitution[119] its application still involves a process, described in *S v Makwanyane and Another*[120] as the "weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests."

[87] In *Makwanyane* the relevant considerations in the balancing process were stated to 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."[121] The relevant considerations in the balancing process are now expressly stated in section 36(1) of the 1996 Constitution to include those itemised in paragraphs

---

119 More particularly in that the prohibition against the negation of "the essential content of the right in question" in section 33(1)(b) and the "necessary" requirement in the proviso to section 33(1) have been omitted from section 36(1) of the 1996 Constitution.

120 Above n 10 at para 104.

121 Id.

(a) to (e) thereof. In my view this does not in any material respect alter the approach expounded in *Makwanyane*, save that paragraph (e) requires that account be taken in each limitation evaluation of "less restrictive means to achieve the purpose [of the limitation]."

[88] The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.

[89] The right we are here concerned with is the right not to be detained without a fair trial, but more particularly with the right to be tried, following on the conclusion earlier reached, in a hearing presided over or conducted by a judicial officer of the court structure established by the 1996 Constitution and in which section 165(1) has vested the judicial authority of the Republic.[122] This is a core and most important procedural component of the right not to be detained without trial. It is the pre-eminent, if not the only, guarantee against arbitrary administrative detention and is indispensable for the upholding of the rule of law and the separation of powers in a constitutional state.

---

122 See paragraph 74 above.

[90] The subsection of the Insolvency Act in question, to the extent indicated, takes away this procedural guarantee entirely. Admittedly this deprivation is only temporary, because the person committed can apply immediately under section 66(5) to the appropriate High Court for discharge from prison. I agree in this regard with Mr Trengove's submission that section 66(5) does not amount to a mere appeal or review; it entitles examinees to a full re-hearing and reconsideration of the lawfulness of their committal to prison. This does not, however, cure the deprivation of the right, it merely limits the deprivation in time. For the period of deprivation, persons committed to prison consequentially suffer a deprivation of the most important aspect of their right to freedom, namely bodily or personal freedom without the constitutional procedural guarantee in question.

[91] I have already found that the process in aid constituted by the section 66(3) committal to prison serves a public interest no less compelling than in the case of the winding up of a company and the necessity of compelling the insolvent to furnish the requisite information no less than in the case of the director of a company in the process of being wound up.[123] We are not, however, under section 36(1), presently considering the justification of any limitation of the substantive freedom right, but the justification for limiting the procedural right, namely, the right to having the committal to prison adjudicated upon by a judicial officer. When considering the "importance of the purpose

---

123 See paragraphs 30 - 40 above.

of the limitation" under section 36(1)(b) it is the importance of the purpose of this latter limitation that must be focussed on; in other words, the importance of the purpose of having an officer in the public service (and not a judicial officer) committing a recalcitrant examinee to prison.

[92] Under the interim Constitution it is for the legislature, or the party relying on the legislation, to establish justification, and not for the party challenging it to show that it was not justified.[124] Neither the wording, structure nor purpose of section 36(1) of the 1996 Constitution warrants a different approach. If factual information, other than facts of which judicial notice may properly be taken, is necessary as a basis for establishing justification, it is for the party relying on justification to establish those facts and failure to do so may result in such party being unable to establish justification. A court cannot be asked to speculate on justification in the absence of any factual basis therefor. In the present case no such factual basis was laid either by proof of facts or by agreement. I accordingly find myself on unsound ground for positively evaluating or determining the importance of having an officer in the public service committing the recalcitrant examinee to prison. If such positive determination is not possible then very little has been established which can counterpose the importance of the right infringed.

[93] I accept, as already indicated, that the public service officers designated to preside

---

124 *Makwanyane's* case above n 10 at para 102 and the authority therein cited.

over creditors' meetings are skilled and experienced. That by itself does not explain why they must have the right to incarcerate examinees. It does not follow, as a matter of logic, that if they do not have this right that their skill and expertise can no longer be used for presiding over meetings. There are simply too many unknown factors in the equation to warrant such a conclusion.

[94] We have no evidence, or other admissible factual material, to indicate (whether statistically or by way of informed expert opinion) what the actual deterrent effect of the summary committal procedure is or how effective the criminal sanction in section 139(2) of the Insolvency Act would be in the absence of the summary committal procedure. It was suggested in argument that if the public service officers did not have summary committal powers this would give rise to delays which would undermine the efficacy of the sequestration process. It is not self-evident to me why this must be so, if creditors' meetings and courts are efficiently run.

[95] There is nothing before us to show why these public service officers cannot legitimately be accommodated in the magisterial judiciary and used exclusively to preside over creditors' meetings or why, for that matter, specialist insolvency or bankruptcy courts cannot effectively be established under the Constitution in which their expertise can also be fully employed.[125] As judicial officers, with true structural and constitutional

---

125 See sections 166(e) and 170 of the 1996 Constitution.

independence, there could be no objection to them committing examinees to prison.

[96] Another avenue also remains unexplored. Provision could be made for a procedure whereby, if an examinee refuses to answer a question or produce documents, the matter is automatically referred to an appropriate court to determine the propriety of the question and the witness ordered to answer the question or produce the document. If the witness still refuses, committal for contempt can follow very rapidly without any delay or disruption of the creditors' meeting. These, or analogous procedures, are used in England, Australia and Canada. There is nothing to suggest that they do not work efficiently, nor that the procedures or their efficacy are dependant on economic or other resources of which our own country is not possessed.

[97] On a broader and more general basis, no example has been offered to us nor been found by us, of any other country which finds it necessary, in the sphere of insolvency, to permit a non-judicial officer to commit a recalcitrant examinee to prison. Nor has it in any way been established that economic or other factors play a role in the other insolvency regimes which are inappropriate to our own circumstances.

[98] As far as the importance of the purpose of the limitation of the procedural right in the present case is concerned there is simply nothing before us to establish it. No example of any other South African statutory provision was cited to us, and I am unaware

of any, which empowers any other tribunal or forum, not being an ordinary court in the judicial arm of the state, to commit a person to prison for civil contempt. It is significant that, for example, such a power is not conferred under the Commissions Act.[126] Instead section 6(1) of the Act makes it a punishable offence for a witness to fail to attend, to refuse to be sworn, to fail to furnish documents or to fail to answer fully and satisfactorily questions lawfully put at the enquiry.[127] A similar approach is adopted under the Labour Relations Act.[128] Section 142(1) of the Act confers wide powers on a commissioner, appointed by the Commission for Conciliation, Mediation and Arbitration under section 142(1), to resolve a dispute, to subpoena witnesses to produce documents, to furnish information and to give evidence. Although section 142(8) makes extensive provision for various acts and omissions of a witness to constitute contempt of the Commission, the Commission itself has no power to commit for contempt. Instead, section 142(9) provides

---

126 Act No 8 of 1947 as amended.

127 Section 6(1) provides:

> " Any person summoned to attend and give evidence or to produce any book, document or object before a commission who, without sufficient cause (the onus of proof whereof shall rest upon him) fails to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the enquiry or until he is excused by the chairman of the commission from further attendance, or having attended, refuses to be sworn or to make affirmation as a witness after he has been required by the chairman of the commission to do so or, having been sworn or having made affirmation, fails to answer fully and satisfactorily any question lawfully put to him, or fails to produce any book, document or object in his possession or custody or under his control, which he has been summoned to produce, shall be guilty of an offence and liable on conviction to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment."

128 Act 66 of 1995.

that any contempt is to be referred "to the Labour Court for an appropriate order."[129]

[99] The examples of alternative procedures in other jurisdictions indicate, on their face at least, that there are not merely less restrictive procedural means to achieve the purpose at which summary committal is directed in insolvency proceedings, but that these purposes can be achieved without restricting at all the component of fair trial right with which we are here dealing. This also means that there is no proportionality, or at best very little, between the nature and extent of the limitation of the procedural right here in question and the purpose sought to be achieved by the limitation. In the result it has not, in my view, been established that the limitation in question in this case is reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom.

[100] In argument we were referred by Mr Trengove to sections 44 to 51 of the Aliens Control Act 96 of 1991 which confer sweeping powers of arrest and expulsion of aliens on the executive without the interposition of a judicial officer. Reference was also made to deprivations of freedom in other contexts, such as disease control and mental health, which might occur without the interposition of a judicial officer. It was contended that it did not necessarily follow that deprivation of bodily freedom in such circumstances

---

129 The Labour Court established under section 151(1) of the Act is, in terms of section 151(2) thereof, a "superior court" on which is conferred "the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of the provincial division of the Supreme Court has in relation to matters under its jurisdiction."

would be unconstitutional. I have already referred to the fact that in the European Convention certain forms of detention are excluded from the right to liberty and the security of the person[130] and that in Germany there are exceptions to the strict constitutional provision that detention may only be ordered by a judge before such detention takes place.[131]

[101] It may well be that in such, and other cases, the interposition in all cases of a judicial officer before detention takes place, would make the achievement of an important and legitimate governmental goal impossible to achieve, and that for these and possibly other reasons a limitation of the right in question could be justified under section 36(1). It is however unnecessary to decide such cases now or express any views on them, for the simple reason that in the present case such circumstances are not present. The present decision does not inhibit an unfettered examination of such cases if and when they present

---

130 Above para 45.

131 Above para 52. There are also statutory exceptions. For example, section 28 of the Wehrdisziplinarordnung (WDO, Military Disciplinary Act) permits a sergeant to order the arrest of a soldier for disciplinary reasons without prior judicial intervention, but in BVerfGE 22, 311 it was held that such detention would be unconstitutional unless the arrest was confirmed by a judge. Section 18(2) and 13 UG (Baden-Württembergisches Gesetz ueber die Unterbringung von Geistekranken und Suchtkranken) an act dealing with the accommodation of mentally ill persons and drug addicts provide for the arrest of such persons and section 311 UG authorises administrative detention of such persons in a hospital if such persons constitute a danger to themselves or others. In BverfGE 58, 208 it was held that prior interrogation by a judge was essential. But under section 5 UG it is permissible to take a person into care without prior judicial intervention provided that the necessity for such detention is confirmed by a medical certificate. The taking into care has to be reported to judicial authorities who then decide on its validity. Section 46I of the HSOG (Hessisches Gesetz ueber die oeffentliche Sicherheit und Ordnung - the Hessian public safety act) permits the police to arrest persons in order to prevent them from life threatening danger or to prevent them from committing a crime. Section 28 requires that the arrest be confirmed by a judge within 48 hours. In BverfGE 83, 24 the Federal Constitutional Court rejected a constitutional complaint against these provisions.

themselves.

The Order

[102] Having concluded that the limitation by section 66(3) of the right not to be detained without trial (to the extent already indicated) is not justifiable under section 36(1) of the 1996 Constitution, it follows that, to that extent also, the subsection is inconsistent with the Constitution.

[103] It was submitted on behalf of the respondents that if such were our conclusion regarding the extent of the subsection's constitutional inconsistency, we should not strike down the subsection in its entirety, but issue an order indicating the extent of the inconsistency as was done in *Ferreira v Levin.*[132] I agree. Here, like in that case, while the subsection is not linguistically severable, it is notionally so, and it would otherwise be appropriate to make an order in such form.

[104] Section 171(1)(b) of the 1996 Constitution provides that when deciding a constitutional issue within its power, a court -

> "may make an order that is just and equitable, including -
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on conditions, to allow the competent authority to correct the

---

132 Above n 35 at para 157.

defect."

The present seems an appropriate case to give the declaration of invalidity no retrospective effect, but to make it operative only from the time of the making of the order. Persons who have, since the coming into operation of the Constitution, been unconstitutionally committed to prison, can unfortunately not be afforded effective relief in the sense of undoing any detention they might have suffered prior to the making of this order.

[105] Moreover, if the order is granted any retrospective effect it could raise uncertainties as to whether a person unconstitutionally committed to prison in the past had a claim for damages in respect of a committal which was unassailable at common law at the time and ordered in good constitutional faith. If it were to transpire that the retrospective operation of the order does not provide a cause of action for damages, then persons unconstitutionally detained in the past suffer no prejudice in relation to damages. If it has the effect of giving rise to such a claim, then it seems to be a most undesirable consequence, having regard to the fact that the committal took place in good faith. Retrospectivity can in any event not assist the applicant, inasmuch as his committal was ordered by a magistrate and was therefore constitutional.

[106] A case has also not been made out for suspending the declaration of invalidity under section 172(1)(b)(ii). Magistrates can continue validly and constitutionally to make

committal orders and presiding officers who are not magistrates can still continue to preside at meetings and the criminal sanctions available to punish recalcitrant examinees can be invoked to induce them to discharge their obligations. It would moreover be unconscionable to continue to allow persons to be committed to prison unconstitutionally in the future.

[107] Although the applicant was ultimately unsuccessful in obtaining any relief which would assist him, inasmuch as a magistrate issued his warrant for committal, the constitutional matters raised by him were ones of substance. In the circumstances he ought not to be mulcted in costs.

[108] The first respondent, who was the presiding officer at the meeting of creditors in question and who issued the warrant on 22 February 1997 committing the applicant to prison under section 66(3), is a magistrate. Paragraph 3 of the order made by Conradie J is to the effect that "[p]ending the confirmation or otherwise [of his order declaring section 66(3) to be constitutionally invalid] the first respondent is interdicted from having the warrant for the imprisonment of the applicant issued on 22 February 1997 executed." In the light of the conclusion I have reached that section 66(3) is inconsistent with the Constitution only to the extent indicated, it follows that the order of constitutional invalidity made by Conradie J can be confirmed to that extent only. Under these circumstances, and having regard to the fact that the first respondent is a magistrate and

the above finding that it is not unconstitutional for a magistrate to issue a warrant of committal under section 66(3), it is for Conradie J to determine the fate of the above temporary interdict granted by him in the light of the order to be made by this Court.

[109] The following order is made :

1. The order of constitutional invalidity made by Conradie J is confirmed to the following extent only:

> Section 66(3), read with section 39(2) of the Insolvency Act No 24 of 1936, is constitutionally invalid to the extent that it authorises a presiding officer who is not a magistrate to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65 of the Insolvency Act.

2. No order is made as to costs.

3. The matter is referred back to Conradie J to be dealt with in the light of this judgment and the order in 1 above.

Chaskalson P, Langa DP and Madala J concur in the judgment of Ackermann J.