

Explanatory Note

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

Sections 65A to 65M of the Magistrates Courts Act 32 of 1944 provide for the imprisonment of judgment debtors. A judgment debtor who has failed to satisfy the judgment debt within 10 days of the date of the judgment can be required to attend a hearing at which an enquiry will be conducted by a magistrate into the financial position of the debtor, his or her ability to pay and his or her failure to do so. Notice to the debtor to appear at a hearing calls upon the debtor to show cause why he or she should not be committed for contempt of court and why the judgment debtor should not be ordered to pay the judgment debt in instalments or otherwise. The notice is drawn up by the creditor, signed by the clerk of the court and served on the debtor in accordance with the rules for service of process. The magistrate has a discretion whether to order committal to prison unless the debtor proves at the hearing that he or she 1) is under the age of 18, 2) was unaware of the original judgment for debt against him or her, or 3) has no means of satisfying the judgment debt. In order to show absence of means of satisfying the judgment debt the debtor also must show that such lack of means is not due to wilful disposal of goods in order to avoid payment of the judgment debt, wilful refusal to pay such debt, squandering of money or living beyond his or her means, or incurring of additional debts (except for household goods) after the original judgment date.

In two separate cases divisions of the Supreme Court referred the question of the constitutionality of ss 65A to 65M of the Magistrates Courts Act to the Constitutional Court.

The Court held that the provisions violated the right to freedom and security of the person contained in s 11(1) of the Constitution. It was considered certain that to put someone in prison is a limitation of that person's right to freedom. To do so without any criminal charge being levelled or any trial being held is manifestly a radical encroachment on that right.

As to the question of the justifiability of the limitation in terms of s 33(1) of the Constitution, it was held that at the very least a law or action limiting the right to freedom must have a reasonable goal and the means for achieving that goal must also be reasonable. The goal of ss 65A to 65M of the Magistrates Courts Act is to provide a mechanism for the enforcement of judgment debts. This goal is a legitimate and reasonable government objective. The means for achieving this objective were however not considered reasonable by the Court. The provisions are held to be overbroad. The sanction of imprisonment is ostensibly aimed at the debtor who will not pay. But it is unreasonable in that it also strikes at those who cannot pay and simply fail to prove this at a hearing often due to negative circumstances created by the provisions themselves. Due to a number of defects, the statute sweeps up those who cannot pay with those who can but simply will not. The provisions allow persons to be imprisoned without having actual notice of either the original judgment or of the hearing. It is not only theoretically possible but also quite possible in practice that the debtor's first notice of the

case against him or her is when the warrant of committal is executed, since personal service of any process prior to that is not required. Even if a person has notice of the hearing, he or she can be imprisoned without knowing of the possible defences available and accordingly without any attempt to advance any of those defences. The so-called notice to show cause issued pursuant to s 65A does not spell out what the defences are, or how they could be established. The burden cast on the debtor with regard to inability to pay, although possibly defensible in principle as pertaining to matters peculiarly within his or her knowledge, is so widely couched that persons genuinely unable to pay are nevertheless struck. The provisions of s 65F(3)(c), which spell out what the debtor must prove, are not only unreasonably wide, but also unreasonably punitive. Whatever may be said about a debtor who wilfully frustrates payment, the nakedly punitive retribution inherent in the provisions of paragraphs (iii) and (iv) cannot be justified. The provisions allow debtors to be imprisoned without knowing that they have a burden to prove their defence or how to discharge such burden. It could possibly be contended that the magistrate ought to explain a debtor's rights and duties to an undefended debtor and would probably do so. But there is no express obligation on the magistrate to do so.

The Court considered it indefensible to treat a civil judgment debtor more harshly than a criminal. The latter is entitled in terms of s 25(3) of the Constitution to a fair trial with procedural safeguards, including the right to legal assistance at public expense if justice so requires. The debtors, who face months of imprisonment, must fend for themselves as best they can. The procedure makes no provision for recourse by the debtor to the magistrate or higher authority once an order for committal has been made. Section 65L, which deals with the release of a debtor from prison, contains no mechanism whereby a debtor, even one against whom a committal order had been made in absentia, is entitled to approach a court for relief.

The Court considered that was not possible to excise only those provisions of the Magistrates Courts Act which fail to distinguish between debtors who cannot pay and debtors who will not pay. In order to do so the Court would have to engage in the details of law making, a constitutional activity given to the legislature. It was, however, considered possible to sever the provisions which make up the option of imprisonment. The object of sections 65A to 65M of the Magistrates Courts Act was to provide a system to assist in the collection of judgment debts. Removing one of the options available under the system did not make the system that remains run contrary to the purpose of the legislative scheme. Accordingly, the infringing provisions could be severed and the balance of the system could usefully remain in force.

The Court therefore struck out certain provisions of the Magistrates Court Act providing for imprisonment of judgment debtors. All other provisions of sections 65A to 65M of the Magistrates Courts Act remained in force. With effect from the date of the Court's order, the committal or continuing imprisonment of any judgment debtor in terms of section 65F or 65G of the Magistrates Courts Act was declared invalid.

The judgment of the Court was delivered by Kriegler J (Chaskalson P, Mahomed DP, Ackermann J, Madala J, O'Regan J and Kentridge AJ concurring). Mokgoro J concurred in the order proposed by Kriegler J. Didcott J delivered a separate judgment, expressing agreement with the judgment and order of Kriegler J but dissenting as to the extent to which the invalid parts of the Act were severable from the valid parts. Langa J delivered a separate judgement , concurring in the order proposed by Kriegler J and concurring with the judgment of Kriegler J and with the judgment of Didcott J. Sachs J delivered a separate judgment

concurring with the judgments of Kriegler J and Didcott J and with the order proposed by Kriegler J. Mokgoro J concurred in the judgment of Sachs J.