SACHS J ABRIDGED JUDGMENT

Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others

[37] **SACHS J**: Is imprisonment for debt in itself unconstitutional, or does it all depend on how it is done and against whom it is directed? This, to my mind, was the major issue raised in the present matter.

[41] A perusal of the admirably, and I might say, enviably, succinct judgments of Didcott J and Kriegler J respectively, shows that they have not found it necessary to go beyond considering the reasonableness of the procedures involved. I agree with their analysis and with the order that Kriegler J proposes. I feel however that a proper answer to the request from the Association of Law Societies that we use our powers to keep the committal proceedings alive pending rectification, requires a fuller analysis of the institution of civil imprisonment than they have considered appropriate. If there is nothing in principle constitutionally objectionable in sending people to jail for not paying their debts - as their judgments indicate or imply - then there would be considerable merit in the argument of the Association of Law Societies in favour of retaining committal proceedings pending rectification. If, on the other hand, we are dealing with an institution that is intrinsically suspect then the justification for using our powers in terms of Section 98(5) becomes weak indeed. The matter is of considerable importance not only for creditors and debtors, but for the administration of justice, inasmuch as it affects the daily work of attorneys, magistrates, and prison officers. I will accordingly complement the judgments of my colleagues with some views of my own. I will start at the beginning, namely, with the nature of the right allegedly infringed, and then proceed step by step until reaching the final question of whether, or not to keep the institution alive.

The Question of Constitutionality

[42] The first task is to decide whether Sections 65A to 65M are in whole or part unconstitutional. In the present case, they were said to violate the right to freedom and security of the person in Section 11, the prohibition against detention without trial in the same section, the requirements of a fair trial specified in Section 25 and the right to dignity contained in Section 10.

[43] Section 11(1) bears directly on the subject. It reads:

> Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

It is tempting to regard the absence of a hearing as indicating that there is a direct violation of the right in Section 11(1) not be detained without trial. Given the specific meaning that the phrase 'detention without trial' has acquired in South Africa, however, I prefer not to apply the words literally to the situation under discussion, but rather, for the purposes of this case, to view them as protective buttresses for the broader structure of personal freedom. I feel that this approach opens the way for a richer and more sophisticated exploration of the values embodied in the concept of personal freedom, which in turn will facilitate the discovery and delineation of what could be appropriate limitations consistent with these values. It also maintains the relative impermeability of the concept of detention without trial, as generally understood; the narrower and more deeply anchored the right, and the closer it is kept to its special purpose, the more easily can it be defended against invasion. Similarly, rather than attempt to force the situation of imprisoned judgment debtors into the matrix of a criminal trial, which has different objectives, I will regard Section 25 as a relevant background source which furnishes values helpful in the interpretation of the elusive notion of freedom. Thus, although Section 25 is not directly applicable to the present case in that defaulting civil debtors are neither persons arrested nor accused persons as provided for in that section, it does indicate fundamental standards of fairness regarded as appropriate before penalties, including imprisonment, are judicially imposed. I propose, also, to treat the right to dignity contained in Section 10 as a right which is intertwined with and helps in the interpretation of the rights of personal freedom and security protected by Section 11,

rather than as an independent right violated by the statute in question. In this way I will attempt to locate the issue in what I regard as its proper constitutional framework.

The right to 'Freedom and security of the person'

[44] My principal focus is on the rights subsumed in the expression 'freedom and security of the person'. The issue of determining the precise limits and content of these words will no doubt exercise this Court for a long time to come. Other jurisdictions have battled with the problem of whether the phrase should be construed as referring to one right with two facets, or two distinct, if conjoined, rights. Another jurisprudentially controversial matter has been whether the words should be considered as applying only or mainly to the absence of physical constraint or whether it should be regarded as having the widest amplitude and extend to all the rights and privileges long recognized as central to the orderly pursuit of happiness by free men and women. Even more fundamental (and even more difficult) are questions relating to the nature of citizenship and civic responsibility in a modern industrial-administrative state, the degree of regulation that is appropriate in contemporary economic and social life and the extent to which freedom and personal security are achieved by protecting human autonomy on the one hand and recognizing human interdependence on the other. The present case does not, however, compel us to penetrate into any of these complex areas. On any analysis, using any approach, there can be no doubt that committing someone to prison involves a severe curtailment of that person's freedom and personal security. Indeed, the very purpose of committal is to limit the freedom of the person concerned. Given the manifest and substantial invasion of personal freedom thus involved, the real issue that we have to decide is whether such infringement can be justified in terms of the general limitations on rights permitted by Section 33 of the Constitution. This is the nub of the problem before us.

[45] Yet the second, and for our purposes, crucial step of the investigation, is by no means unrelated to the first. Although notionally the court proceeds in two distinct analytical stages, there is clearly a relationship between the two curial enquiries. The more profound the interest being protected, and the graver the violation, the more stringent the scrutiny; at the end of the day, the court must decide whether, bearing in mind the nature and intensity of the interest to be protected and the degree to which and the manner in

which it is infringed, the limitation is permissible. The President of this Court has outlined the basic balancing process in the following words:

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of Section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to provisions of Section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators.'

If I might put a personal gloss on these words, the actual manner in which they were applied in *Makwanyane* (the Capital Punishment case) shows that the two phases are strongly interlinked in several respects: firstly, by overt proportionality with regards to means, secondly by underlying philosophy relating to values and thirdly by a general contextual sensitivity in respect of the circumstances in which the legal issues present themselves.

[46] I make these points because of what I regard as a tendency by counsel, manifested in this case, to argue the two-stage process in a rather mechanical and sequentially divided way without paying sufficient attention to the commonalities that run through the two stages. In my view, faithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based, and case-oriented framework. The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct. If I may be

forgiven the excursion, it seems to me that it also follows from the principles laid down in *Makwanyane* that we should not engage in purely formal or academic analyses, nor simply restrict ourselves to ad hoc technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case. There is no legal yardstick for achieving this. In the end, we will frequently be unable to escape making difficult value judgments, where, in the words of McLachlin J, logic and precedent are of limited assistance. As she points out, what must be determinative in the end is the court's judgment, based on an understanding of the values our society is being built on and the interests at stake in the particular case; this is a judgment that cannot be made in the abstract, and, rather than speak of values as Platonic ideals, the judge must situate the analysis in the facts of the particular case, weighing the different values represented in that context. In the present matter then, we are called upon to exercise what I would call a structured and disciplined value judgment, taking account of all the competing considerations that arise in the circumstances of the present case, as to whether in the open and democratic society based on freedom and equality contemplated by the Constitution, it is legitimate/acceptable/appropriate to continue to send defaulting judgment debtors to jail in terms of the procedures set out in Section 65 of the Magistrates' Courts Act.

The Limitations Clause

[47] Section 33, commonly known as the Limitations Clause, is central to our enquiry and bears repeating:

> 33 (1) The rights entrenched in the Chapter may be limited by law of general application, provided that such limitation -
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> (a) shall be permissible only to the extent that it is -
>
> (i) reasonable; and
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> (ii) justifiable in an open and democratic society based on freedom and equality; and
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> (b) shall not negate the essential content of the right in question,
>
> and provided further that any limitation to -
>
> (aa) a right entrenched in section ... 11 ...

shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

[48] There are in fact a multiplicity of situations where the limitations clause might be invoked to justify physical restrictions on personal freedom. They were not argued before us, and it would be inappropriate to express any opinion whatsoever on the validity of other proceedings presently treated by the law as permissible. They would include such matters as: detention of illegal immigrants, segregation of persons with highly infectious diseases, custodial orders in terms of mental health legislation, and arrests to establish or confirm jurisdiction of a person seeking to flee the country so as to avoid civil liability. In each case, the law limiting the exercise of the rights contained in Section 11 would have to pass the tests of reasonableness, justifiability and necessity laid down in Section 33. I will not touch the complex question of not negating the essential content of the right. Many jurisdictions, our own included, allow imprisonment of persons who fail to meet court-ordered maintenance payments. Here, too, we are not called upon to give any ruling. Nor are we called upon to make a ruling on other statutes which impose criminal liability for failure to pay monies owing. What we are required to decide is the narrow question of whether the Sections 65A to 65M procedures for the committal of non-paying judgment debtors to prison for up to ninety days are constitutionally permissible; more particularly do they meet the Section 33 criteria? Put in summary form, Section 33 requires us to ask: is the limitation reasonable, is it justifiable and is it necessary?

[49] The tests of reasonableness, justifiability and necessity are not identical, and in applying each one individually we will not always get the same results. Frequently, however, it is convenient to look at and assess them together. Normally, if a limitation fails to pass the test of reasonableness, there is no need to consider whether it could be justified or regarded as necessary; it falls at the first hurdle. My colleagues have demonstrated convincingly that on the assumption that sending defiant judgment debtors to jail was a legitimate objective, present procedures are manifestly overbroad in furthering that purpose, and as such are unreasonable and unconstitutional. As I have said, I agree with them. In the present case, however, we are required to do more than decide on the constitutionality of certain statutory provisions. We are asked to use our discretion in terms of Section 98(5) to keep constitutionally invalid provisions alive. In concrete terms, I consider this to be the real issue before us. In making our assessment, I accordingly feel it is appropriate to examine whether, even if the procedural defects could be cured, as Mr Du Plessis argued, the limitation would pass the tests of justifiability and necessity. If

committal proceedings are in essence both justifiable and necessary, but vitiated merely because the means used are unreasonable in relation to the objective to be achieved, the case for giving Parliament a chance to remedy the defect is a strong one. If, however, they would fail the tests of justifiability and necessity, however well-tailored, then there would be no point in attempting to correct the procedures. I will accordingly deal with the distinct criteria both separately and globally.

'Reasonableness'

[50] The requirement that limitation be reasonable presupposes more than the existence of a rational connection between the purpose to be served and the invasion of the right. Thus, a limitation logically connected to its objective could be unreasonable if it undermined a long established and now entrenched right; imposed a penalty that was arbitrary, unfair, or irrational; or, as in this case, used means that were unreasonable. My colleagues have dealt in detail with this aspect, and I need say no more than that the procedures are manifestly unreasonable.

'Justifiable in an Open and Democratic Society'

[51] In deciding whether or not sending people to jail for not paying their debts is justifiable in an open and democratic society based on freedom and equality, we need to locate ourselves in the mainstream of international democratic practice.

[52] At first sight, it would appear that imprisonment for debt is totally prohibited in international law and practice. Paul Sieghart writes in a much-quoted passage that:

> In the international instruments there are ... some exceptions of choice such as the freedoms from torture, slavery, and imprisonment for debt, which are declared absolutely, without restriction or limitation of any kind, and not subject to derogation even in the most extreme circumstances.

Without further analysis, however this statement might be misleading. The point the author is making is that, like torture and slavery, imprisonment for debt is one of the prohibited practices in relation to which no derogation is permissible. The question that still has to be determined is exactly what is meant by imprisonment for debt; in other

words, the concept or definition of imprisonment for debt can be qualified, even if its practice is absolutely forbidden. A close look at international instruments shows that far from resolving the dilemma posed in the opening sentence of this judgment, they replicate it. Thus, the American Declaration of the Rights and Duties of Man provides in broad terms that:

> XXV. No person may be deprived of liberty for non-fulfilment of obligations of a purely civil character.

The American Convention on Human Rights similarly states in Article. 7(7) that:

> no one shall be detained for debt. This principle shall not limit the order of a competent judicial authority issued for non-fulfilment of duties of support.

[53] On the other hand, the prohibition in the UN International Covenant on Civil and Political Rights (ICCPR), which is repeated verbatim in Protocol 4 of the European Convention, is somewhat narrower. It reads:

> 11. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

According to the Explanatory Report on the Fourth Protocol to European Convention, freedom from civil imprisonment must be understood in the following context:

> [T]he obligation concerned must arise out of contract; the prohibition does not apply to obligations arising from legislation in public or private law. Nor does the prohibition apply if the debtor acts with malicious or fraudulent intent; or if a person deliberately refuses to fulfil an obligation, irrespective of his reasons therefor, nor if his inability to meet a commitment is due to negligence. In these circumstances, the failure to fulfil a contractual obligation may legitimately constitute a criminal offence.

The aim of the Protocol was said to be to prohibit, as contrary to the concept of human liberty and dignity, any deprivation of liberty for the sole reason that the individual had not the material means to fulfil his or her material obligations. Similar points are made in connection with the ambit of Article 11 of the ICCPR, where it is stressed that the prohibition relates expressly to contractual obligations; that it does not cover deprivations of liberty based on non-fulfilment of statutory obligations, nor does it include criminal

offences related to civil law debts, nor does it protect persons who simply refuse to honour a debt which they are able to pay.

[54] The only conclusion that I can draw from these materials is that international instruments strongly repudiate the core element of the institution of civil imprisonment, namely, the locking-up of people merely because they fail to pay contractual debts, but that there is a penumbra relating to money payments in which imprisonment can be used in appropriately defined circumstances.

'Necessary'

[55] By adding the requirement that limitations on Section 11 be not only reasonable and justifiable, but also necessary, the framers of the Constitution were emphasizing the status of Section 11 as one of the core provisions requiring special solicitude. It would thus not be sufficient for defenders of a renovated set of committal proceedings to show that they were reasonable and justifiable in an open and democratic society. The use of prison would also have to be sustained on the grounds that it was necessary.

[56] The element of necessity thus tightens up the scrutiny in respect of what would be reasonable and justifiable. It is a question of degree rather than of kind. Investigation of alternatives becomes more important, and the tolerance given to the legislature in its choice of means to achieve 'reasonable' objectives is reduced. The burden of persuasion is a higher one, and the balance is tipped more sharply in favour of upholding the infringed rights. Although this might not involve an onus of proof in the sense that the term is used in criminal and civil trials, it does presuppose that at the end of the day, and after having considered all argument and done its own intellectual research, the court must be satisfied that the limitation in fact meets the requirements of Section 33. Clearly, not every form of regulation or each impediment to the exercise of free choice would qualify as a violation of freedom. Yet once there is a manifest infringement of the right, as in the case of civil imprisonment, such invasion would have to satisfy the special test of being necessary.

[57] How are we to interpret the word 'necessary'? Section 35 invites us to have regard to international experience where applicable when seeking to interpret provisions relating to

fundamental rights. As I understand it, this section requires us to give due attention to such experience with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules. Because of its importance and its relative novelty in South African jurisprudence, I will set out references to international instruments in some detail. The phrase 'necessary in a democratic society' appears frequently in the European Convention for the Protection of Human Rights and Fundamental Freedoms. To determine whether a particular restriction is necessary, a number of guidelines have been developed which the European Court summarized in *Silver v United Kingdom* as follows:

(a) the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.

(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention.

(c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'.

(d) those paragraphs of Article (sic) of the Convention which provide for an exception to a right to be guaranteed are to be narrowly interpreted.

[58] The term 'necessary' is also used in the ICCPR in relation to permissible limitations on fundamental rights specified on an article-by-article basis. This has been interpreted to mean that a restriction is necessary only if it responds to a pressing public and social need, pursues a legitimate aim and is proportionate to that aim. It has also been stated that the requirement of necessity implies that the restriction must be proportional in severity and intensity to the purpose being sought and may not become the rule. Unlike the European Convention, the ICCPR does not relate the element of necessity to a democratic society; accordingly, the relevant criterion for evaluating whether interference is necessary is not a common, democratic minimum standard, but rather solely whether it was proportional in the given case.

[59] The Siracusa Principles drawn up by a group of experts to guide the interpretation of the limitations clauses in the ICCPR state that:

10: Whenever a limitation is required in terms of the Covenant to be 'necessary', this term implies that the limitation:

(a) is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant,

(b) responds to a pressing public or social need,

(c) pursues a legitimate aim, and

(d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

Commenting on the general use of the word 'necessary' in international instruments, Paul Sieghart says that the principle of proportionality is inherent in the adjective 'necessary'. This means, amongst other things, that every 'formality', 'condition', 'restriction', or 'penalty' imposed must be proportionate to the legitimate aim pursued.

[60] What all the above citations indicate is that the term 'necessary' is not made the subject of rigid definition, but rather is regarded as implying a series of inter-related elements in which central place is given to the proportionality of the means used to achieve a pressing and legitimate public purpose. Turning to the South African Constitution, I will not attempt a full definition of the word 'necessary', but, bearing international experience in mind, make the following observations. The requirement that the limitation should be not only reasonable but necessary would call for a high degree of justification. It would also reduce the margin of appreciation or discretion which might otherwise be allowed to Parliament. Personal freedom would have to be regarded as a core value not lightly to be interfered with. In particular, any physical restraints imposed by State coercion would have to be looked at very closely. In lay language, a strong case indeed would have to be made out in favour of a law which allowed people to be locked up other than through the pre-trial and trial procedures provided for in Section 25. Put more technically, it would not be enough that suitably amended Sections 65A to 65M served the public interest in a rational way by enforcing legitimate claims of creditors and using justifiable methods before to do so. The public interest served by these sections would have to be so pressing or compelling as clearly to outweigh the indignity and loss of freedom suffered by the judgment debtors, not to speak of the costs to the public purse. In negative terms, the law would not be permitted to impose restrictions or burdens going beyond what would be

strictly required to meet the legitimate interests of judgment creditors and society as a whole. This is not to say that an impossibly high threshold would have to be established which effectively ruled out genuine weighing by Parliament of reasonable alternatives within the broad bracket of what would not be unduly oppressive in the circumstances. The requirement of finding 'the least onerous solution' would not therefore have to be seen as imposing on the court a duty to weigh each and every alternative with a view to determining precisely which imposed the least burdens. What would matter is that the means adopted by Parliament fell within the category of options which were clearly not unduly burdensome, over broad, or excessive, considering all the reasonable alternatives. The question would then have to be asked: could the societal reasons in favour of imprisonment of judgment debtors be said to be sufficiently acute and forceful to pierce the protective constitutional armour provided by the word necessary?

Civil imprisonment or contempt of court?

[61] One justification of the necessity for retaining committal proceedings is that what we are really dealing with is not civil imprisonment at all but contempt of court. This indeed is the descriptive justification given in the texts of Sections 65A to 65M themselves for imprisonment of debtors in default. The institution of contempt of court has an ancient and honourable, if at times abused, history. If we are truly dealing with contempt of court then the need to keep the committal proceedings alive would be strong, because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained. Yet are we in truth dealing with contempt of court? In answering this question it is useful to look at the context in which Sections 65A to 65M were adopted and the manner in which they have been interpreted until now. Legal history shows that Sections 65A to 65M are based on a confluence of two common law principles that were previously separate and to some extent even in conflict with each other. The first related to imprisonment for civil debt, which went back to Roman times; the second was the concept of contempt of court, in

terms of which persons could be fined or committed to prison for challenging the dignity or authority of a court, usually because of defying a court order. In respect of contempt of court, the common law drew a sharp distinction between orders *ad solvendam pecuniam,* which related to the payment of money, and orders *ad factum praestandum,* which called upon a person to perform a certain act or refrain from specified action. Failure to comply with the order to pay money was not regarded as contempt of court, whereas disobedience of the latter order was. Thus, civil imprisonment for failure to pay a debt was a remedy in its own right, not dependent on proof of contempt of court. Conversely, contempt of court proceedings were not used against defaulting judgment debtors.

The purport of legislation adopted in the mid-1970's was to reverse the situation: civil imprisonment as an institution was to be abolished, while failure to pay a judgment debt was to give rise to liability to be imprisoned for contempt of court. Sections 65A to 65M, introduced into the Magistrates' Courts Act in 1976, authorized the committal to prison for contempt of court of debtors who had defaulted on judgment debts. The Abolition of Civil Imprisonment Act 2 of 1977, on the other hand, purported to get rid of civil imprisonment, though it did keep alive committal proceedings in the Magistrates Courts. Judges of the Supreme Court were, however, unconvinced either that civil imprisonment had been abolished or that the real reason why debtors in the Magistrates Courts were being committed to prison was for contempt of court. Looking at the legislative history, Van Dijkhorst J felt compelled to declare that *"die daad wat strafbaar gestel word is ... die wanbetaling van die vonnisskuld"* (the act that is made punishable is the failure to pay judgment debt), and that in reality civil imprisonment was re-introduced *"onder die dekmantel van minagting van die hof"* (under the cloak of contempt of court). In another case, the court commented that if regard was had to the wording of Section 65A(1) and 65F(1) "the so-called contempt of court is a failure to satisfy a civil

judgment". In both cases, the court observed that the sections concerned made drastic inroads into the freedom of the individual and had accordingly to be interpreted restrictively rather than extensively.

[62] The mere fact that what the statute refers to as contempt of court could be considered civil imprisonment under another name, (a matter which will be discussed further below), would not, of course, *per se* make it unconstitutional. Nor does the judicial characterization of the law as being one that makes severe inroads into the freedom of the individual mean that such inroads could not be justified in terms of Section 33. The function of this Court is limited to declaring unconstitutionality in relation to matters properly brought before it, and then only where the legislation concerned clearly resists being construed in a manner which would save it. This latter principle does not, of course, imply the opposite, namely that fundamental rights would have to be narrowly interpreted in order to keep legislation alive. Section 232 (3) would permit a pared-down construction of legislation so as to rescue it from being declared invalid; it would not require a restricted interpretation of fundamental rights so as to interfere as little as possible with pre-existing law. Furthermore, it would not be the function of the court to fill in lacunae in statutes that might not have been visible or regarded as legally significant in the era when parliamentary legislation could not be challenged, but which would become glaringly obvious in the age of constitutional rights; the requirement of reading down would not be an authorization for reading in.

Critiques of Sections 65A to 65M

[63] Mr Du Plessis contended on behalf of the Association of Law Societies that save for one fatal defect, the procedures outlined in Sections 65A to 65M were not only not unfair, but necessary to ensure that people paid their debts and that debt-collecting was

conducted in an orderly way and not through what he termed the law of the jungle. The essence of Mr Du Plessis argument can be summed up as follows: The threat of committal for a short period is not an inappropriate sanction for debtors who are able to pay, but refuse to do so. Without some penalty of this kind, the whole of debt-collecting can come to be regarded more as a matter of benign entreaty than of serious law enforcement. Worse still, strong-arm methods of debt-collecting, far more deleterious in the result than a period in prison, would inevitably follow. Far from being over-severe, a well-focused process could be quite appropriate for the objective to be achieved, namely to separate out the reprobate from the unfortunate. The correct balance between the rights of creditors and debtors would be maintained. The rule of law would be upheld. Any limitation on personal freedom that might result would be the consequence not of a harsh law, but of a conscious decision by the recalcitrant debtor to defy the court order; it would not be too drastic in the circumstances; and it would be under judicial control and function according to clearly prescribed criteria. It was reasoning along these lines which underlay Mr Du Plessis request, on behalf of the Association of Law Societies, that we exercise our discretion to keep the current debt-collecting procedure alive while Parliament remedied what he regarded as a technical and procedural defect in a well-tried, legitimate and socially-necessary legal institution.

[64] As far as counsel for the Applicants and the Government were concerned, however, the institution was intrinsically bad because it represented a continuation of civil imprisonment, under another name. In their view, it was profoundly violatory of fundamental rights in its application, and beyond repair by Parliament. For the purposes of this judgment, it is not necessary to recapitulate all their arguments or to analyse the supporting materials they made available to us. Nor is this Court obliged to make a definitive finding on whether or not the committal proceedings in Sections 65A to 65M

are constitutionally retrievable or not. Yet it is appropriate to examine Mr Du Plessis arguments with some attention, since if I am convinced that his overall evaluation of the committal proceedings is correct, then I could be more easily persuaded than otherwise to accede to his request to give an order in terms of Section 98(5) which would enable the committal proceedings to be rescued by Parliament.

[65] If we look at the text not in abstract, but in its actual legal-historical setting and socio-economic context, and if we are sensitive both to its purpose and to its impact, we find strong suggestions to the effect that it does indeed represent a form of civil imprisonment in disguise, retained as a relatively quick and inexpensive means of frightening small debtors into paying up without following the procedures regarded as appropriate in the case of larger debtors. In other words, the defects might be symptomatic of a deeper unconstitutionality, so that even if each imperfect procedural detail were to be corrected, we might still be left with an unconstitutional legal institution. The picture of the operation of the provisions, as painted for us by all three counsel, was that of an institutionalized and systematic instrument of debt collecting, rather than that of a badly-tailored, yet nevertheless individualized, back-up process to deal with occasional recalcitrant and contumacious debtors; the difference between counsel was that Mr Du Plessis, in the name of the Association of Law Societies, thought the system as such was necessary and justifiable, while counsel for the Applicants and the Government thought it was not.

[66] As I have said, Sections 65A to 65M do indeed describe the penalty imposed on a defaulting debtor as being based on contempt of court, which is a well recognised legal institution of manifest virtue if properly utilized. Yet even in technical terms, there must be doubts as to whether this description is accurate. The proceedings lack the essential

elements of criminal contempt of court, in that the imposition and continuation of the penalty is dependent on the will of the judgment creditor and not the court (other than through imposing the sentence). It is also doubtful whether it properly qualifies as civil contempt of court. A judgment debtor should in principle not be held liable through his or her person, life or liberty, for the payment of a debt, but only through the aggregate of his or her means. The long-standing distinction made in common law between orders *ad pecuniam solvendam* and those *ad factum praestandum* is therefore founded on logic and principle. Thus, whatever terminology may be used, we could well be dealing in reality with civil imprisonment and not with contempt of court. The essence of civil imprisonment, even in its milder forms, has always been that the debtor pays with his or her body. The Afrikaans word *gyselaar* (hostage) comes from the contract recognized in Roman Dutch law in terms of which a freeman pledged his person as suretyship for performance. Behind its verbal description, the committal process embodied in Section 65A can be said still to amount in practice to a form of ransom which family and friends are forced to pay to secure the release of the debtor, the only two differences being that the period is limited to ninety days, and that the State pays for maintenance rather than the creditor. Viewed historically, civil imprisonment can hardly be regarded as a tried and tested remedy deeply rooted in progressive legal tradition and necessary in a democratic society. Over the centuries and decades, its ambit has been progressively restricted so that now all that is left of it is its attenuated existence in relation to debtors hauled before the Magistrates Court; like the Cheshire cat, it has disappeared bit by bit leaving only, not a smile, but a frown. The broad question before us would be whether, in the open and democratic society contemplated by the Constitution, it could ever be appropriate to use imprisonment as a means of ensuring that creditors got paid in full, bearing in mind that the amount to be collected would often fall below the costs of collection, not to speak of the costs to the taxpayer of keeping the debtor in prison. It is evident from the statistical

data presented to us that committal to prison is in reality mainly for relatively small amounts and largely for debt in respect of goods purchased, services rendered and money borrowed. Mr Du Plessis argued that the expense to be considered would not be that of sending people to prison for trifling amounts, but rather the cost of keeping the spectre of prison sufficiently alive and deterrent (afskrikwekkend) to compel the great majority of debtors to pay up. When properly examined, however, this argument seems to condemn rather than support the institution of committal proceedings, under Sections 65A to 65M. The persons most vulnerable to committal orders would be precisely those who were unemployed, and thus could not be subject to emoluments orders, and those who did not have any property which could be attached. To penalize the workless and the poor so as to frighten those a little better off would be exactly the kind of instrumentalising of human beings which the concept of fundamental rights was designed to rebut. To suggest that thousands of people would rather go to jail than satisfy relatively small debts within their capacity to pay, strains the imagination. There is thus support for Mr Navsa's claim that the object of the system would be to send to jail those who could not pay in order to get money out of those who could pay. The borderline between ability to pay and refusal to pay would be a shadowy one; resigned and bewildered debtors, confused by complicated and technical notices, would inevitably get caught up with the truly recalcitrant debt-dodgers who defiantly refused to pay even when they could.

[67] Furthermore, even if the corrected law were to be overtly neutral in its language, its operational effect would to a degree be discriminatory in that the rich who did not pay their debts would in practice be dealt with in the Supreme Court by bankruptcy procedures which respected due process, while the non-paying poor would continue to be faced with summary committal in the Magistrates Court. It seems strange indeed that the lower courts, using attenuated procedures in relation to smaller debtors less able to

defend themselves, would have greater coercive powers than would the superior courts using normal due process in relation to larger debtors, better able to assert their rights.

[68] Finally, we must take into account the fact that other efficacious remedies would be available to judgment creditors. It would not be easy to substantiate the existence of an imperative need to use committal orders. The civil law, in fact, would provide a series of remedies for non-payment of contractual debts. These would vary depending on the nature of the contract: repossession or holding on to goods in some cases, evictions from premises, cutting-off of services, attachment and sale of property and deduction from wages in others. Where the assets were insufficient to cover liabilities, bankruptcy proceedings could be instituted with a view both to recovering hidden assets and to ensuring appropriate distribution of what was available. The specific remedies, other than imprisonment, which Sections 65A to 65M themselves would provide, would include: sale in execution of goods; attachment of debts due; emoluments orders and an order to pay in instalments. Another section would provide for what would amount to sequestration. Furthermore, creditors could arrange different forms of security for debts, ranging from mortgages to pledges to sureties. Rather than extend credit freely and then rely on the threat of imprisonment to ensure that the debt is paid, persons could prudently calculate the risks they undertook, and then depend on normal methods of securing payment where the means for such payment existed. This need not require their denying credit to the poor, but, rather, their treating the poor with the same circumspection they would apply to the better-off.

[69] For the purposes of this judgment it is neither necessary nor desirable to make definitive findings on any of the above matters. Suffice to say that the constitutional vice at the heart of the committal proceedings cannot be identified with total assurance as

being limited merely to the failure to provide a hearing, nor in my view, simply to the defects listed by Didcott J and Kriegler J. There are weighty arguments in favour of considering the institution as being more profoundly vitiated.

[70] Having rejected the minimalist position of contended for by Mr Du Plessis, however, I feel it equally necessary to refuse to accept the maximalist claims of Mr Navsa. As I have stated above, the answer to the problem of constitutionality cannot be found in an abstract, either/or decision over whether the practice in the Magistrate's Court can be defined as civil imprisonment and as such automatically fall to be rejected as unacceptable (argument for both the Applicants and the Government tended to be along these lines). Rather, it would depend on an evaluation of whether, in their actual setting and operation, the provisions would involve concretely identifiable and constitutionally indefensible invasions of the right to personal freedom. Looked at in relation to the request by the Association of Law Societies, which does not relate to constitutionality but to the appropriate order to be made, the issue presently before us is whether the institution under consideration is in itself so non-problematic and worthy of being kept alive that we should exercise our discretion under Section 98(5) in favour of this course.

[71] My conclusions, on this point, are as follows: when the Law Commission says committal of judgment debtors is an anomaly that cannot be justified and should be abolished; when it is common cause that there is a general international move away from imprisonment for civil debt, of which the present committal proceedings are an adapted relic; when such imprisonment has been abolished in South Africa, save for its contested form as contempt of court in the Magistrate's Court; when the clauses concerned have already been interpreted by the courts as restrictively as possible, without their constitutionally offensive core being eviscerated; when other tried and tested methods

exist for recovery of debt from those in a position to pay; when the violation of the fundamental right to personal freedom is manifest, and the procedures used must inevitably possess a summary character if they are to be economically worthwhile to the creditor, then the very institution of civil imprisonment, however it may be described and however well directed its procedures might be, in itself must be regarded as highly questionable and not a compelling claimant for survival.

[72] This is not to say that there could never be circumstances which could justify the use of the back-up of prison to ensure that court orders for payment of judgment debts were obeyed in the same way as other orders. We are not called upon to decide this question at the moment, nor do we have sufficient material before us to make a definitive finding. The legislature, if it so chose, would be better placed than ourselves to do the requisite research, canvass opinions and receive information; it could give full consideration to relevant, inter-related factors, such as the proper management of debt collection, the way in which credit is extended, remedies for ensuring fulfilment of obligations and the proper use of court time and prison facilities. It could weigh up all the competing considerations and take account of cost implications and the availability of court and prison officials. If it chose to undertake such an investigation it would, in my opinion, have to operate within the following framework:

(i) The process should not permit the imprisonment of persons merely because they were unable to pay their contractual debts;

(ii) The procedures adopted would have to be manifestly fair in all the circumstances;

(iii) Imprisonment, involving as it does a major infringement of the right to personal freedom, would have to be the only reasonably available way of achieving the stated objectives.

II THE APPROPRIATE ORDER

[73] In the light of the above evaluation of the use of committal proceedings for non-payment of judgment debts, I proceed to answer the question raised at the beginning of this judgment, namely, whether or not this Court should use its powers in terms of Section 98(5) to keep such proceedings alive. If my overall assessment is correct, then the necessity for retaining what amounts to a sanitized form of civil imprisonment has not been established. There accordingly seems to be little reason for pressurizing Parliament into considering these questions as a matter of priority, which use of Section 98(5) powers would require it to do. The Association of Law Societies did suggest a course of action which would result in the coming into existence of such a reason. They argued that the committal procedures were so bound up with and central to the application of the remaining debt collecting provisions, that removing imprisonment and the threat of prison would lead to the collapse of the entire system. They accordingly urged us to strike down Sections 65A to 65M as a whole and, then, in order to avoid a chaotic situation from arising in the entire area of debt-collection, to use our powers in terms of Section 98(5) to put Parliament on terms to correct the defects. Committal proceedings would then continue, pending appropriate remedial action by Parliament.

[74] This raised the question of severability, namely, whether the impugned provisions could be excised from the rest of Sections 65A to 65M, or whether these sections must fall in their totality. If we were to follow the proposal of the Association of Law Societies, (surprisingly, in this respect, supported by the Applicants), then no debt-collecting procedures in the Magistrates' Court would remain, and the need to exercise our 'life-saving' discretion would indeed be great.

[75] Severability is an important concept in the context of the relations between this court and Parliament; like 'reading down', it is an instrument of judicial restraint which reduces the danger of producing an overbroad judicial reaction to overbroad legislation. I agree with Kriegler J's analysis of the matter, subject to one methodological qualification I feel worth mentioning. It is the following: in deciding whether the legislature would have enacted what survives on its own, we must take account of the coming into force of the new Constitution in terms of which we receive our jurisdiction and pay due regard to the values which it requires us to promote. We must, accordingly, posit a notional, contemporary Parliament dealing with the text in issue, paying attention both to the constitutional context and the moment in the country's history when the choice about severance is to be made. It is in this context that we must decide whether the good can be separated from the bad. In the instant case, the excisions which my colleague proposes would leave a statutory provision that in my view is linguistically sustainable, conceptually intact, functionally operational, and economically viable; I agree with them.

[76] Having separated the good from the bad, would it then be in the interests of justice and good government to keep the bad in existence to give it a chance to become part of the good? The words 'in the interests of justice and good government' are widely phrased and, in my view, it would not be appropriate, particularly at this early stage, to attempt a precise definition of their ambit. They clearly indicate the existence of something substantially more than the mere inconvenience which will almost invariably accompany any declaration of invalidity, but do not go so far as to require the threat of total breakdown of government. Within these wide parameters, the Court will have to make an assessment on a case-by-case basis as to whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect, than would be the case if the measure were kept functional pending rectification. No hard and fast rules can be applied. In the present case, we are dealing with one of the core values of the Constitution. As I have endeavoured to show at some length, we cannot say with confidence that all that is needed to rectify the defect in the sections concerned is a simple set of technical amendments. It is

intolerable, once the unconstitutionality of imprisonment of judgment debtors has been established, that persons should continue to be detained under the impugned provisions. It has not been established that ending committal proceedings will impair justice or interfere with good government in any drastic or irreparable way. The other remedies provided for in Sections 65A to 65M remain available to creditors. There is no reason why we should insist on a rapid decision by Parliament, one way or the other, either to accept the continuance of Sections 65A to 65M in their truncated form, or else to modify them in the light of the principles enunciated by this Court. Many issues which were raised before us could be considered at the appropriate time in that forum, basing itself on the kinds of broadly-based enquiry we are not in a position to undertake: for example, whether or not the whole area should be decriminalized, or whether a procedure should be developed in terms of which failure to attend a debt enquiry hearing, or the deliberate concealment of assets, should be made criminal offences to be prosecuted in the ordinary way. Policy choices of this kind, provided they are resolved within constitutional limits, belong to Parliament, not to this Court, and it would be invidious for us to pre-empt the issue by making an order keeping the present system alive pending legislative modifications. I accordingly do not think it right to accede to Mr Du Plessis's request, and for the reasons advanced above, agree fully with the order proposed by Kriegler J.