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

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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.

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.

[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]

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[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] 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 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

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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.

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.

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 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] 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,

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

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

8 Id para 11.

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 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.

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[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."

[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

[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).

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

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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.

due and proper trial procedures and that the presiding officer at a meeting of creditors is 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:

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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.

"(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:

" 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:

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17 Id para 145.

18 Id para 146.

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

> "[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 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

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20 Id para 159.

21 Above n 7.

22 Act 51 of 1977.

> 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:

> "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.

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23 Above n 7 paras 11 and 12.

24 Id para 14.

[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]

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

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25 Id para 11.

26 Id para 22.

> 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 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

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27 Above n 7 at paras 12 to 14.

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.

[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 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.

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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.

[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, 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

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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.

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).

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 "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

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[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.

Constitution as a whole. I wish to say no more about "just cause" than is necessary for the decision of the present case.

(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."

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

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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.

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."

[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]

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

[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 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.

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

[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.

[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

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

40 Above n 6.

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."

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

42 Id.

[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 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

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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.

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

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

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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 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.*

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

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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 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.

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 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).

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50 Above n 7 paras 14 and 15.

[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 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":

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[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).

"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]

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52 Article 5.1(b) of the Convention.

53 Article 5.1(e) of the Convention.

> "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]

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

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54 Article 5.1(f) of the Convention.

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).

> 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:

> "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."

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

[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 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

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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.

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 (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]

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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.

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").

[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. 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

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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. . . ."

65 In *Plastiras v Idell (In re Sequoia Auto Brokers Ltd.),* 827 F 2d 1281, 1289 (9th Cir 1987) it was held that

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]

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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.

[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

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67 Section 104 II 1 GG provides:

> "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).

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]

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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.

[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."

[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

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69 N 45 above and accompanying text.

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

71 Referred to above n 46 and accompanying text.

72 Rose (above n 46) at 194.

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.
>
> 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

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

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 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

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74 1996 (10) BCLR 1253 (CC).

75 Id paras 106-8.

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 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

[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."

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]

[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.

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[77] Id 485 (internal citations omitted).

[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."

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

[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] 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]

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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.

[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 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 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."

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

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 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,

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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.

87 Id 187 and 190.

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]

88 Id 169-70.

"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 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]

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89 Id 172-3.

90 Id 175.

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]

[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

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91 Id.

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

93 Id 128 c-d.

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 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:

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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.

> "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 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"

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95 Above n1 at 1557 C-E.

96 Id 1556 I.

97 Id 1557 A.

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 . . ."

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

[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 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.
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> [15] It is unnecessary for purposes of this case to decide whether this 'entity' to which I have referred must in all cases be a judicial officer who ordinarily functions as such in

99 Above n 7.

the ordinary courts."[100]

100 Id paras 14 to 15.

[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 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

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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.

102 Above n7 paras 12-5.

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 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

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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

the act of issuing the committal warrant, are clearly judicial and nothing else.

418 of the Companies Act acts in a quasi-judicial capacity.

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

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104 Act 32 of 1944.

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

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.

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the exercise of his functions."

106 Above n 1 at 1557 D-E.

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

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107 Above n 6 para 14.

[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, 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

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108 Above n 6.

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;

abovementioned attack, the Court in *Bernstein* necessarily, albeit implicitly, concluded 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,

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(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.

111 Above n 6 at paras 51-5.

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

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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 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

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 rejecting the constitutional attack based on section 11(1) of the interim Constitution, place

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> 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.

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 factors, including-

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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.

(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."

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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.

[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 (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.

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121 Id.

[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.

[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.

122 See paragraph 74 above.

[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 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.

123 See paragraphs 30 - 40 above.

[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 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.

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

[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 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

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

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

126 Act No 8 of 1947 as amended.

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

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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.

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 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

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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."

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 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]

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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 3I1 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.

[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 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

[132] Above n 35 at para 157.

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 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.

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

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

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

[112] That third ground was considered by Tebbutt J in *Nieuwoudt v Faught NO en Andere*.[133] His judgment, in which King J concurred, examined section 66(3) and its context closely. He then came to this conclusion about the effect which the subsection had in dealing with the failure to answer questions fully and satisfactorily. What that part hit, he held, was an unwillingness to answer pertinently and completely. A general lack of credibility did not count. Nor even did the apparent untruthfulness of the answer given to

133 1987 (4) SA 101 (C) at 109B - 114C.

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

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

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

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

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

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

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

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

[118] A word or two had better be said in that connection about *Nel v Le Roux NO and Others,*[134] where we considered section 189 of the Criminal Procedure Act (51 of 1977) which provided for the imprisonment of recalcitrant witnesses in criminal proceedings. One of the criticisms levelled at the section was that it allowed a witness to be "detained without trial", a remedy likewise prohibited by section 11(1) of the interim Constitution (Act 200 of 1993). We seem to have accepted that an imprisonment might fall foul of section 11(1) in circumstances not going the length of the infamous detentions that I have described. But the supposition does not obstruct me from taking a different view now since, in the particular circumstances postulated by section 189, we dismissed the objection in any event.

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134 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

[119] Nor, to my mind, is our earlier judgment in point anyhow. Section 189 has a dual purpose, coercion in the first place and punishment in the second. The imprisonment which it sanctions is specifically called a "sentence" in four places and "punishment" in one. That is something meted out only in a criminal trial and by the court hearing it. A committal in terms of section 66(3), on the other hand, cannot truly be rated as punishment. Its object is not that, but coercion alone. That is why the intended duration of the imprisonment lasts until the coercion works whereas, whenever imprisonment punishes, its period is fixed in advance. Punishments are imposed for crimes. Section 66(3) creates none. That is done elsewhere, in section 139(1) of the statute which makes it an offence to behave in a way warranting a committal and prescribes a sentence of imprisonment as one that may be passed on the offender, even if the same conduct has resulted already in his or her prior imprisonment under section 66(3). Yet double punishment can scarcely have been envisaged. Imprisonment is common, to be sure, to committals and punishments. But it is all they have in common. To equate them on that account would sound rather like regarding the penalties exacted by customs and revenue officials as the fines resembled in their effect, and therefore as punishments.

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

should be deprived of personal liberty in a manner that is procedurally unfair.

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

swift one taking effect before assets of the estate disappear or information about its affairs becomes unobtainable.

[122] The use of committals rather than prosecutions in the endeavour to overcome recalcitrance has the result, of course, that the coercion thus exerted is not controlled by the safeguards against procedural unfairness which are prescribed for criminal trials. That does not mean, however, that witnesses threatened with committals enjoy no such protection. For the common law entitles them to the procedural fairness on which the rules of natural justice insist.[135] Those certainly cover the right to be told precisely what is wanted of them in case they do not realise that already from the history of their attendance, the right to be warned about the potential consequence of not complying, the right of each to oppose the application for a warrant, and his or her right to be heard in opposition to the application. To that list the statute adds, in section 65(6), the right to be legally represented during the proceedings and, in section 66(5), the right of recourse to the judiciary in the event of a committal. I can therefore see nothing unfair in the way in which the proceedings are required or allowed to be run. Nor does Ackermann J, not surprisingly since he finds no fault with committals ordered by magistrates and the

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

procedure followed then is exactly the same as that observed whenever others officiate.

[123] Ackermann J believes it to be procedurally unfair, even so, for anybody but a magistrate to issue a warrant of committal. His reason has to do with the very source of the decision. He considers that, in accommodating the performance by others of so grave a function, the structure for the conduct of the proceedings is intrinsically flawed because it does not conform to a couple of cardinal principles, the separation of powers and the rule of law.

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

[125] Ackermann J maintains, however, that sending people to jail should always be the function of the judiciary alone; that the reason lies in the judicial independence and impartiality which is fundamental to the separation of powers, indeed to the rule of law itself; that presiding officers who are not drawn from the ranks of the magistracy possess no such qualities; and that both principles are harmed by their lack of those in issuing warrants under section 66(3). That seems to concentrate on form at the expense of

substance. Presiding officers situated outside the magistracy are unlikely to be less independent or impartial in doing their duty than those located within it. They, like magistrates, must make up their own minds about committals. Not to do so, but to obey the instructions, succumb to the pressure or defer to the wishes of departmental superiors, would be an improper exercise of their powers and a reviewable irregularity. It seems fanciful, in any event, to imagine a superior wanting to influence the decision of a presiding officer on the case for a committal. The executive has no interest to promote or protect in that area. And no reason of policy, good or bad, suggests why it should care what happens there. Then one has the ultimate safeguard against an irregularity of that or any other sort, which is the immediate opportunity for an approach to the High Court and the consequent intervention of the judiciary. In all those circumstances, I consider, section 66(3) contains nothing that infringes or imperils either the rule of law or the doctrine of separate powers.

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

Kriegler J concurs in the judgment of Didcott J.

MOKGORO J:

[127] My views have been informed by the opportunity I have had to read the judgments of Ackermann, Didcott, O'Regan and Sachs JJ. I respectfully disagree with the view of Didcott J that section 66(3) of the Insolvency Act[1] (the Act) is wholly unobjectionable. However, I associate myself with much in his interpretation (and Sachs J's intimations in that direction[2]) of section 12(1)(b),[3] and to the extent that he construes "detention without trial" to have a particular historical and political meaning,[4] I agree with his view. Like O'Regan J, though, I am also in respectful disagreement with the view of the matter taken by Ackermann and Sachs JJ: I do not in these circumstances distinguish between judicial officers officiating under appointment of the Master in quasi-judicial proceedings, and non-judicial appointees of the Master officiating in a similar capacity.[5] This case is in my respectful opinion not about office, but about process. I however have a narrow point of disagreement with O'Regan J. Whereas her emphasis is on a judicial forum where fairness is presumed, my emphasis is more centrally on the fairness required of process,

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1 Act 24 of 1936.

2 At paras 172-3.

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

4 At paras 115-7.

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

regardless of office or forum. In arriving at the same decision as she does, I have merely taken a different route which I will explain below.

[128] Section 12 protects the freedom and security of the person. I hold it as uncontroversial that a decision which deprives persons of their freedom or their security is policed by at least the twin notions of procedural and substantive fairness. Procedural fairness ordinarily refers to the manner in which a decision is made, and it involves scrutinising the steps that are followed and the checks and balances put in place prior to the decision being taken. The notion of substantive fairness, I believe, is a tool that generally helps us to focus our attention on the reason, grounds or basis of the decision. Considerations of procedural and substantive fairness are therefore instruments that operate in an interactive way to protect an adjudicator from the real possibility of making an unjust decision. Procedural fairness is a hedge that society places around public decision-making[6] in an effort to ensure that the rule of law is upheld and seen to be upheld. Where an interest of paramount importance is at issue, then stringent procedures are called for: indeed, we expect them to be more precise than when a lesser interest is implicated, and our contemplation of the substance of the matter will influence our attitude toward the procedure required. It may, however, be stated that while there are often clear examples of substantive and procedural issues that might be contrasted, sometimes the line is too fine to be drawn.

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

[129] The notions of procedural and substantive fairness accord with virtually universally held views on the subject, and were already well-established principles of justice in our pre-constitutional era.[7] These principles, then and even more so now, are respectful of the fundamental premise that decisions affecting paramount human interests be made for good reason and in a fair manner. In giving meaning to section 11(1)[8] of the interim Constitution,[9] this Court upheld this viewpoint in the cases of *Bernstein and others v Von Wielligh Bester NO and others*,[10] *S v Coetzee & others*,[11] and *Nel v Le Roux NO and others*.[12] The dicta in these cases are succinctly set out in paragraphs 17 to 21 of the judgment of Ackermann J and I refer to them as they are cited therein so far as they develop the point that fairness in adjudication includes considering both the merits and the process. However, I do not come to the same interpretive conclusion as to the necessary

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

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

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

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

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

construction to be placed on section 12(1)(b) of the 1996 Constitution that that judgment does.

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

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

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

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

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

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

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14 "*Nemo iudex in sua causa*".

15 "*Audi alterem partem*".

[132] Procedural fairness is, however, not confined to the twin maxims referred to above.[16] The exact content has eluded judicial definition. In *Van Huyssteen v Minister of Environmental Affairs and Tourism*,[17] Farlam J considered its content for the purpose of Administrative Justice. While interpreting the content of section 24(b) of the interim Constitution,[18] he came to the conclusion that:

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16 See note 14 and 15 above.

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

18 This section provides:

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

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

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

[133] The disturbing consequence[19] that section 66(3) of the Act has is that a person arraigned in the Act's terms may be confined to prison, or have the confinement renewed in circumstances where the usual safeguards that imprisonment would demand are not afforded the examinee. The imprisonment may be for an indeterminate period. There is no process of automatic review.[20] It occurs in a summary fashion where there has not been adequate time to prepare.[21] And since this is not a criminal trial there is no constitutional right to legal representation at State expense, notwithstanding the fact that

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

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

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

the imprisonment, something ordinarily reserved for criminal sanction, occurs.[22] Whether these factors are procedural or substantive is not the important consideration. What is important is that the section 66(3) process does not allow for sufficient or adequate safeguards before inroads are made into an important right such as freedom and security of the person. The sum of all these factors is sufficient to constitute a violation of the right, in my view.

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

[134] In scrutinising other statutes for equivalent provisions relating to the way in which contempt of proceedings is dealt with,[23] one observes that in every instance where the forum which was held in contempt was something other than a court of law, the statute first creates an offence, and only after procedural safeguards afforded by a trial and conviction before a court of law, is the offender liable to imprisonment. The formula replicates itself again and again: contempt is offensive, so offensive that it may result in incarceration, but only after the intervention of a properly constituted trial procedure which is seen to be fair for the purposes of incarceration.[24] While I do not hold that only a court of law can uphold procedural fairness required by my interpretation of section 12(1)(a), what is clear is that these other statutes require the intervention of a fair trial procedure prior to confinement, which is not the case with section 66(3). Instances of detention[25] in the absence of a criminal conviction authorised in our law might fall into at least two identifiable categories: on the one hand there are the well-known instances of

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23 I referred to the following statutes: Magistrates Court Act 32 of 1944; Supreme Court Act 61 of 1984; Heraldry Act 18 of 1962; Publications Act 42 of 1974; Commission on Gender Equality Act 39 of 1996; Independent Electoral Commission Act 150 of 1993; Powers and Privileges of Parliament Act 91 of 1963; Abolition of Civil Imprisonment Act 91 of 1963; Credit Agreements Act 75 of 1980; Constitutional Court Complementary Act 13 of 1995; Vexatious Proceedings Act 3 of 1956; Financial Markets Control Amendment Act 74 of 1996; Prevention of Public Violence and Intimidation Act 139 of 1991; Child Care Act 33 of 1960; 74 of 1983; Income Tax Act 58 of 1962; Labour Relations Act 66 of 1995; Development Facilitation Act 67 of 1995; Land Reform (Labour Tenants) Act 3 of 1996; Restitution of Land Rights Act 22 of 1994; Human Rights Commission Act 54 of 1994; Public Protector Act 23 of 1994; Water Act 54 of 1956; Defence Act 44 of 1957; Promotion of National Unity and Reconciliation Act 34 of 1995 and the Pension Funds Act 44 of 1957.

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

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

arrest that precede a trial. Here the person *must* be brought to trial or else released, and a court of law, again with the safeguards of fair procedure, decides on the conditions of a continued confinement if there is to be any. On the other hand, there are those instances, other than those where it occurs for the reasons set out in the interpretation of detention without trial in terms of section 12(1)(b) and analysed in the judgment of Didcott J, where persons can be detained without any prospect of a trial. These are also the well known instances of prohibited aliens,[26] mental patients[27] or persons placed under quarantine.[28] In these instances, each confinement is limited in time to establish a procedure that regulates the fairness or otherwise of any continued confinement. In the case of the first-mentioned category, a prohibited immigrant may only be held for a maximum period of forty-eight hours.[29] He or she is then to be released, unless the detention is for purposes of deportation, in which case the period of detention is limited to thirty days. Any extension will then only be granted on the approval of a High Court Judge, where subsequent identical renewals will be required every ninety days. In the case of detainees in terms of the Mental Health Act,[30] they may only be detained on the strength of a reception order issued by a magistrate, where the validity of the order is limited to a maximum period of

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

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

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

29 Above n 26, section 55.

30 Above n 27, sections 9-11.

forty-two days. In addition, a magistrate may only issue the reception order after satisfying himself or herself as to the jurisdictional facts, while being assisted by two medical practitioners. Persons placed under quarantine[31] are released as soon as the danger of infection is passed, and it is at least tenable to draw a distinction in this case on the strength of the danger to the public that communicable diseases present. Without pronouncing on their constitutionality, a comparison of these procedures with the one created by the Insolvency Act, shows that they seem to differ in important respects, namely the duration of the imprisonment, and the safeguards that surround the detention.

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

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

> "This illustrates a conceptual confusion which characterised the applicant's argument in other respects as well. The only issue before us is whether, on a proper construction of section 205, it expressly or by necessary implication infringes any of the rights relied upon by the applicant. If the section, properly construed, compels the presiding officer to act or apply the provisions in a way which would infringe any of the rights relied upon, then the constitutionality of the section in respect of that right is properly before us. This would also be the case if the presiding officer were prohibited by the section from acting or intervening in a way which would prevent a particular infringement which would inevitably follow in the absence of such intervention. What is certainly *not* before us is a consideration of a multitude of questions relating to hypothetical decisions or rulings which may (not must) be made in applying the provisions of section 205 and the question whether such *rulings* or *decisions* would or might infringe any of the examinee's Chapter 3 rights or not."

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32 Above n 10.

33 Above n 12.

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

35 Above n 12, para 18.

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

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

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

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36 Above n 10, para 46.

> "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."[37]

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

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

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

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

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

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

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

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39 Above note 10.

40 Act 61 of 1973.

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

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

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

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

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

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

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42 Above n 10, para 55.

43 Above n 12, para 14.

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

44 Above n 12, para 15.

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

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

46 Section 165 of the 1996 Constitution,

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

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

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

both instrumental and intrinsic value.

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

[139] In this particular case, several less intrusive means present themselves: for example, the questions that an examinee fails to answer can be dealt with in the way that

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

other statutes do.[49] Admittedly creating a separate offence and going through the trial procedure may not expedite the process, but it is the price we pay for living in a society that has committed itself to the preservation of liberty. Alternatively, the legislature may opt for a model that could, in turn, expedite these procedures without great difficulty, with surely the equivalent coercive end-result, and in a way that matches the limitation's purpose in a manner consonant with the interest that the right protects.

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

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

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

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

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

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

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

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

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

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

O'REGAN J:

[142] I have had the opportunity of reading the judgment written by Ackermann J in this case. I agree with him that section 66(3) of the Insolvency Act, 24 of 1936 ("the Insolvency Act") is in conflict with the provisions of section 12 of the 1996 Constitution to the extent that it permits a person presiding over a creditors' meeting who is not a judicial officer to order the imprisonment of a person who refuses to testify or produce documents to the meeting. He holds however, in paragraphs 76 to 83 of his judgment, that where a magistrate presides over the meeting of creditors, there is no breach of

section 12. I am in respectful disagreement with this aspect of my colleague's decision for the reasons given in this judgment.

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

> "Everyone has the right to freedom and security of the person, which includes the right –
>
> (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."

I agree with Ackermann J at paragraph 22 of his judgment where he states that, amongst other things, this section protects individuals from the deprivation of physical freedom save where there is a good reason for the deprivation and where appropriate procedural safeguards exist. I also agree with Ackermann J that there can be no doubt that in this case there are good reasons for the deprivation of freedom which section 66(3) authorises. The real difficulty lies in the question of whether there are appropriate procedural safeguards accompanying that deprivation. Of course, there is no rigid rule as to what procedural safeguards are appropriate in the context of section 12(1). The procedural safeguards required will depend on the nature of the deprivation and its purpose. It is necessary therefore to examine the nature of deprivation of freedom occasioned by section 66(3) as well as its purpose. This analysis requires an understanding of the role and nature of creditors' meetings in the insolvency process.

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

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

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

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

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

may be able to give material information concerning the insolvent or his or her affairs.[5] The presiding officer may administer the oath to persons summoned in this way and permit the trustee or any creditor who has proved a claim against the estate to interrogate such person concerning all matters relating to the insolvent or his or her affairs. The presiding officer must disallow any irrelevant question.[6]

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

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

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

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

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

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

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

[148] In *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC), this Court had to consider the question of whether section 205,[9] read with section 189[10] of

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9 Section 205 of the Criminal Procedure Act provides that:

> "(1) A judge of the supreme court, a regional court magistrate or a magistrate may, subject to the provisions of subsection 4, upon the request of an attorney-general or a public prosecutor authorized thereto in writing by the attorney-general, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the attorney-general or the public prosecutor authorized thereto in writing by the attorney-general, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the attorney-general or public prosecutor concerned prior to the date on which he is required to appear before a judge, regional court magistrate or magistrate, he shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.
> (2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under subsection (1).
> (3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.
> (4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order."

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

> "(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.
> (2) After the expiration of any sentence imposed under subsection (1), the person concerned may from time to time again be dealt with under that subsection with regard to any further refusal or failure.
> (3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1).
> (4) Any sentence imposed by any court under subsection (1) shall be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case by such court, and shall be served before any other sentence of imprisonment imposed on the person concerned.

the Criminal Procedure Act, 51 of 1977 was in breach of section 11(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim Constitution"). As Ackermann J has outlined in his judgment at paragraphs 15 - 16 and 22 - 24 above, section 11(1) entrenched the right to freedom and security of the person in slightly different terms to the provisions of section 12 of the 1996 Constitution. The applicant in that case argued that the procedure in section 189 was unconstitutional in that it authorised a magistrate to sentence a recalcitrant witness to imprisonment after the magistrate has enquired into the refusal "in a summary manner". In particular, the applicant argued that the procedure permitted by section 189 did not constitute a "trial" and that therefore the section permitted "detention without trial" in breach of section 11(1) of the interim Constitution. Ackermann J speaking for a unanimous court dismissed this argument in the following way:

> "[14] The s 11(1) right relied upon by the applicants is the 'right not to be detained without trial'. The mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards. In its most extreme form, the mischief exhibits itself in the detention of a person pursuant to the exercise by an administrative official of a subjective discretion without any, or grossly inadequate, procedural safeguards. The nature of the fair procedure contemplated by this right will depend upon the circumstances in which it is invoked. The 'trial' envisaged by this right does not, in my view, in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in s 25(3) of the Constitution. In most cases it

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(5) The court may, notwithstanding any action taken under this section, at any time conclude the criminal proceedings referred to in subsection (1).
(6) No person shall be bound to produce any book, paper or document not specified in any subpoena served upon him, unless he has such book, paper or document in court. (7) Any lower court shall have jurisdiction to sentence any person to the maximum period of imprisonment prescribed by this section."

> 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. As far as s 205 of the Criminal Procedure Act is concerned the entity is indeed a normal judicial officer who ordinarily functions in the ordinary courts. The 'court' before which the s 205 enquiry takes place is in every material respect, particularly insofar as its independence and impartiality is concerned, identical to the 'ordinary court of law' envisaged by s 25(3) of the Constitution."

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

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

[12] Id at paragraph 22.

[150] Creditors' meetings, on the other hand, are part of a process to regulate insolvency. The primary function of the meetings is to attend to the proof of claims by creditors. A decision by a presiding officer not to admit a claim is not final. A creditor can submit it once again at a later meeting of creditors, or he or she can seek relief in a court.[13] In addition to the business of the proof of claims, the meeting may engage upon an investigation of the affairs of the insolvent. Any person who in the opinion of the presiding officer may be able to provide material information concerning the affairs of the insolvent may be required to do so. This investigative aspect of creditors' meetings is a fact-finding process aimed at identifying assets of the insolvent. It can be likened to many fact-finding processes authorised by our law in a wide range of circumstances. It is therefore correct to understand a creditors' meeting as an administrative or quasi-judicial proceeding, rather than judicial proceedings, and our courts have so held on several occasions.[14] It is extremely rare as I outline below, not only in our law, but in other jurisdictions as well for agencies exercising such powers to be granted summary powers of imprisonment to coerce information from unwilling witnesses.

[151] In *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC), we were concerned with a challenge to the provisions of sections 417

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13 Section 44(3) of the Insolvency Act.

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

and 418 of the Companies Act, 61 of 1973. We concluded that those provisions were not in conflict with the provisions of the interim Constitution. Section 418(2) of the Companies Act provides that:

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

Others 1996 (2) SA 573 (A) at 579I.

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

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

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

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

> die Engelse reg is, is minstens te betwyfel, maar na my oordeel weinig ter sake, omdat die omskrywing van die misdaad in ons reg nie deur die Engelse reg bepaal word nie."

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

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

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

and 167(3) of the Labour Relations Act). Section 31 of the Supreme Court Act provides in relevant part:

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

[154] Section 108 of the Magistrates' Court Act, 32 of 1944 confers upon magistrates the power to punish persons for certain acts committed in the court room during court proceedings.[18] So a person who wilfully insults a magistrate during the court's sitting or interrupts the proceedings or "otherwise misbehaves" is liable to be sentenced summarily or upon summons to a fine not exceeding R2 000 or to imprisonment for a period less than six months. It may be that a refusal to answer a relevant question will constitute a

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[18] Section 108(1) provides that:

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

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

breach of this section.[19] It is clear, however, that this power may only be exercised when magistrates are carrying out their judicial functions as magistrates in terms of the Magistrates' Courts Act and not when they are performing administrative or quasi-judicial functions allocated to them by other legislation.[20]

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

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

[155] Section 51(2) of the Magistrates' Courts Act also provides that a person who refuses to obey a subpoena to attend court may be fined R300 or imprisoned for three months.[21] It should be noted that in both section 108 and section 51(2) the extent of the punishment that may be imposed is limited and may not be of an indefinite duration as is permitted by section 66(3). On the other hand, section 189 of the Criminal Procedure

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

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

Act[22] regulates the situation in criminal proceedings before magistrates. A witness who refuses to be sworn in or to answer a particular question in the absence of a just excuse may be sentenced to imprisonment for a period not exceeding two years.[23] Section 189(2) specifically provides that after the expiration of the first sentence, a witness may be subjected to further imprisonment if he or she persists with a refusal to testify. Other institutions which enjoy similar powers are the Land Claims Court[24] and courts martial.[25]

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

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

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

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

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

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

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

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

Labour Relations Act, 66 of 1995 also has no independent contempt powers. Instead, section 142(8) of the Act provides that certain forms of conduct shall constitute contempt of the commission and section 142(9) provides that the commission may refer any contempt to the Labour Court so that that court can make an appropriate order.

[157] The reluctance to confer powers of civil contempt upon institutions other than courts of law is not peculiar to our legal system. In the United Kingdom, as well, both the legislature and the courts have demonstrated an unwillingness to confer powers of civil contempt upon tribunals or agencies that are not courts of law.[29] In the United States of

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Relations Act, 28 of 1956.

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

America, as well, the Supreme Court has held that administrative agencies may not be given powers of coercive imprisonment.[30]

Attorney-General sought an injunction preventing the broadcast of a television programme concerning a local valuation court.

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

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

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

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

[159] The requirement that it is only a court, or an institution similar to a court, that may exercise powers that involve indefinite deprivation of liberty for coercive purposes is based not only on the nature of the officer presiding but also on the institution itself. There can be no doubt that for the requirements of procedural fairness to be met, the

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

presiding officer must be impartial and independent. Independence of a presiding officer is, as Ackermann J states in his judgment at paras 71 - 4, assured by security of tenure and financial security. But the independence and impartiality of the presiding officer is only the first aspect of judicial independence. In addition to the independence and impartiality of the presiding officer, it seems to me that the institution or proceedings over which the officer presides must also exhibit independence and impartiality in the judicial sense. As Le Dain J held in *Valente v The Queen* (1985) 24 DLR (4th) 161 at 171:

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

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

[160] I have outlined the functions and nature of the creditors' meeting in paragraphs 144-6 and 150 above. It is a form of proceeding which does not finally determine the rights of creditors.[33] In relation to its primary purposes, the appointment of a trustee, the proof of claims, the giving of directions to the trustee and the receipt of the trustee's report, therefore, it is not carrying out judicial functions.[34] The creditors' meeting therefore does not resemble, in function or in form, a judicial body. In addition, it is not a body which is in any sense independent of the executive in the manner that the judiciary is. It is presided over by an official of the Master's office and it is attended by creditors (who have voting powers[35]) as well as the insolvent. The Master is an officer in the public service appointed in terms of section 2 of the Administration of Estates Act, 66 of 1965 who may only act within the terms of the powers statutorily conferred expressly or by necessary implication.[36] It seems to me, therefore, that it cannot be said that a creditors' meeting itself carries the hallmarks of judicial independence and impartiality required of our courts of law. The second aspect of judicial independence, the institutional aspect, is absent.

[161] Ackermann J holds that although a creditors' meeting may for most purposes

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33 See paragraph 150 above.

34 See above n 14.

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

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

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

> ". . . if a tribunal has no power to settle disputes nor to determine rights as between contending parties it is not a judicial tribunal and the proceedings are not judicial proceedings. A claimant at a creditors' meeting is not a plaintiff and he is not there for the purpose of having his rights in the insolvent estate settled or determined by the presiding officer. Secs 44(3) and 45(3) make this quite clear. The presiding officer does not, in my opinion, sit as a Judge or magistrate (even though, as in the present matter, he was a magistrate). I consider his functions to be administrative in essence although, as I have said, superficially the proceedings may be judicial in appearance."[37]

The fact that a person who is a judicial officer presides over the creditors' meeting does not transform the proceedings of a creditors' meeting into a judicial proceeding. Nor can the fact that the legislature confers a power generally reserved only to courts of law upon the presiding officer at such proceedings change the overall character of the proceedings.

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

They remain administrative or quasi-judicial proceedings, albeit ones which have been clothed with an extraordinary and, in my view, procedurally unfair and inappropriate power.

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

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

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

(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

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

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

[164] To determine whether section 66(3) may be justifiable in terms of section 36(1), it is necessary therefore to place its purpose, effect and importance on one side of the scales and the nature and effect of the infringement it causes on the other. It is also necessary to consider whether the same goal could be achieved by less restrictive means. Counsel for the respondents argued that the purpose of section 66(3) was to further the interests of

creditors in the insolvency process. I have no doubt that protecting the interests of creditors is an important and legitimate purpose.[38] Counsel argued further that section 66(3) is an extremely effective coercive tool. I do not doubt this either. Indeed, it is stated in the Master's Report to us that the powers contained in section 66(3) have never as far as can be recalled been used to incarcerate a reluctant witness. Similarly, it is recorded that the powers under section 66(2), not in issue in this case, have only been used once in the past fifteen years. This is evidence indeed of effective coercive powers.

[165] However, on the other hand, it is necessary to realise that the infringement of the procedural fairness requirement of section 12(1) is not insignificant. A person is entitled to expect that he or she will not be summarily imprisoned by a body other than a court of law for an indefinite period for coercive purposes. People in all walks of life and in a wide range of circumstances are regularly required to provide evidence to administrative agencies. It seems to me that it is an element of procedural fairness that such people have the right not to be summarily and indefinitely imprisoned by such agencies without the intervention of a court, or a tribunal with the qualities of judicial independence and impartiality. It is true that where a magistrate presides over the enquiry, the extent of the breach of section 12 will be reduced because the magistrate will have the skills and experience of a judicial officer in making the order of imprisonment, but the institutional requirements of judicial independence and impartiality remain absent.

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

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

[167] This conclusion is strengthened by the fact that, as counsel conceded, another mechanism already exists in the Insolvency Act to obtain the compliance of recalcitrant witnesses. Section 139 of the Insolvency Act provides that a person who may have been committed to prison in terms of section 66(3) shall also be guilty of a criminal offence and subject to a fine or imprisonment. This provision is similar to the criminal offences created by the Commissions Act referred to above. Counsel argued and I accept that, unlike the proceedings under section 66(3) which are summary, the institution of a

criminal prosecution under section 139 could lead to inconvenient delays. I accept that the technique of a criminal prosecution to obtain compliance may not be as efficient or as quick as the mechanism in section 66(3). It is however far less invasive of the rights of the recalcitrant witness. In addition to the criminal offence contained in section 139, however, other mechanisms could be employed. For example, one similar to that contained in section 142(8) of the Labour Relations Act, 1995, which would permit an official presiding at a creditors' meeting to refer a recalcitrant witness to court for an appropriate order to be made. Such a mechanism may be more efficient and speedy than a criminal prosecution.

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

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

In his careful and thorough judgment, Ackermann J has pointed to the fact that powers to imprison a recalcitrant witness in insolvency enquiries are generally reserved to courts of

law.[39] It is unnecessary to repeat the references to the foreign jurisdictions here. Suffice it to say, that in all jurisdictions to which he refers, the power to imprison a recalcitrant witness in insolvency enquiries in order to compel that witness to testify is reserved for courts of law and is not exercised by administrative or quasi-administrative institutions.

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

[170] For these reasons, therefore, I am not persuaded that section 66(3) may be considered a justifiable limitation of section 12(1) of the Constitution. Counsel for the appellant did not rely on section 165 of the Constitution which vests the judicial authority of the Republic in the courts. Accordingly, I wish to express no view on the question of whether the power to imprison a person for coercive or punitive purposes forms part of

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[39] See paragraphs 49 - 55 of his judgment.

the "judicial authority" contemplated by that provision.

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

SACHS J:

[172] I agree with the order proposed by Ackermann J for reasons that are similar to his in philosophy but different in logic and articulation. I accept his conclusion that in entrenching the right to freedom and security of the person, section 12(1) of the Constitution[1] either expressly or implicitly protects persons against deprivations of freedom that are substantively unacceptable or procedurally unfair.[2] In addition, I concur fully with his eloquent explanation of the special meaning that the phrase "detention without trial" has acquired in South Africa.[3] I have grave doubts, however, about the more extended interpretation on which he relies,[4] and in this respect would wish to associate myself with the clear and forceful observations on the subject by Didcott J.[5] In

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1 The Constitution of South Africa 1996.

2 Para 22 above.

3 Paras 26-7 above.

4 Para 28 above.

5 Para 115 above.

my view, section 12(1)(a) serves far more comfortably than does 12(1)(b) as the basis for any analysis of freedom rights in the present case. I accordingly express my support for the remarks both by Didcott J and by Mokgoro J[6] on this score, and add the following comment.

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

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

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

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

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

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

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

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8 Para 27 above.

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

10 Above n 7

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

[175] Section 165(1) of the Constitution makes it clear that "[t]he judicial authority of the

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[11] Act 24 of 1936.

Section 39(2) reads as follows:

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

Section 66(3) reads as follows:

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

Republic is vested in the courts." The appointee of the Master or the magistrate, however, need not be a judicial officer serving in any court.[12] When such appointee is not

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the provisions of sub-section (5)."

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

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

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

a judicial officer, he or she should not be able to exercise what is really a crucial part of the authority reserved in democratic states to the judiciary, namely the power to punish misconduct or penalise recalcitrance by means of incarceration in a state jail.

[176] These remarks refer only to the authority to imprison someone as a penalty to mark state reprobation. The situation may be different where persons are deprived of liberty in non-punitive circumstances and where, subject to respect for fundamental rights of personality being maintained, reasons of exigency might render it constitutionally permissible for restraint first to be applied and judicial control to take place only afterwards. Thus, it is not uncommon in democratic states for custodial powers to be conferred initially on persons who are not judicial officers where the purpose to be achieved is not that of imposing a penalty, but, for example, that of securing immigration control or dealing with severe health risks. Here the medium of imprisonment is not regarded as the message, but only as the means. In these circumstances custody or physical restraint does not serve in itself as a mechanism for commanding respect for the law. It is neither punishment for past defiance nor compulsion to future compliance but simply the only reasonable way in which a non-punitive objective of pressing public concern can be achieved. By way of contrast, the authority to incarcerate for purposes of imposing penalties for past or continuing misconduct belongs to the judiciary, and to the judiciary alone. In my view, the doctrine of separation of powers prevents Parliament from entrusting such authority to persons who are not judicial officers performing court functions as contemplated by section 165(1).

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

[178] The essential characteristics of the courts exercising judicial authority as contemplated by the Constitution are that "[they] are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."[13] Unlike other appointees, magistrates exercising powers of committal to prison under section 66(3) of the Insolvency Act will enjoy institutional independence and can be expected to apply the law impartially and without fear, favour or prejudice. Furthermore, they will exercise their powers within the matrix of the superior hierarchical

[13] Section 165(2).

judicial control to which they are institutionally and habitually accustomed.[14] The principles embodied in and the values to be protected by the separation of powers will accordingly be secured. In this respect, I agree with the broad evaluation made by Ackermann J on the character of the judicial function,[15] and support the distinction which allows magistrates to order committal to prison and denies that power to other state functionaries. For these reasons, I concur in the order he proposes.

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14 Section 66(5) reads:

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

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

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