

Explanatory note

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

This matter concerns the constitutional validity of a subsection of the Insolvency Act which provides that if a person summoned to appear before a meeting of creditors should refuse to be sworn by the presiding officer at the meeting, fail to produce any book or document which he or she was required to produce, or refuse to answer a question lawfully asked, the presiding officer may commit that person to prison. According to another section of the Act such a meeting of creditors can be presided over by a magistrate, a Master or an officer in the public service designated by the Master of the High Court or a magistrate. Mr. de Lange claimed that this state of affairs violates his constitutional right not to be detained without trial.

Judge Ackermann wrote the majority judgment in this case. Judges Chaskalson, Langa and Madala concurred in his judgment, whereas Judge Sachs concurred in the order proposed but for separate reasons. Judges Didcott, Mokgoro and O' Regan wrote separate dissenting judgments. Judge Kriegler concurred in Judge Didcott's judgment.

In his majority judgment Judge Ackermann held that the subsection concerned is unconstitutional only to the extent that it authorises a presiding officer who is not a magistrate to issue a warrant committing an examinee at a creditors' meeting to prison.

The right to freedom and security of the person, Judge Ackermann stated, has a substantive as well as a procedural aspect. With respect to the substantive aspect, Judge Ackermann found that the only issue was whether there was just cause for the power to commit to prison under the subsection. He concluded that the power to commit recalcitrant witnesses at insolvency hearings served an important public objective, namely, to ensure that insolvents and other persons who are in a position to give important information relating to an insolvency do not evade supplying it. This important objective constitutes just cause for the deprivation of freedom under these circumstances. All the judges agreed with Judge Ackermann's view in this regard.

With respect to the attack based on the fair procedure aspect of the right to freedom, Judge Ackermann noted that in several foreign countries surveyed government personnel other than judicial officers were not permitted to commit to prison a reluctant witness in an insolvency proceeding. Judge Ackermann concluded that because non-judicial government officers lack the independence of the judiciary, non-judicial officers cannot commit an uncooperative witness to prison. However, magistrates who commit uncooperative witnesses in aid of an insolvency inquiry do so in a judicial and not an administrative capacity. Accordingly, committal by a magistrate presiding at creditors' meetings is constitutionally permissible.

Judge Sachs agreed with Judge Ackermann's majority judgment, but on separate grounds. He evaluated the constitutionality of the subsection within the context of separation of

powers rather than that of freedom rights. He then applied the principle that only judicial officers should have the power to punish misconduct or penalise recalcitrance by means of imprisonment, and concluded that the subsection contravenes the principle of separation of powers as contemplated by the Constitution because it entrusts authority to order incarceration to persons who are not judicial officers. Judge Sachs consequently agrees with Judge Ackermann's distinction, which allows magistrates to order committal to prison and denies that power to non-judicial government officials.

Judge Didcott disagreed with the finding that the subsection would be invalid where it allowed a presiding officer who is not a magistrate to issue a warrant of committal. He rejected the idea that officers other than magistrates will be less independent or impartial in upholding the rule of law. In any case there is always the opportunity for an aggrieved party to approach the High Court and thus involve the judiciary. Judge Didcott argued that the words "detention without trial" had to be interpreted in its specific historical context and that it bears no resemblance to committal to prison under the circumstances of this case.

Judge Mokgoro disagreed in part with Justice Ackermann's majority judgment. In her view the matter was not about whether the person presiding was a magistrate or not, nor whether the decision to incarcerate is made in a court or some other forum. Instead, the subsection as a whole infringed the right not to be deprived of freedom arbitrarily or without just cause. She acknowledged the legitimate purpose of the committal procedure but objected to the absence of adequate safeguards to protect personal liberty. Judge Mokgoro therefore concluded that the entire subsection was unconstitutional, not least because there are less restrictive means available to achieve the purpose.

Judge O'Regan, also partially disagreeing with the majority, asserted that the right to freedom and security of the person is infringed even when imprisonment of a recalcitrant witness at a creditors meeting is ordered by a magistrate. She said that a magistrate presiding at a creditors' meeting is not acting in his or her judicial capacity but rather fulfills an administrative or quasi-judicial function. The powers of coercive imprisonment are seldom conferred on administrative or quasi-judicial bodies, even where those bodies are exercising functions similar to those of courts of law. Coercive imprisonment is a deprivation of physical freedom requiring thorough procedural safeguards of the type ordinarily followed in courts of law. It also demands impartiality and independence not only of the presiding officer but of the institution exercising those powers. Judge O'Regan went on to say that the provision cannot be justified and is therefore unconstitutional.

*Thursday, 28 May 1998*