**SACHS J ABRIDGED JUDGMENT**

*De Lange v Smuts NO and Others*

[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 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.

[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)]

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.

[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 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 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 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.