CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 05/10
[2010] ZACC 13

In the matter between:

TATIANA MALACHI	Applicant
and	
CAPE DANCE ACADEMY INTERNATIONAL (PTY) LTD	First Respondent
HOUSE OF RASPUTIN PROPERTIES (PTY) LTD	Second Respondent
ADDITIONAL MAGISTRATE, DISTRICT OF CAPE TOWN	Third Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
MINISTER FOR HOME AFFAIRS	Fifth Respondent
COMMANDING OFFICER, POLLSMOOR PRISON	Sixth Respondent

Heard on : 25 March 2010

Decided on : 24 August 2010

JUDGMENT

MOGOENG J:

Introduction

[1] This is an application for the confirmation of an order of constitutional invalidity made by Hlophe JP in the Western Cape High Court, Cape Town (High Court).[1]

[2] The declaration of constitutional invalidity relates to section 30(1) and (3)[2] (impugned provisions) of the Magistrates' Courts Act (Act). This section empowers a magistrate to issue an order for the arrest and detention of a debtor in circumstances where a creditor reasonably believes that a debtor is about to flee the country in order to avoid paying what is owed to a creditor. That procedure is known as arrest *tanquam suspectus de fuga*.[3]

[3] The High Court referred its order declaring both the common law and section 30(1) and (3) constitutionally invalid to this Court for confirmation in terms of section 167(5) and section 172(2) of the Constitution.[4] However, the Registrar of the

[1] *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC).

[2] The text of section 30 of the Magistrates' Courts Act 32 of 1944 (Act) is set out in [19] below.

[3] It appears that some commentators prefer to refer to it as "*tamquam suspectus de fuga*", however for the sake of consistency we will use "*tanquam*" as it appears in the Act and in the cases. See an explanation of what arrest *tanquam suspectus de fuga* means at [17] and [21] below.

[4] Section 167(5) reads:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

Section 172(2) reads:

> "(a) 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.

High Court failed to lodge a copy of the order with the Registrar of this Court as required by rule 16(1) of the Rules of this Court.[5] The applicant rescued the situation by bringing an application to this Court for the confirmation of the order of invalidity[6] only in so far as it relates to the impugned provisions, and supplied the necessary order. The Constitution does not make provision for the confirmation of an order of constitutional invalidity of the common law. The applicant's approach is, therefore, the correct one.

[4] It is convenient at this stage to set out the factual background.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[5] Rule 16(1) of the Constitutional Court Rules, 2003 reads:

"The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order."

[6] Rule 16(4) of the Constitutional Court Rules reads:

"A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

Had the applicant not applied to this Court for the confirmation of the order of invalidity, the High Court order would have been without any force since it would not have been confirmed by this Court. See section 167(5) read with section 172(2)(a) of the Constitution.

Factual background

[5] The applicant, Ms Tatiana Malachi, is a citizen of the Republic of Moldova. She was recruited from Moldova and employed by Cape Dance Academy International (Pty) Ltd (first respondent) and House of Rasputin Properties (Pty) Ltd (second respondent), as an exotic dancer. The first and second respondents are jointly referred to as "the employers".

[6] Upon the applicant's arrival in South Africa, a representative of the employers caused her to surrender her passport to him. When she subsequently asked for it, he refused to give it back to her unless she reimbursed her employers the money they had allegedly spent on her pursuant to the terms of the contract of employment.

[7] In terms of the contract of employment, the employers were to make and pay for all of the applicant's visa and travel arrangements. They also had to provide her with rented accommodation. The applicant was in turn obliged to reimburse them. A cursory reading of the contract of employment reveals that more is said about her duties and what she was required to pay to her employers than about the benefits that would accrue to her for services rendered. After working for several months, the applicant expressed dissatisfaction to her employers with her conditions of employment.

[8] Eventually, she enlisted the assistance of the Consul General of Russia to secure an air ticket to return to her country of origin.[7] She was scheduled to depart on 9 July 2009. Somehow her employers got to know about her plans. They then applied for and were granted an order by the Magistrates' Court, Cape Town, to have the applicant arrested in terms of the impugned provisions. The basis for the application, and for the granting of the arrest order, was that the applicant owed her employers about R100 000 and that they reasonably suspected that she was about to flee the country permanently in order to escape payment of the debt.

[9] On the same day, the applicant was arrested and detained in Pollsmoor Correctional Centre. She was incarcerated from 9 to 24 July 2009. Aggrieved by the order for her arrest, she approached the High Court to secure her liberty.

Proceedings in the High Court

[10] The applicant challenged the constitutional validity of both the impugned provisions and the common law in so far as they empower a court to make an order for arrest *tanquam suspectus de fuga*.

[7] It is not clear whether the applicant had a passport when she returned to Moldova.

[11] By agreement between the parties, the applicant was released before the application was heard. She, however, insisted on the determination of the constitutional issues raised in her application.[8]

[12] The High Court held that the common law and the impugned provisions infringed the applicant's constitutional rights.[9] It made the following order:

> "1. The words "arrest *tanquam suspectus de fuga*" as contained in section 30(1) of the Magistrates' Courts Act 32 of 1944 are declared unconstitutional and invalid and must therefore be deleted.
> 2. The whole of section 30(3) of the Magistrates' Courts Act 32 of 1944 is declared to be inconsistent with the Constitution and invalid.
> 3. The common law which authorises arrests *tanquam suspectus de fuga* is declared to be inconsistent with the Constitution and invalid.
> 4. [The Minister for Justice and Constitutional Development] is to pay the costs of this application including the costs of two counsel."

The issues

[13] The applicant attacks the validity of the impugned provisions on the basis that they violate her rights.

[8] In the High Court the applicant alleged that her arrest violated her rights, among others, to equality (section 9), dignity (section 10), freedom and security of the person (section 12) and freedom of movement (section 21).

[9] These rights are equality (section 9), dignity (section 10), freedom and security of the person (section 12) and freedom of movement (section 21).

[14] Of the constitutional rights allegedly infringed by the impugned provisions,[10] the most directly implicated is the right to freedom and security of the person in terms of section 12(1) of the Constitution which 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."

[15] The main issue that arises in this matter is thus whether arrest *tanquam suspectus de fuga* as authorised by the impugned provisions is consistent with the Constitution. This issue is broken down as follows:

(i) Does the arrest of a potential debtor in terms of the impugned provisions limit the arrestee's right to freedom of the person? More specifically, is it "arbitrary" or "without just cause"?

(ii) If the right is limited, is the limitation justifiable?

(iii) If not, what is the appropriate remedy?

[16] Before I consider the constitutional validity of section 30, it is necessary to set out the history of arrest *tanquam suspectus de fuga*.

[10] Id.

The history of arrest tanquam suspectus de fuga

[17] Arrest *tanquam suspectus de fuga* owes its origin to Roman law.[11] It was introduced in South Africa as part of Roman-Dutch law[12] and was first reported as a part of the rules of court from as early as 1842. The procedure existed at common law as well

[11] Van Zyl *The Theory of the Judicial Practice of the Colony of the Cape of Good Hope* 2 ed (Juta, Cape Town 1902) at 129. While our law of arrest *tanquam suspectus de fuga* has its origins in Roman and Roman-Dutch law, it should be noted that imprisonment for debt was also adopted into the law of England as early as the 13th century. See Cole "A Modest Proposal for Bankruptcy Reform" (2002) 5 *Green Bag* 2d 269 at 271-2. Cole describes the historical origins of this procedure in English law:

> "In 1267, the Statute of Marlbridge created the first form of imprisonment for debt. This form of imprisonment was limited, however, to holding the debtor over until a trial could establish the obligation. This interlocutory form of detention came to be known as imprisonment upon mesne process, and was largely intended to prevent flight.
>
> Civil imprisonment was extended to merchants' debtors with the Statute of Acton Burnell in 1283. . . . The creditor could insist upon the continued confinement of the debtor until he 'made agreement (to satisfy the debt) or his friends for him.' . . . The Statute of Merchants, passed in 1285, permitted debtors to be incarcerated after judgment for the first time. It was this structure of imprisonment for debt, coercive before judgment and punitive after judgment, which remained relatively unchanged until its abolition in the nineteenth century." (Footnotes omitted.)

See also Aird "The Scottish Arrestment and the English Freezing Order" (2002) 51(1) *International and Comparative Law Quarterly* 155 at 156.

According to Aird, another English law mechanism designed to assist creditors was later developed. It is known as the Mareva Injunction. This injunction (also known as a freezing order) prevents an asset from being removed from the jurisdiction of a court so as to ensure that a future judgment is effective. This type of order was first given in the English case of *Nippon Yusen Kaisha* (1975) 1 WLR 1093, but it was the case of *Mareva Compania Naviera SA v International Bulk Carriers SA* (1975) 2 Lloyd's Rep 509 which provided the name by which it is commonly referred. The Mareva Injunction was initially restricted to cases where it was likely that a foreign debtor would remove his or her assets from the jurisdiction of a court which would make those assets incapable of being attached to satisfy a judgment debt. However, the Mareva Injunction has since been widened in its application and has subsequently been codified in section 37(3) of the English Supreme Court Act, 1981. See Aird at 156-7.

Despite the existence of section 37(3) of the Supreme Court Act, 1981 the arrest of a debtor is still possible in English law, although a high standard of evidence is required to succeed with such an arrest order. Furthermore, the English courts have followed a strict interpretation of the requirements. The requirements for an arrest order are: "that the action must be good [in law], that there is a probable cause for believing that the [debtor] is about to quit the English jurisdiction unless arrested and that his departure will necessarily prejudice the [creditor] in the prosecution of his case." Germany has a similar procedure known as the Persönlicher Arrest whereby a debtor is detained until he or she has deposited or provided security for a claim. However, this procedure is rarely used. See Aird at 160-1.

[12] Voet *His Commentary on the Pandects* translated by Buchanan (Juta, Cape Town 1880) at 227; and van der Linden *Institutes of Holland* translated by Juta 3 ed (Juta, Cape Town 1897) at 288.

as in a codified form in various rules of court.[13] Arrest *tanquam suspectus de fuga* is ordered when a creditor on reasonable grounds suspects that a debtor, whose liability has not yet been acknowledged or proven in a court of law, is about to flee the country in order to prevent the adjudication of the dispute in this country.[14] Only a court of law is, in terms of the common law as well as section 30(1) and (3) of the Act read with rule 56 of the Magistrates' Courts Rules[15] and section 19 of the Supreme Court Act[16] read with rule 9 of the Uniform Rules of Court,[17] entrusted with the authority to order arrest *tanquam suspectus de fuga*.

[18] Even at the inception of a debtor's arrest, the courts were reluctant to grant orders of arrest because of their interference with the arrestee's right to personal freedom.[18] In *Chaloner v Corrie* it was held that to grant an order of arrest on poorly reasoned grounds was not right as this would be "carrying the law to great extremes" and that it was "an

[13] See in this regard *Salm v Kohn* 1914 TPD 55; *Robertson v Wilkinson* 1877 Buch 43; *Thompson v Andrews* (1842) 3 Menz 128; and *Roberts v Tucker* (1842) 3 Menz 130. See for instance rule 12 of the Rules of the Court of the Cape of Good Hope Provincial Division, *Government Gazette* 2493 GN 41, 13 January 1938; rule 16 of the Rules of Superior Courts of the Transvaal in Rorke *Rules of the Superior Courts of the Transvaal* (African Book Company, Grahamstown 1906) at 128-32; Order VIII of the Rules of the Supreme and Circuit Courts of the Colony of Natal, in Civil and Criminal Cases, *The Natal Government Gazette* 3593 GN 79, 5 February 1907; and rule 16 of the Rules and Regulations of the High Court of the Orange River Colony, *Government Gazette of the Orange River Colony* 124 GN 221, 23 July 1902.

[14] Erasmus and van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa – Volume 1: The Act* 9 ed (Juta, Cape Town 1996) at 82.

[15] *Government Gazette* 2103 GN R1108, 21 June 1968.

[16] 59 of 1959.

[17] *Government Gazette* 999 GN R48, 12 January 1965.

[18] See *Segal v Diners Club South Africa (Pty) Ltd* 1974 (1) SA 273 (T) at 275E; and *Chaloner v Corrie* (1887) 8 NLR 42.

undue interference with a man's liberty to adopt that course."[19] Ninety years on the sentiment of the courts had not changed. In *Segal v Diners Club South Africa* the court warned that "[i]f the debtor has been wrongly deprived of his freedom it cannot be put right in the subsequent suit. The harm to him is irreparable."[20] This historical perspective leads to a discussion on the constitutionality of the arrest.

Constitutional validity of the impugned provisions

[19] Section 30 of the Act provides:

> "(1) Subject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for arrest *tanquam suspectus de fuga*, attachments, interdicts and *mandamenten van spolie*.
>
> (2) Confirmation by the court of any such attachment or interdict in the judgment in the action shall operate as an extension of the attachment or interdict until execution or further order of the court.
>
> (3) No order of personal arrest *tanquam suspectus de fuga* shall be made unless—
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> (a) the cause of action appears to amount, exclusive of costs, to at least forty rand;
>
> (b) the applicant appears to have no security for the debt or only security falling short of the amount of the debt by at least forty rand; and
>
> (c) it appears that the respondent is about to remove from the Republic."

[19] *Chaloner v Corrie* above n 18 at 44. See also *Stayn v Bolus and Co* 1915 EDL 60 at 62; and *African Realty Trust v Sherman* 1907 TH 34 at 36.

[20] *Segal v Diners Club South Africa* above n 18.

[20] An order in terms of the impugned provisions, as interpreted by the courts,[21] must be aimed at the debtor who: (i) allegedly owes the creditor at least R40 excluding costs; (ii) is reasonably believed to be about to leave the Republic, but not one who appears to be leaving one part of the country for another;[22] and (iii) intends leaving permanently and whose departure is imminent.[23] Furthermore, the creditor must appear to have no, or insufficient, security for the debt.[24]

[21] The impugned provisions empower a magistrate to issue an order for the arrest of a debtor even though the debtor's liability has not been acknowledged or proven in a court of law. Peté *et al* describe arrest *tanquam suspectus de fuga* as follows:[25]

> "In a situation where a debtor owes money to a creditor, who holds no security for the payment of the debt, and there are reasonable grounds for believing that the debtor is about to leave the country in order to avoid paying creditors, the creditor may make use of a procedure known as arrest *ta[n]quam suspectus de fuga*. This literally translated, means 'an arrest as if being suspected of being a fugitive'. The purpose of the procedure is to prevent a person against whom a creditor intends to institute, or has already instituted, an action, from fleeing from the jurisdiction of the court, with the purpose of avoiding or delaying payment of the claim. The object of the arrest is not to force the debtor to pay the claim. The object is to ensure that he remains within the jurisdiction of

[21] The requirements for the granting of the order for the arrest *tanquam suspectus de fuga* are set out in section 30(3) of the Act. Erasmus and van Loggerenberg above n 14 at 84-6 also set out the requirements including those which were developed by the courts as and when they interpreted the section.

[22] See *Segal v Diners Club South Africa* above n 18 at 275H; and *Taylor Brothers Limited v Blackhurst (II)* (1917) 38 NLR 69 at 78.

[23] See *Norden v Sutherland* (1845) 3 Menz 133 at 139; *Taylor Brothers Limited v Blackhurst (II)* above n 22 at 76; and *Frazer v Sievewright* (1885) 3 SC 342 at 343.

[24] Section 30(3)(b) of the Act.

[25] Peté *et al Civil Procedure: A Practical Guide* (New Africa Books, Claremont 2005) at 418.

> the court until the court has given judgment in the matter. The phrase generally used is to 'abide the judgment of the court'. Of course, if the debtor gives sufficient security for the claim, it does not matter if he leaves the country." (Footnotes omitted.)

These views capture the essence of the nature and purpose of this arrest, which is to stop an alleged debtor from fleeing this country with the intention of preventing the adjudication of the dispute within it.[26] As Wunsh J correctly pointed out, the object of the arrest "is to enable the plaintiff to obtain a judgment against the defendant, not to keep him or her in custody until payment is made."[27]

[22] The procedure to be followed in applying for the order of arrest is set out in the Magistrates' Courts Rules.[28] Rule 56 regulates the section 30 process by providing that an application for an arrest *tanquam suspectus de fuga* may be made *ex parte*.[29] An order made *ex parte* shall call upon the debtor to show cause against its grant on the first court day after its service on the debtor,[30] which may be anticipated by the debtor upon

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[26] Van Winsen *et al Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* 4 ed (Juta, Cape Town 1997) at 112 reads:

> "It is of prime importance to a creditor to obtain a valid judgment against his debtor. Such a step would enable the creditor to seek satisfaction of the judgment in most of the civilized countries of the world. The court will accordingly assist the creditor to keep the debtor within its jurisdiction until such time as it has given judgment against him, but for no longer. The debtor is arrested, not to perform the judgment, but to abide the judgment of the court." (Footnote omitted.)

[27] *Alliance Corporation Ltd v Blogg: In re Alliance Corporation Ltd v Blogg and Others* [1999] 3 All SA 262 (W) at 266B.

[28] Above n 15.

[29] Rule 56(1).

[30] Rule 56(5)(b).

12 hours' notice to the creditor.[31] A copy of the order obtained *ex parte* and of the affidavit, if any, on which it was based must be served forthwith on the debtor.[32]

[23] Although section 30(1) and section 30(3) refer only to arrest and not to detention, the process of arrest is always effected by the police and thus prevents flight by actually limiting the arrestee's freedom until the debt is paid, adequate security is furnished or judgment is handed down.

[24] There can be no doubt that section 12 is designed to bury our painful history of random, unjust and arbitrary deprivation of physical liberty and to ensure that abuse of state power never again rears its ugly head.[33] Section 12(1)(a) was discussed in *De Lange v Smuts NO*.[34]

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[31] Rule 56(6).

[32] Rule 56(7).

[33] In *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) this Court held at paras 26-7:

> "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 s 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.
>
> Even where a derogation from a s 12(1)(b) right has validly taken place in consequence of a state of emergency duly declared under the provisions of the 1996 Constitution, 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. 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

[25] The protection of the right to freedom of the person in terms of section 12(1)(a) has both a substantive and a procedural dimension. The substantive aspect ensures that a deprivation of liberty cannot take place arbitrarily or without just cause whereas the procedural element ensures that the deprivation will only take place in terms of a fair procedure.[35] O'Regan J outlined the two interrelated constitutional aspects in *Bernstein v Bester*:[36]

> "In my view, freedom has two interrelated 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."

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provisions of s 37 could properly be justified under s 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." (Footnotes omitted.)

See also para 115.

[34] Id at para 23, quoted at [27] below.

[35] See *S v Coetzee and Others* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 159; and *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 145.

[36] *Bernstein v Bester* above n 35.

[26] This foundation was built upon in *S v Coetzee*[37] where O'Regan J said that 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. I will deal only with the first of the two constitutional aspects of freedom, namely the substantive, since that will dispose of the matter.

Substantive aspect

[27] Ackermann J explained the substantive aspect of freedom in *De Lange v Smuts NO*[38] as follows:

> "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."

[28] An arrest and detention, by its nature, limits the freedom of a person. The right to freedom of the person is limited if the deprivation is done arbitrarily, or without just cause. The question is whether the deprivation or limitation of freedom authorised by the

[37] *S v Coetzee* above n 35.

[38] *De Lange v Smuts NO* above n 33 at para 23.

impugned provisions is arbitrary or without a just cause. In the view I take of the matter, I choose to deal with just cause.

Just cause

[29] In *De Lange v Smuts NO*,[39] Ackermann J had the following to say about just cause:

> "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 and gathered from the provisions of the Constitution as a whole." (Footnote omitted.)

[30] In *Bid Industrial Holdings*,[40] which dealt with arrest to found jurisdiction, Howie P found that the section 12(1)(a) right is infringed where there is an absence of just cause or fair trial. Since there was no question of a trial in that case, he addressed just cause in the following terms:

> "In assessing whether establishing jurisdiction for purposes of a civil claim can be 'just cause' it is necessary, first, to consider whether arresting the defendant can enable the giving of an effective judgment. There is a crucial difference between attaching property and arresting a person. . . . [T]he property attached will, unless essentially worthless, obviously provide some measure of security or some prospect of successful execution. Arrest, purely by itself, achieves neither. Security or payment will only be forthcoming if the defendant chooses to offer one or other in order to avoid arrest and ensure liberty.

[39] Id at para 30.

[40] *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA) at para 37.

> It is therefore not the arrest which might render any subsequent judgment effective but the defendant's coerced response.
>
> The impotence of an arrest itself to bring about effectiveness is illustrated by the result that would ensue were the arrested defendant to do nothing either before, or in answer to, judgment for the plaintiff. Pending judgment there is no legal mechanism to enforce security or payment and failure to pay the judgment debt does not expose the defendant to civil imprisonment. Consequently, deprivation of liberty does not of itself serve to attain effectiveness."[41] (Footnote omitted.)

[31] Although *Bid Industrial Holdings* did not deal with arrest *tanquam suspectus de fuga*, the observations relating to what would constitute just cause for the purpose of the arrest apply with equal force to this matter. There can be no doubt that arrest *tanquam suspectus de fuga* has the effect of limiting the arrestee's fundamental right to freedom.[42]

[32] The object of the arrest "is to ensure that [the potential debtor] remains within the jurisdiction of the court until the court has given judgment in the matter."[43] As soon as judgment is given, a debtor would, however, be free to catch the next flight to any foreign destination even if this is done to evade payment and no realisable asset exists in the country, from the proceeds of which payment may be effected. Arrest does not, therefore, ensure the satisfaction of the judgment debt. Admittedly, the unfairly exerted pressure of incarceration may at times force the arrestee to pay the debt or provide security. But, that does not detract from the fact that the arrest does not necessarily

[41] Id at paras 38-9.

[42] Id at para 36.

[43] Peté *et al* above n 25.

render the judgment any more executable or beneficial to the creditor than would have been the case had the debtor left the country. It simply limits the fundamental right to freedom of the person for no just reason.

[33] The order for the arrest of persons *tanquam suspectus de fuga* under the impugned provisions is ordinarily made at the time when their civil liability has not yet been established.[44] Their debt is only alleged on affidavit, often in an urgent application brought *ex parte*. The potential debtor is often only afforded the opportunity to resist the severe curtailment of the right to freedom, by the order, on the return date. Potentially the detention may endure for as long as the action is pending.[45] The effect of this deprivation was more aptly captured in *Segal v Diners Club South Africa* where we are warned that "[i]f the debtor has been wrongly deprived of his freedom it cannot be put right in the subsequent suit. The harm is irreparable."[46] Nothing can undo the degrading effect of incarceration, particularly if the order were obtained *ex parte*. This is the position in which the applicant in this matter found herself for 16 days.

[44] See Mathopo J's remarks in *Amrich 159 Property Holding CC v van Wesembeeck* 2010 (1) SA 117 (GSJ) at paras 28 and 31.

[45] Id at para 31.

[46] *Segal v Diners Club South Africa* above n 18.

[34] Since there is no legal basis for the imprisonment of someone who has been found civilly liable,[47] it is inconceivable that any legal justification can ever exist for putting behind bars a person whose civil liability is yet to, or will possibly never, be proven. Although an order for arrest is granted by a court, the intervention of the judicial process can not legitimise the deprivation of freedom, since the arrest may stem from a debt which has itself not been established through the judicial process. I therefore conclude that there is no just cause for the arrest in terms of the impugned provisions.[48]

[35] Having found that the right to freedom is limited, I will now consider whether such limitation is justifiable in terms of section 36 of the Constitution.

Justification analysis

[36] The dictum in *Makwanyane*[49] has essentially been codified in section 36(1) which provides:

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[47] Abolition of Civil Imprisonment Act 2 of 1977. See also *Gouveia v Da Silva* 1988 (4) SA 55 (W) at 62F-G. Further, see article 11 of the International Covenant on Civil and Political Rights and article 1 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[48] See also the remarks in *Bid Industrial Holdings* above n 40 at para 41 which reads as follows:

> "Apart from the fact that arrest does not serve to attain jurisdictional effectiveness it cannot be 'just cause' to coerce security or, more especially, payment, from a defendant who does not owe what is claimed or who, at least, is entitled to the opportunity to raise non-liability in the proposed trial. If there is no legal justification for incarcerating a defendant who has been found civilly liable there cannot be any for putting a defendant in prison whose liability has not yet been proved. And as to the function of arrest to enable the court to take cognisance of the suit, that could be appropriately achieved if the defendant were in this country when served with the summons and there were, in addition, significant factual links between the suit and South Africa. . . . Accordingly, there is no 'just cause' for the arrests sought."

[49] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.

> "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."

What falls to be considered is the justification of the limitation of freedom.

[37] Section 30(1) and section 30(3) are laws of general application. Arrest *tanquam suspectus de fuga*, which they authorise, plays a role in facilitating debt collection. Unfortunately, the impugned provisions go further than is necessary to achieve the objective. They do so without any regard to less invasive options that are available. They also do not insist on the exhaustion of less restrictive remedies before pursuing the option of arrest and detention.[50]

[38] As was found in *Coetzee v Government*, albeit in a different context, the impugned provisions are overbroad.[51] Although they are meant to facilitate the adjudication of the

[50] *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 22. The first less invasive option is to sue the debtor in the country to which the debtor has fled. The other less intrusive alternative, provided for by section 30(1), is that a creditor may apply for an interdict restricting a debtor from leaving the country, subject to appropriate conditions. Those conditions could, for example, include that the debtor stays either where he or she has been staying all along or at some other address within the court's jurisdiction, which should be made known to the creditor or the sheriff.

[51] Id at para 13.

dispute in the country and the effective execution of a subsequent judgment debt against a debtor who has the means to pay but refuses to do so, they also strike at debtors, like the applicant, who cannot pay. This is what led this Court in *Coetzee v Government* to find that a similar limitation cannot be justified as reasonable.[52]

[39] Even in the writings of the first Roman-Dutch authors, arrest *tanquam suspectus de fuga* was treated as an extraordinary remedy[53] and the rules of court originally set a high monetary threshold for the granting of this remedy.[54] A paltry amount of R40, which is the threshold for the deprivation of a person's liberty, probably the cost of two small chickens, highlights the disproportionality of the means and the purpose. Although the employers' claim is about R100 000, this does not detract from the fact that a debtor could potentially be deprived of freedom for being suspected of intending to flee the country to avoid the adjudication of a claim for R40.[55]

[40] Freedom is an important right. The detention of any person without just cause is a severe and egregious limitation of that right. It is difficult to imagine the circumstances in which a law that allows detention without just cause could ever be justifiable.

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[52] Id at paras 13-4.

[53] Van der Linden above n 12 at 292.

[54] For instance the cause of action must have been in the amount of £25 or more under rule 12(1) of the Rules of the Cape of Good Hope Provincial Division above n 13; £20 or more under rule 16 of the Rules of the Supreme Court of the Transvaal above n 13 at 128; more than £20 under rule 16 of the Rules and Regulations of the High Court of the Orange River Colony above n 13; and more than £15 under order VIII of the Rules of the Supreme and Circuit Courts of the Colony of Natal, in Civil and Criminal Cases above n 13.

[55] In the High Court this amount is R400. See rule 9 of the Uniform Rules of Court.

[41] Other comparable jurisdictions have done away with arrest and detention that aims to prevent flight or to recover civil debts.[56] I therefore conclude that the limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[42] For these reasons the order of constitutional invalidity stands to be confirmed. It is necessary to say something about the High Court order relating to the common law.

[43] The impugned provisions are essentially a codified version of the common law. There is no real difference between the two. The High Court has already declared the common law equivalent of the impugned provisions unconstitutional. Although this Court is seized with the impugned provisions and not with the common law, our finding that the impugned provisions are unconstitutional is not at odds with that of the High Court that the common law is unconstitutional.

[44] The appropriate remedy is next in line for consideration.

[56] England, Australia and New Zealand retain the procedure for the imprisonment of a fleeing debtor in very limited and clearly demarcated circumstances. With regard to the practice in England and Germany see Aird above n 11 at fns 44-7. Australia retains the English mechanism of the Mareva Injunction, however, it is seldom used. See Kercher "Legal History and the Study of Remedies" (2001) 39 *Brandeis Law Journal* 619 at 627-8. In New Zealand, section 55 of the Judicature Act, 1908 read with Part 17 Subpart 8, 17.88-9 of the Judicature (High Court Rules) Amendment Act, 2008 provides the legal mechanism for arresting an absconding debtor. In a query we conducted through our involvement in the European Commission for Democracy through Law (the Venice Commission) it emerged that of the 14 countries that submitted replies only three allow for the detention of fleeing debtors. These countries are Georgia, Norway and Sweden. The countries which did not have similar provisions are Poland, Slovenia, Bosnia and Herzegovina, Hungary, Bulgaria, Croatia, Lithuania, Brazil, Luxembourg, Switzerland and Belarus.

Severability

[45] The appropriate way to remedy the unconstitutionality is to sever the offensive parts of subsection (1) and to strike out subsection (3) in its entirety.

[46] As in *Coetzee v Government*, severability of the impugned provisions presents itself for consideration in this matter. The test for severability as developed by this Court is:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[57] (Footnote omitted.)

[47] The impugned provisions do not insist on the exhaustion of alternatives that are less extensive and yet effective before an order that infringes the potential debtor's right could be resorted to. Any attempt by this Court to ensure that the constitutional invalidity is cured, would be nothing short of legislating. And that would fall foul of the separation of powers doctrine. The impugned subsections of section 30 can be severed from the section and what remains will still give effect to the purpose of section 30 and the purpose of the legislative scheme. As Hlophe JP correctly held, the words "arrest

[57] *Coetzee v Government* above n 50 at para 16.

tanquam suspectus de fuga" must be excised from section 30(1) of the Act. Similarly, the whole of subsection (3) must be severed from section 30 of the Act.[58]

Retrospectivity

[48] The intricate question that arises in this matter is whether the retrospective effect of the declaration of invalidity should be limited; and if so, to what extent? The High Court simply declared the impugned provisions invalid. This means that, in terms of the doctrine of objective constitutional invalidity, the impugned provisions become invalid from the date on which the Constitution came into operation.[59]

[49] This issue was not debated at the hearing and we did not have the benefit of the parties' submissions on it. It is necessary to limit the retrospective application of the order. The order should apply to all pending cases. In other words, the declaration will not apply to cases where the review and appeal processes have been finalised. Consequently those potential debtors who are presently incarcerated in terms of this law will have to be released with immediate effect.

Costs

[50] The Minister for Justice and Constitutional Development (fourth respondent) is enjoined by the constitutional development leg of his portfolio to ensure that pre-

[58] *Malachi v Cape Dance Academy* above n 1 at para 66.

[59] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 27. The Constitution came into effect on 4 February 1997.

Constitution laws which are inconsistent with the Constitution are identified for repeal or suitable amendment. The impugned provisions are in point. The fourth respondent omitted to amend or repeal section 30(1) and (3). The ill effects are evident in this case. Not only was the applicant struck by the provisions, but she had to approach both the High Court and this Court to ensure that these unconstitutional provisions are removed from the statute books. For that reason her costs must, at least to some extent, be borne by the fourth respondent who correctly conceded such an order.

[51] Mr Katz, for the applicant, sought a costs order against the employers on the basis that the employment arrangement with the applicant amounts, for all intents and purposes, to human trafficking. The employers were not notified that an order for costs would be sought against them on this basis. It was a novel point. To have them mulcted in costs on the basis that they were involved in human trafficking, would not be just and equitable. The application for costs on this basis must therefore be dismissed.

[52] Ordinarily, costs follow the result. The applicant is the successful party and would ordinarily be entitled to costs against the first and second respondents as well. Nevertheless, Mr Katz informed this Court that the applicant and the employers agreed that the applicant would not seek costs against them even if her application for the confirmation of the order of constitutional invalidity succeeds. Consequently, Mr Katz did not ask for costs against the first and second respondents except on the basis of human trafficking. This Court is, however, not bound by that agreement. Costs are a

matter which lies entirely within the discretion of this Court, to be exercised with due regard to the particular circumstances of each case.[60] The first and second respondents launched an application against the applicant and obtained an order for her arrest and detention in terms of the impugned provisions. When the order was challenged they failed to offer any justification for the order or for the statutory provisions invoked to obtain it, in either the High Court or in this Court, choosing instead to abide the decision of both courts. Sight should not be lost of the fact that had they not initiated those proceedings, it would not have been necessary for the applicant to approach this Court.

[53] In these circumstances, despite the agreement on costs referred to above, it appears that it may be just and equitable to order the first and second respondents to pay half of the applicant's costs in this Court. Since this issue was not debated during the hearing, all the parties will be afforded the opportunity to make submissions on the appropriateness of the costs order. A provisional order for costs will now be issued ordering the fourth respondent to pay half of the costs of the proceedings in this Court and the first and second respondents to pay the other half.

Order

[54] In the result, the following order is made:

[60] See *Chonco and Others v President of the Republic of South Africa* [2010] ZACC 7; 2010 (6) BCLR 511 (CC) per Khampepe J at para 6 and the authorities cited therein.

(a) The order of constitutional invalidity made by the Western Cape High Court, Cape Town is confirmed to the following extent:

(i) The words "arrest *tanquam suspectus de fuga*" as contained in section 30(1) of the Magistrates' Courts Act 32 of 1944 are declared unconstitutional and invalid.

(ii) The whole of section 30(3) of the Magistrates' Courts Act 32 of 1944 is declared to be inconsistent with the Constitution and invalid.

(b) The Minister for Justice and Constitutional Development is to pay the costs of the applicant in the High Court.

(c) The Minister for Justice and Constitutional Development is ordered to pay half of the costs of the proceedings in this Court.

(d) The Cape Dance Academy International (Pty) Ltd and House of Rasputin Properties (Pty) Ltd are ordered jointly and severally to pay half of the costs of the proceedings in this Court.

(e) The orders in subparagraphs (c) and (d) are provisional.

(f) The parties are invited to make representations as to the appropriateness or otherwise of these orders before Tuesday, 28 September 2010 and before a final order is made.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Mogoeng J.

For the applicant:	Advocate A Katz SC and Advocate R Garland instructed by Eisenberg & Associates.
For the fourth respondent:	Advocate P Bezuidenhout instructed by the State Attorney, Cape Town.