IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**
WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 14830/09

In the matter between

TATIANA MALACHI	APPLICANT
and	
CAPE DANCE ACADEMY INT. (PTY) LTD	FIRST RESPONDENT
HOUSE OF RASPUTIN PROPERTIES (PTY) LTD	SECOND RESPONDENT
ADDITIONAL MAGISTRATE, DISTRICT OF CAPE TOWN	THIRD RESPONDENT
MINISTER OF JUSTICE	FOURTH RESPONDENT
MINISTER OF HOME AFFAIRS	FIFTH RESPONDENT
THE COMMANDING OFFICER, POLLSMOOR PRISON	SIXTH RESPONDENT

JUDGMENT DELIVERED ON THIS 7TH DAY JANUARY 2010

Hlophe JP:

A. Introduction

[1] On 22 July 2009 the applicant brought an urgent application to this court pursuant to an order made by the third respondent for her arrest in case 19806/09 of 9 July 2009. The applicant sought to set aside the order of third respondent and to further order her immediate release from Pollsmoor Prison by the sixth respondent. The applicant also sought to declare section 30(3) of the Magistrates' Courts Act 32 of 1944 ("the Act") and the common law rule of arrest *tanquam suspectus de fuga* unconstitutional and invalid. By agreement between the parties, the first and second

respondents secured the discharge of the arrest warrant by the third respondent and the applicant was released from custody of the sixth respondent on 24 July 2009.

[2] Mr Katz appeared together with Mr Garland for the applicant in this matter. First, second and third respondents filed a notice of intention to abide by the decision of this court. Fourth respondent initially filed a notice of intention to abide by the decision of this court, but later filed its notice of intention to oppose. On 17 September 2009 the court ordered the fourth respondent to deliver its answering affidavit on or before 1 October 2009 and its heads of argument on 29 October 2009. The fourth respondent failed to timeously file its answering affidavit and sought condonation thereof. Mr Bezuidenhout appeared on behalf of fourth respondent. On 5 November 2009 this court condoned the late filing of the answering affidavit by fourth respondent. Fifth and sixth respondents were unrepresented and no opposing affidavits were filed. Fourth respondent in its heads of argument and during the hearing of this application conceded that it was not opposing the relief sought by the applicant in relation to the constitutional invalidity of section 30 of the Act. Fourth respondent opposed the relief sought by the applicant in respect of declaring the common law rule of arrest *tanquam suspectus de fuga* constitutionally invalid as it is argued that the issue has already been decided upon and therefore merely academic.

B. Factual Background

[3] The facts giving rise to this application are by and large common cause.

> Applicant is a citizen of the Republic of Moldova. She was employed as an exotic dancer at a nightclub managed by the first and second respondents. On her arrival in South Africa during March 2009, applicant handed her passport to the owner of second respondent. Applicant was initially informed that her passport would be kept for 30 days in order to have it registered at the Police station. Second respondent subsequently kept applicant's passport during the entire period of her employment. The owner of second respondent informed applicant that he would not return her passport unless the applicant paid him $2000 for her

air ticket and R20 000 as a levy. The applicant was unable to pay either of these amounts, as she was not earning sufficient income during her employment with second respondent.

Applicant sought and received the assistance of the Consul General of Russia to facilitate her return to her home country Moldova. Prior to her departure from South Africa on 9 July 2009, applicant was arrested and taken into custody at Pollsmoor Prison. The arrest was made pursuant to a court order issued by the third respondent ex parte on 9 July 2009 and warrant of arrest *tanquam suspectus de fuga*. The applicant was to remain in custody pending the return date, which was to be 30 July 2009. If the applicant furnished adequate and satisfactory security for the total claim of R100 000 plus interest and costs, the applicant would be released from custody and the order for arrest discharged. The applicant had no assets of any tangible value in South Africa and therefore was unable to furnish adequate and satisfactory security. By agreement between the parties, the first and second respondents secured the discharge of the arrest warrant by the third respondent and the applicant was released from the custody of the sixth respondent on 24 July 2009.

C. **<u>The issues to be decided</u>**

[4] The applicant sought an order:

4.1 deleting the words “arrest *tanquam suspectus de fuga*” from section 30(1) of the Magistrates’ Courts Act;

4.2 declaring Section 30(3) of the Act unconstitutional and invalid; and

4.3 declaring the common law rule of arrest *tanquam suspectus de fuga* unconstitutional and invalid;

[5] The issues to be decided upon in this matter relate to the constitutionality of sections 30(1) and 30(3) of the Act and the common law relating to arrest *tanquam suspectus de fuga* and the alleged infringement upon fundamental human rights guaranteed in the Constitution.

It is necessary for purposes of the judgment to quote the provisions of section 30 of the Magistrates' Courts Act in full.

Section 30 of the Act provides for:

"**30 Arrests and interdicts**

(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) . . .

(3) No order of personal arrest *tanquam suspectus de fuga* shall be made unless-

(a) the cause of action appears to amount, exclusive of costs, to at least forty rand;

[Para. (a) amended by s. 4 of Act 19 of 1963.]

(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

[Para. (b) amended by s. 4 of Act 19 of 1963.]

(c) it appears that the respondent is about to remove from the Republic.

[Para. (c) amended by s. 11 of Act 53 of 1970.]"

[6] The common law rule relating to arrest *tanquam suspectus de fuga* allows a judicial officer to issue a writ of arrest and for the procedure to be used prior to and after a judgment.[1] This common law rule was encoded in section 30 of the Act. *Suspectus de fuga* was regarded as an extension of the common law principle of contempt of court, notwithstanding the Abolition of Civil Imprisonment Act 2 of 1977 which provides that no court shall have the power to order the civil imprisonment of a debtor for his failure to pay a sum of money in terms of any judgment. Jones and Buckle state that "The legislature clearly did not intend to modify the common law by the enactment of section 30 of the Act. The intention rather seems to have been to endow the magistrates' court by statute with all common-law powers in regard to arrest *tanquam suspectus de fuga*." [2]

Constitutionality of section 30 of the Act

[7] Mr Katz argued on behalf of applicant that numerous constitutional rights have been infringed by section 30 of the Act and further that the infringement of these rights is not reasonable and justifiable in terms of section 36 of the Constitution of the Republic of South Africa, 1996 (' the Constitution') , namely the limitations clause. Therefore Mr Katz argued section 30 of the Act and the related common law should be declared unconstitutional and invalid.

[8] He submitted further that a case which may be regarded as moot should be decided where it raises important questions of law on which there is little authority and are bound to arise again. The issue of the constitutionality of an arrest procedure in terms of section 30 has not yet been decided upon by the courts. The authorities relied upon in court have dealt with the constitutionality of enforcement procedures in

[1] HJ Erasmus, Jones and Buckle: *The Civil Practice of the Magistrates's Courts in South Africa*, Ninth edition Volume 1: The Act at p83. See further the case of *Elliot v Fourie* 1992 (2) SA 817 (C).
[2] Ibid at p83

relation to other legislation. However the applicable principles are of equal importance to the legislative provisions under consideration.

(i) Right to equality:

[9] The applicant argued that section 30 of the Act violates the right to equality, which is guaranteed by section 9 of the Constitution. Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Equality involves the full and equal protection of all rights and obligations. Applicant submitted that section 30 infringes upon the right to equality as the defendant is placed in an unequal position vis- a- vis the prospective civil claim by the plaintiff and further placed in an inferior and prejudicial position in relation to other litigants in general who have a financially higher standing and are able to furnish security and avoid arrest. A defendant who is unable to furnish adequate security will be obliged to remain incarcerated pending the return date whereby the defendant would then be required to show cause why the order of arrest should not be confirmed and made final. A defendant who has adequate assets will be able to furnish adequate and satisfactory security and therefore be able to secure his or her release. Clearly, Mr Katz submitted, this infringes upon the right to equality.

[10] This is particularly true as it relates to poor debtors or defendants who may be willing but unable to satisfy a judgment debt or to provide adequate security for the claim. The debtor in this inferior financial position will therefore be subjected to an arrest and detention in terms of section 30 of the Act. Such a debtor is treated in a manner less equal than other debtors.

Furthermore a debtor in a civil matter is treated unfairly compared to an accused

person in a criminal case. The procedural rights of an accused person in a criminal case are contained in section 35 of the Constitution. Section 35 (2) of the Constitution provides that everyone who is detained has the right to be informed promptly of the reason for being detained, to choose and to consult with a legal practitioner and to have a legal practitioner assigned at state expense. An accused person may therefore challenge the lawfulness of the detention before a court and if the detention is unlawful he or she may be released. Section 35(2) of the Constitution further provides that a detained or sentenced prisoner has the right to conditions of detention that are consistent with human dignity and to communicate and be visited by family, a chosen religious counsellor and chosen medical practitioner.

[11] Section 30 of the Act makes no provision for the defendant who is arrested and detained to be informed of his constitutional right to legal representation, or even to have any of his other constitutional rights explained to him. Furthermore section 30 does not make any provision for a debtor to be informed of available defences to an arrest *suspectus de fuga*. Therefore a defendant who may have a valid defence could be arrested and detained in terms of section 30. The facts relied upon in an ex parte application may have been fabricated. However in terms of section 30 the defendant would not be able to challenge this. The only way to avoid arrest and detention is to pay the amount claimed by the applicant or to provide adequate security for the claim.

[12] Fourth respondent conceded that section 30 of the Act is unconstitutional inasmuch as it is inconsistent with the constitutional right to equality.

[13] Applicant has rightfully submitted that a person arrested pursuant to *suspectus de fuga* has less rights than a detained person in terms of section 35(2) of the

Constitution. With civil imprisonment there is no obligation for a defendant to be brought before the court within any specific time period. An arrest in terms of section 30 of the Act can be made on an ex parte basis. In *Coetzee v Government of Republic of South Africa, Matiso and others v Commanding Officer, Port Elizabeth Prison and others* 1995 (4) SA 631 (CC), the Constitutional Court was called to decide upon the constitutional validity of the provisions of sections 65A-65M of the Magistrates' Courts Act 32 of 1944 which provided for the imprisonment of judgment debtors in certain circumstances. The court found that the said provisions were inconsistent with the right to personal freedom. In analysing the constitutionality of these provisions the court found that the defendant cannot challenge the prima facie claim prior to being detained. Therefore this tends towards a trial in absentia since the effect of the order as it relates to imprisonment is final. The procedure makes no provision for recourse by the debtor once an order of committal has been made. [3]

[14] In my view the defendant in a civil matter is in a worse position than an accused in criminal proceedings. As stated above an accused has the right to be informed promptly of the reason for being detained and to consult with a legal practitioner. Furthermore South African criminal law and procedure recognizes the general principle of presumption of innocence as a substantive principle of fundamental justice and has protected the fundamental rights of liberty and human dignity of any person accused by the state of committing a crime. In *S v Acheson* 1991 (2) SA 805 (Nm) the court stated (at 822A-B) that:

> "An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."

[3] 1995 (4) SA 631 (CC) at 644F

[15] Applicant further submitted that since it is unlawful for a debtor to be imprisoned in order to execute against a judgment then the same principle should apply to a debtor prior to any judgment being granted. In the unreported judgment in *Amrich 159 Property Holding CC v Van Wesemb Eeck* (25846/09) delivered on 21 August 2009[4] the court dealt with an ex parte application for the arrest of the respondent *tanquam suspectus de fuga*. The court stated that the procedure of arrest was not devised to prevent a debtor's departure from the Courts jurisdiction but to prevent flight. In *Amrich Property Holdings* above the court aligned itself with the reasoning of the Supreme Court of Appeal in *Bid Industrial Holdings (Pty) Ltd v Strang and another*

> (Minister of Justice and Constitutional Development, third party*)* 2008 (3) SA 355 (SCA), and held "that if there is no obligation 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".[5]

[16] Mr Katz submitted that section 30 coerces the individual to furnish security or make payment in order to avoid arrest. In *Amrich Property Holding* above, Mathopo, J said (para 28) that "The continued arrest in such circumstances would be tantamount to coercing security or payment especially where it is manifestly clear that his liability has still not been established and is disputed". Further In *Coetzee v Government of South Africa* above the court stated (at 641D-E) that:

> "...the law seems to contemplate that imprisonment should be ordered only where the debtor has the means to pay the debt, but is unwilling to do so. . . it is clear that the law does not adequately distinguish between the fundamentally different categories of debtors: those who cannot pay and those who can pay but do not want to. . . . "

Effectively section 30 of the Act coerces security for payment in order to avoid

[4] [2009] ZAPG JHC 40.

[5] Para 30 where Mathopo J further states that ". . . the liability of the respondent has not been determined. To order his arrest particularly since he has a counter claim which on his version exceeds the applicant's unliquidated claim would be contrary to the spirit of the Constitution

imprisonment. An arrested person who has no money to secure payment or pay a debt will remain in prison for reasons unrelated to the effectiveness of a future judgment. In any event if it is found that the suspect is liable for payment, imprisonment is normally not an option for enforcement of that civil judgment or order. This is so because of the provisions of the Abolition of Civil Imprisonment Act 2 of 1977 which prohibit imprisonment to enforce civil judgments.

[17] Section 34 of the Constitution allows for equal access to the courts and a fair civil trial. The applicant submitted that the defendants' ability to conduct any prospective civil claim is materially compromised by the fact that the applicant would be forced to conduct the trial on the merits from prison.[6] In *Coetzee v Government of South Africa* above the court found several reasons why the provisions relating to jurisdictional arrest were indefensible; these include a situation where even if a person has notice of the hearing, he can be imprisoned without knowing of the possible defences available to him and accordingly without any attempt to advance any of them. It was also found that the provisions allowed persons to be imprisoned without actual notice of either the original document or of the hearing.[7] Section 30 of the Act does not make any provision for a debtor to be informed of available defences to an arrest *suspectus de fuga.*

[18] I am inclined to agree with Mr Katz that section 30 infringes the constitutional right to equality as a defendant in a civil matter is treated unfairly in relation to a defendant who is able to furnish adequate security for his or her release from detention. Furthermore a debtor in a civil matter is treated unequally compared to an accused in a criminal case; an accused person has constitutionally guaranteed fair trial rights as contained in section 35(2) of the Constitution. Section 30 of the Act does not make provision for any of the constitutional rights contained in section 35 of the

[6] See *Amrich Property Holdings* para 31 & *Bid Industrial Holdings* para 43.
[7] At page 643 D-G.

Constitution.

(ii) Right to Dignity:

[19] Applicant submitted that section 30 of the Act also infringes upon the right to dignity as set out in section 10 of the Constitution. Section 10 provides that "everyone has inherent dignity and the right to have their dignity respected and protected". Applicant submitted that section 30 of the Act infringes upon the right to dignity in that the defendant is imprisoned alongside accused and convicted persons for an indefinite period of time in a prospective civil matter on the basis of a debt which has not been tested or proved in a court of law. Fundamental rights such as the right to be free from cruel, inhuman or degrading treatment, the right to privacy, to equal treatment and to security of the person are so closely linked to the concept of the right to dignity. Section 30 allows for degrading treatment in that a debtor or defendant is arrested and detained on the basis of a prima facie claim by the plaintiff. For that reason alone, Mr Katz argued, section 30 infringes the constitutional right to dignity and cannot withstand constitutional muster. In *Amrich Property Holdings* above *the* court stated (para 28) that ". . . To order the arrest of the respondent on the basis that he is unable to give security would in my view offend his right to dignity, equality and freedom of movement as enshrined in the Bill of Rights." *In Bid Industrial Holdings* the court stated (at 366B) that "The most obvious concomitant would be breach of the defendant's respective rights to equality, human dignity and freedom of movement. . ."

[20] In my view in terms of Section 30 of the Act a debtor may be incarcerated for an amount claimed by the applicant. To incarcerate a debtor on this basis would be tantamount to an arbitrary deprivation of liberty thereby infringing upon the right to dignity as the arrest procedure in section 30 also allows a defendant to be subjected to cruel and degrading treatment. I am further inclined to agree with applicant's submission that since a debtor is imprisoned alongside a criminal accused for an untested civil matter for an indefinite period of time, the right to dignity is infringed upon by section 30 of the Act.

(iii) Right to freedom of movement:

[21] Applicant submitted that section 30 infringes on the right to freedom of movement in terms of section 21 of the Constitution. Section 21 provides that everyone has the right to freedom of movement and the right to leave the Republic. Counsel for applicant argued that since the defendant is incarcerated indefinitely, this right is defeated in its entirety. The defendants are unable to leave South Africa on the basis of an untested and prospective civil claim and without regard to the ability to satisfy any judgment in the event that liability is proved in respect of such claim. Freedom of movement is an important aspect of the right to liberty and is recognized internationally.[8]

[22] Fourth respondent in its heads of argument conceded that the arrest of a debtor would involve physical detention entailing a serious deprivation of the liberty of the defendant. This of course directly affects the right to freedom of movement and the right to leave the Republic.

[23] In my view section 30 in as far as it authorizes an arrest *tanquam suspectus* infringes on the right to freedom of movement in that a defendant who does not have any assets to furnish adequate security to secure his or her release from prison will face incarceration indefinitely. Freedom to leave South Africa will be affected by an

[8] Article 13(1) of the Universal Declaration of Human Rights; article 12 of the International Covenant on Civil and Political Rights; article 2 of the Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms; article 22 of the American Convention on Human Rights; and article 12 of the African Charter of Human and People's Rights make provision for it.

untested and prospective civil claim without regard to a defendants' ability to satisfy any part of the debt. Freedom to leave the Republic is therefore limited by the arrest *tanquam suspectus de fuga* provision.

(iv) Right to freedom and security of the person:

[24] Applicant submitted that section 30 of the Act offends against the right to freedom and security of the person in terms of section 12 of the Constitution.[9] *In terms of this section everyone has the right not to be deprived of freedom arbitrarily or without just cause, not to be detained without trial and not to be treated in a cruel, inhumane and degrading way. Section 30 of the Act has the effect that the liberty of a defendant could be deprived where security for the debt cannot be furnished or where payment in relation to a prospective claim cannot be made. It is worth noting that previous legislation infringing upon the right to freedom of the person have been struck down.*[10]

[25] In *Bid Industrial Holdings* above the court had to decide upon the constitutionality of an arrest to found or confirm jurisdiction as provided for by section 19(1)(c) of the Supreme Court Act 59 of 1959. The court found that the jurisdictional arrest aimed to limit the arrestee's liberty and his right to freedom and security of the person as entrenched in section 12 of the Constitution. In terms of section 19(1)(c) any High Court may issue an order for attachment of property or arrest of a person to

[9] Section 12 provides that (1) Every person shall have the right to freedom and security of the person, which includes 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.

[10] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (C) where the Constitutional Court stated at para 36 " The importance of the right to freedom and, in particular, not to be detained without trial can never be overstated. The right has particular significance in the light of our history during which illegitimate detentions without trial of many effective opponents of pre-1994 government policy of apartheid abounded. We must never again allow a situation in which that is countenanced" See also *De Lange v Smuts No and Others* 1998 (3) SA 785 (C) at para 24; *Freedom of Expression Institute and Others v President Ordinary Court Martial*, and Others 1999 (2) SA 471 (C); *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) at para 10.

confirm jurisdiction. The court had to deal with the constitutionality of jurisdictional arrest whether founding or confirming jurisdiction. The court in *Bid Industrial Holdings* addressed the constitutional arguments relating to jurisdictional arrest on the basis that there is no legal obligation on a foreign defendant to consent to jurisdiction or to provide a monetary basis in order to avoid arrest or its consequence, where that consequence can only be detention.

The court in *Bid Industrial Holdings* stated (at 364G) that:

> "Although S19(1) (c) does not refer to detention, the process of arrest is always to engage the relevant agencies of the State to effect the arrest and then to restrict the arrestee's freedom pending attainment of some lawful purpose. If, for example, that purpose is not attained on the day of the arrest, the arrestee must necessarily remain in detention by the State until it is attained. . . Jurisdictional arrest therefore unquestionably aims to limit the arrestee's liberty."

In *Coetzee v Government of the Republic of South Africa* above the Constitutional Court held that the civil imprisonment under sections 65A-65M of the Magistrates' Courts Act concerning judgment debtors who had failed to pay their judgment debts was an unconstitutional limitation of the fundamental right of freedom of the person.

[26] It was argued on behalf of fourth respondent that the purpose of arrest *tanquam suspectus de fuga* is for the protection of the creditor by the apprehension and detention of the debtor who is about to flee in order to avoid paying a debt. An arrest in terms of the section would involve a serious deprivation of liberty where the debtor is unable to provide such security. Should an arrest be effected, the debtor would then have to wait for the return date of the order. Fourth respondent further submitted that section 30 of the Act which authorizes arrest *tanquam suspectus de fuga* infringes

upon the fundamental right of a debtor to freedom and security of his or her person as provided for in terms of section 12 in that there is no legal obligation on a foreign debtor to consent to jurisdiction or to provide a monetary basis to avoid arrest or detention. It was further submitted that when a debtor who is either a citizen or foreigner provides no security for the claim or any prospect of successful execution, the arrest in itself will not satisfy the claim.

[27] It is my judgment that section 30 infringes upon the right to freedom and security of a person as set out in section 12 of the Constitution in that a defendant would arbitrarily be deprived of his or her freedom where an arrest is merely made pursuant to an ex parte application. The defendant may have a valid defence to the alleged claim and may be willing but unable to furnish security for the disputed claim. The effect of the order for an arrest in terms of section 30 will be that the defendant is detained without a trial. The common cause facts show that the basis for second respondent obtaining the arrest warrant was a contractual claim and as she was unable to put up security for her disputed claim she was obliged to remain incarcerated for an indefinite period of time until the claim was pursued by second respondent at its discretion and when a decision was reached by the judicial officer in respect of the merits of second respondents claim.

[28] In my judgment the arrest and civil imprisonment of defendants in advance of any trial on the merits is a limitation of the right protected by section 12(1)(b) of the Constitution not to be detained without trial. Any law or action which limits the right to freedom should be reasonable and the means employed for achieving that goal should be reasonable. In *Coetzee v Government of South Africa* above it was said that the legislation under consideration was meant to provide for the enforcement of judgment debts as well as the securing of payment for a debt. The court stated (at 642C) that:

"... Certainly to put someone in prison is a limitation of that person's right to freedom. To do so without any criminal charge levelled or any trial being held is manifestly a radical encroachment upon such right. . . "

[29] Based on the reasons set out above, I find that section 30 infringes upon the right to freedom and security of the person as set out in section 12 of the Constitution.

The section 36 enquiry

[30] Section 36 of the Constitution provides that any limitation on fundamental human rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[11] Having examined the various constitutional rights infringed upon by section 30 of the Act, the enquiry now turns on whether in terms of section 36 of the Constitution the limitation on these fundamental human rights can be seen as 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.

The limitation must further also be authorized by a law of general application.

(a) *The nature of the right:*

[31] The nature of the fundamental rights in question has been discussed in the preceding paragraphs above.

[11] Section 36 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, (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.

(b) *The importance of the purpose of the limitation:*

[32] It seems that the main purpose of an arrest in terms of section 30 of the Act is to prevent judgment debtors or defendants from absconding and therefore allowing litigants to enforce prospective judgments. This is irrational and illegitimate as it allows for an arrest of an indigent person who may not have any assets in South Africa. It further allows for the detention of certain debtors, which may serve no rational purpose in enabling a potential judgment creditor to enforce any judgment in any civil case that may successfully be brought against the imprisoned person. In the case of *Bid Industrial Holdings* the court stated (at 364E-F) that "...there is no legal obligation on a prospective debtor to furnish security or make payment; the arrest itself does not render any prospective judgment effective". In the case of *Getaz v Stephen* 1956 (4) SA 751 (N) the court set out the common law that the procedure for arrest was not devised to prevent the departure of a debtor from the jurisdiction of the Court, but to prevent him from departing with the intention of evading or delaying payment of his indebtedness. It is a form of relief available to a creditor who on reasonable grounds suspects that a debtor against whom he has instituted an action or against whom he intends instituting an action for the recovery of a debt is about to depart from the jurisdiction of the court in order to escape responsibility for the debt.[12]

In *Amrich Property Holdings* above the court stated that the procedure of arrest was not devised to prevent a debtor's departure from the courts jurisdiction but to prevent his departure with the intention of evading or delaying payment. The court stated (para 17) that ". . . The reason for leaving the country with the intention of evading or delaying payment of his debts must account for all the proven facts. It is not the effect but the requisite intention which is material." The court further considered all the objective facts and came to the conclusion that the applicant failed to prove that the respondent made the arrangements to depart with the intention of evading or delaying payment of his debts.

[12] *Elliot v Fourie* 1992 (2) SA 817 (C) at 819G-J

[33] In my judgment although it seems that the main purpose of the limitation contained in section 30 of the Act is to prevent judgment debtors from absconding, thereby giving creditors an option of enforcing judgment debts or prospective judgment debts, the limitation is arbitrary and cannot be justified in an open and democratic society. As will be shown there are certainly less restrictive means to achieve this purpose.

(c) *Nature and extent of the Infringement of rights:*

> [34] The nature and extent of the infringement of the relevant rights have been discussed in the preceding paragraphs.

As was shown above, section 30 of the Act extensively infringed upon the rights to equality, dignity and freedom. It was also shown that the liberty of a defendant was arbitrarily infringed upon where the defendant could not secure his or her release by providing security or payment for the debt. The arrest contemplated in section 30 unquestionably aims to limit the arrestee's liberty. The right to equal protection and benefit of the law was further shown to be infringed on by section 30 of the Act in that a defendant in an inferior financial position would be denied the opportunity to equal access to the courts. The defendant in this position would certainly be in a less advantageous position than those who have sufficient assets and therefore adequate security to ensure their release from prison. Further a civil debtor is denied the fair trial rights afforded to an accused person in terms of section 35 of the Constitution. Accordingly the nature and extent of the infringement of the rights shown above cannot be reasonable and justifiable in an open and democratic society based on human dignity and freedom.

(d) *The relationship between the limitation and its purpose:*

[35] The aim of effecting an arrest for the fulfillment of a judgment debt or payment for security of a debt is to provide a creditor with the mechanism with which to enforce a judgment debt or secure payment for that debt. However the arrest itself does not serve to attain the fulfillment of such debt. Therefore it cannot be 'just cause' to coerce security or payment from a defendant who is entitled to the opportunity to raise non-liability in the proposed trial in subsequent legal proceedings.
The court in *Bid Industrial Holdings* stated (at 365 B-D) that:

> "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. Attachment ordinarily involves no infringement of constitutional rights (absent, for example, seizure of the means by which the defendant's livelihood is earned). But, more importantly, the 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. It is therefore not the arrest which might render any subsequent judgment effective but the defendant's coerced response. "

(e) *Less restrictive means to achieve the purpose:*

[36] The goal of securing payment for a judgment debt or security for payment can be achieved by less restrictive measures other than an arrest procedure in terms of section 30 of the Act. Applicant submitted that the second respondent could have obtained a judgment against the applicant and would then have the option to execute the judgment against the applicant in her home country or place of residence. A creditor may also take the judgment to most civilized countries to seek satisfaction of the judgment.[13] Applicant correctly submitted that other court proceedings may be used such as interdict proceedings or sequestration, if the defendant has assets in

[13] See Jones & Buckle above at p83

South Africa. In *Gouveia v Da Silva* 1988 (4) SA 55 (WLD) the court (at 62F-G) stated that "No marked injustice will follow if the applicant is left to the enforcement of the judgments in that country to which the respondent moves. . . "Fourth respondent conceded that the function of arrest is to enable a court to take cognizance of a suit and that this can be achieved through less invasive means. Fourth respondent further conceded that the limitations imposed by an arrest *tanquam suspectus* are not reasonable and justifiable in an open and democratic society and cannot pass the limitations test set by section 36 of the Constitution.

[37] South Africa recognizes judgments of other jurisdictions. In the unreported judgment of *Mahon v Mahon and Others* (CPD) case no 14918/2008 delivered on 29 July 2009, the judgment of the Family Division of the High Court of Justice in the United Kingdom was relied upon to issue a summons for provisional sentence against the applicant in the High Court of South Africa. The correctness of the judgment of the English court in this matter was not contested.

[38] The Enforcement of Foreign Civil Judgments Act 32 of 1988[14] provides for a procedure designed to reduce the time and costs involved in the common law enforcement action. The Act only applies to countries designated specifically by the Minister of Justice. Reciprocal treatment by the chosen states is not required. Non-monetary judgments and those based on penal or revenue laws are excluded in terms of section 1 of the Act. The Act only applies to enforcement proceedings in the magistrate courts where the financial limit on actions is R100 000. Foreign judgments

[14] The recognition and enforcement of foreign judgments is the subject of the South African Law Reform Commission Project 121 *Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters* Report December 2006. The proposed bill contained in Project 121 provides for the recognition and enforcement of foreign civil judgments in Magistrates courts and the High Courts in the Republic and for matters connected thereto.

in excess of this must be applied for in the High Court. [15] Foreign judgment creditors may sue under the common law, which entails bringing an application to have the judgment made into an order of a local court.

In *Bid Industrial Holdings* supra the court stated (at 368 B-D) that:

> "Consideration of a substitute practice can usefully start with the observation that this court has accepted, for purposes of reciprocal enforcement of a foreign judgment, that the defendant's mere physical presence within the foreign jurisdiction when the action was instituted is sufficient, according to South African conflict of law rules, for a finding that the foreign court had jurisdiction. It may also be noted that in England, for example, service on a foreign defendant while physically present-albeit temporarily- within its borders is sufficient for jurisdiction provided the case has a connection with that country. These are pointers to the acceptability - subject to the presence of sufficient evidential links - of mere physical presence as being an acceptably workable substitute for a detained presence. One might add - a self-evidently more acceptable substitute."

[39] The court in *Bid Industrial Holdings* therefore noted that for purposes of reciprocal enforcement of a foreign judgment, the courts have accepted that the defendants' mere physical presence within the foreign jurisdiction when the action was instituted is sufficient, according to the South African conflict of law rules, for a finding that the foreign court has jurisdiction.

[15] The South African law reform commission has found that the common-law method for recognizing and enforcing foreign judgments in South Africa is a vital adjunct to the accelerated statutory procedure available under the Enforcement of Foreign Civil Judgments Act 32 of 1988. An accelerated procedure for enforcing foreign judgments in South Africa and for assisting local litigants to enforce the judgments of South African courts abroad is available under the Enforcement of Foreign Civil Judgments Act 32 of 1988. undesignated countries will still have to rely on the common law. See para 4.3.1 of Project 121 December 2006.

[40] Other applicable legislation for the enforcement of foreign judgments include the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 which provides accelerated procedures for enforcing awards emanating in South Africa and in countries abroad. The Act applies only to countries designated by the Minister of Justice. There are further alternative ways in which a debt can be secured; such measures would include the furnishing of security or payment of the claim. In *Bid*

> *Industrial Holdings* supra the appellant failed to attach an asset belonging to the respondent, which was capable of being attached in order to found or confirm jurisdiction. In terms of section 19(1)(c) of the Supreme Court Act 59 of 1959 only a High Court may issue an order for attachment of property or arrest of a person to confirm jurisdiction. As submitted by applicant, if the judgment creditor were to obtain a judgment order, the applicants' presence in the Republic would not affect the effectiveness of that judgment. The creditor would still have the option to execute the judgment in the home country of the debtor or defendant.

[41] There are certainly less restrictive means in which a claim or judgment may be pursued and which would not violate fundamental human rights. Section 30 of the Act cannot pass the test as set out in section 36 of the Constitution as the governmental purpose which serves to interfere with fundamental human rights cannot be justified in an open and democratic society based on human dignity, equality and freedom. Furthermore there are less restrictive means which can be utilized in order to serve the same purpose without infringing upon the said constitutional rights. Accordingly the relevant provisions in the Magistrates Courts Act relating to arrest *tanquam suspectus de fuga* are declared unconstitutional and invalid.

[42] A limitation logically connected to its objective could also be unreasonable if it undermined a long established and now entrenched right, imposed a penalty that was arbitrary, unfair or irrational or used means that were unreasonable.[16] The limitation should also be necessary in an open and democratic society. Applicant further

[16] Sachs J in *Coetzee v Government of South Africa* at 659F.

submitted that if section 30 of the Act remained on the statute book, the confidence in our legal system would be eroded as various international and regional instruments repudiate the core element of the institution of civil imprisonment. Sachs J in *Coetzee v Government of South Africa* above (para 51) stated ". . . we need to locate ourselves in the mainstream of international democratic practice. . . "

[43] The constitutionality of Section 30 should also be considered in light of the National Credit Act 34 of 2005. [17] In terms of this Act, the emphasis has moved to the enforcement of the rights of consumers and is meant to protect consumers through addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness, providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.[18] Interestingly Didcott J in *Coetzee v Government of South Africa* above stated well before the contemplation of the National Credit Act (at 646G-J) that the creditor should explore all other means for execution of the judgment. This should be preceded by a full enquiry into the reasons why the debtor had failed to pay and the amount that he owed/disclosed from his financial state of affairs...the legislation does not insist upon the exhaustion by the creditor of lesser remedies.

The Constitutionality of the common law rule relating to arrest *suspectus de fuga*

[17] Section 3 of Act 34 of 2005 provides that "The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-..."
[18] ibid

[44] The common law rule relating to arrest *tanquam suspectus de fuga* allows for a judicial officer to issue a writ of arrest. The rule allows for the procedure to be used prior to and after a judgment. As stated above the common law rule was encoded in section 30 of the Act. Applicant submitted that notwithstanding the introduction of the Abolition of Civil Imprisonment Act 2 of 1977, the courts jurisdiction to order an arrest *suspectus de fuga* was held not to be ousted. This is because *suspectus de fuga* was regarded as an extension of the common law principle of contempt of court. Applicant is seeking a declaration of invalidity of the common law rule relating to arrest *tanquam suspectus de fuga*. Applicant submitted that this Court has a constitutional obligation to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights.

[45] Section 2 of the Constitution states that "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." This court has the inherent power in terms of section 173 of the Constitution to protect and regulate its own process and to develop the common law taking into account the interest of justice. In doing so regard should be had to sections 7, 8 and 39(2) of the Constitution. Section 39(2) of the Constitution provides that 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. Furthermore section 172(1) of the Constitution obliges a court to declare a legal provision invalid to the extent of its inconsistency with the Constitution.

(i) *Mootness of the legal issue:*

[46] Fourth respondent opposed the relief sought by applicant in respect of declaring the common law rule relating to arrest *tanquam suspectus de fuga* constitutionally invalid. Fourth respondent argued that the issue is academic and had already been

decided by the Supreme Court of Appeal in the matter of *Bid Industrial Holdings* above. Fourth respondent conceded, however, that the legislature clearly did not intend to modify the common law by the enactment of section 30 of the Act and that the intention rather seems to have been to endow the magistrates' court by statute with all common law powers in regard to arrest *tanquam suspectus de fuga.* Furthermore fourth respondent proposed the enactment of remedial legislation in order to cure the constitutional invalidity of section 30 of the Act.

[47] Applicant submitted, on the other hand, that even though the applicant was released from custody, the issue of law as it pertains to the arrest and detention of civil debtors remains of considerable importance. The issue of law in this matter impacts on the interests of other detained persons who are similarly incarcerated due to the *suspectus de fuga* procedure. Applicant further submitted that both creditors and debtors have an interest in knowing what the law is and that the issue in this case is likely to arise again in future. Counsel for applicant submitted that in *Bid Industrial Holdings* above, the court did not deal with arrest *suspectus de fuga*. In *Bid Industrial Holdings*, the Supreme Court of Appeal declared section 19(1)(c) of the Supreme Court Act and the common law rule allowing arrest to found or confirm jurisdiction unconstitutional. The constitutionality of an empowering provision for the arrest to found or confirm jurisdiction was challenged.

[48] The Supreme Court of Appeal found that the common law came to deal with the attachment of property and the arrest of the person (this was to enable an effective judgment or security to be obtained) and that the governmental purpose of the limitation was to favour plaintiffs in line with the common law by seeking to enable them to establish jurisdiction which would not otherwise exist and therefore to avoid the expense of suing abroad. [19]The Supreme Court of Appeal (para 48) stated that if

[19] Bid Industrial Holdings at paragraphs 30 & 45

the common law is to be developed by abolishing jurisdictional arrest, that development must necessarily involve practical expedients for cases where jurisdiction is sought to be established and there can be neither arrest nor attachment. Similarly if the common law relating to arrest to found or confirm jurisdiction is declared unconstitutional, there are as set out above less restrictive measures to achieve the objective.

[49] In *Amrich Property Holdings* above, Mathopo J dealt with the issue of arrest *suspectus de fuga*. However the constitutionality of Section 30, although discussed, was not pronounced upon. Therefore the legal issue has not yet been decided upon. In my view the constitutionality of an arrest *suspectus de fuga* will continue to be the subject of legal proceedings before the courts. It is in the interests of justice to decide upon the constitutionality of section 30 of the Act. Furthermore the Magistrate Courts in terms of section 170 of the Constitution do not have the power to enquire into the constitutionality of section 30 of the Act or any other legislation. Therefore it is incumbent upon this court to make a finding on the constitutionality of the section under consideration.

[50] In *Freedom of Expression Institute and others v President, Ordinary Court Martial and Others* 1999 (2) SA 471 (C), the court dealt with the issue concerning the constitutional validity of the Defence Act 44 of 1957 and section 78(3) of the Military Disciplinary Code. These relevant sections provide for the establishment and composition of a court martial. Certain charges in terms of this Act were brought against the applicants in this matter and if convicted on the charges, they would face the possibility of terms of imprisonment of up to two years. The court found section 78(3) of the above Act to be unconstitutional as it did not accord with the norms of a civilized and democratic society. The court further held that the section offends against

an accused persons constitutional rights in terms of section 35(3)(c) of the Constitution. The court further found that the section was not consonant with section 34 of the Constitution. On this basis it was found that the section was unconstitutional and should be struck down. (at 478B-E)

[51] In the *Freedom of Expression Institute* case above counsel submitted that since the Defence legislation was currently being revised, it would be a purely academic exercise to decide the constitutional issues, and therefore it would be unnecessary for this Court to pronounce on the constitutional validity or otherwise of the various provisions of the Defence Act and the Military Disciplinary Code. The court however disagreed and held (at 485G-486I) that:

> " Firstly we should remind ourselves that the first and most sacred duty of the Court, where it is possible to do so, is to administer justice to those who seek it (*Hurley and Another vv Minister of Law and Order and Another*) 1985 (4) SA 709 (D) at 715G). It follows from this principle that the Court should be loath to close its doors to a litigant because of what happened subsequent to the launching of proceedings. Secondly, and in any event, our Courts have laid down on numerous occasions that pronouncements to the effect that a Court will not enquire into matters which are of intellectual or academic interest only should not be misconstrued. As appears from the judgment of the Appellate Division in *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 486H, those pronouncements 'dealt with the situation where the issue presented for decision to the court of first instance was *at that stage* of abstract or intellectual interest only'..."

[52] The court further found that when the application was presented to court there was a very real and 'live' issue and the fact that subsequent concessions were made by the respondents was of no importance. The court stated the following at 486B-D. emphasis added)

> "The issues raised in the present case are not purely academic but of real and practical consequence. There are interested parties upon whom the declaratory order would be binding. The application involves a matter of public and not private law. The issues raised are very much alive and if not resolved in these proceedings they will inevitably come before Court in the near future. The issues will certainly affect not just the applicants before us but many more people in similar circumstances. The raising of these issues in legal circles has surely caused uncertainty and anxiety in the minds of people who may similarly be affected. Therefore it is only proper that this Court should pronounce on these issues. It would be unwise, in my view, to abdicate our responsibility on the basis that the matter is currently being reviewed by the work group. Surely the judgment of this Court would be of relevance to the work group in updating the Defence legislation in line with the Constitution. Further authorities for the view that pronouncing on a matter of public interest is not an academic exercise include *Ex parte Chief Immigration Officer, Zimbabwe* 1994 (1) SA 370 (ZS) at 376-7; Tribe American Constitutional law 2nd ed at 88. "

(ii) *Developing the common law rule suspectus de fuga:*

[53] Applicant has referred to the unreported judgment of Mathopo, J in *Amrich Property Holdings* above where the court concluded (para 35) that:

> ". . . to the extent that the common law may be at odds or variance with the Constitution it should be developed, because an arrest under such circumstances cannot pass the limitation test in section 36, as it is contrary to the spirit, purport and objects of the bill of rights."

Developing the common law would entail considerations and adoption of a legally acceptable substitute practice. It was held in *Bid Industrial Holding* case (at 368B-C) that:

> "...this court has accepted for purposes of reciprocal enforcement of a foreign judgment, that the defendant's mere physical presence within the foreign jurisdiction when the action was instituted is sufficient, according to South African conflict of law rules, for a finding that the foreign court had jurisdiction..." See *Richman v Ben-Tovim 2007 (2) SA 283 (SCA)* paras 7 to 9."

[54] It was submitted on behalf of applicant that even if section 30 is deleted, the common law power to issue a writ of arrest still remains and that the court needs to make an order declaring the common law in this regard as unconstitutional. It was further submitted that no harm would be caused by declaring the common law as unconstitutional. The unconstitutionality of the common law has been addressed in the case of *Amrich Property Holdings* above. The court in this instance relied upon the judgment of Flemming J in *Gouveia v Da Silva* the court stated (at 62F-G) that:

> "...the imprisonment which is sought...so closely approximates that civil imprisonment to which the 1977 legislation refers that, if not covered thereby, the modern policies regarding imprisonment for debt cannot be lost sight of. No marked injustice will follow if the applicant is left to the enforcement of the judgments in that country to which the respondent moves..."

[55] Applicant further submitted that there was no evidence that there would be a lacuna in the law should the court order a declaration of invalidity. The High court still has an obligation to make a declaration of invalidity. In *Coetzee v Government of South Africa* above the court held that it is not the function of the Court to fill in a lacuna in pre-Constitution statutes to save them from invalidity. In terms of the Constitution the courts are permitted the pared- down construction of legislation so as to rescue it from a declaration of invalidity; however this does not require a restricted interpretation of fundamental rights so as to interfere as little as possible with pre-

existing law.[20]

[56] I am inclined to agree with applicant's submission that the proposal by fourth respondent for the enactment of remedial legislation is not required as it is difficult to understand what effective and alternative provision could be enacted which would have a less drastic effect on the liberty, dignity and equality of a person who is affected by section 30 of the Act. In *Dawood , Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA (CC) 936 the Constitutional Court considered the appropriate orders to be made where legislative provisions are found to be unconstitutional. The Constitutional Court stated that a court is obliged once it has concluded that a provision of a statute is unconstitutional, to declare that provision to be invalid to the extent of its inconsistency with the Constitution. The court may also make any order that it considers just and equitable, including an order suspending the declaration of invalidity for sometime. The court said (at 972 B-C) that:

> ". . . The inconsistency with the Constitution therefore lies in a legislative omission, the failure to provide guidance to the decision-maker. As such, therefore, it cannot be cured by the technique of actual or notional severance employed by this Court, for example in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell No and Others*"

[57] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (1) SA 6 (CC) , the Constitutional Court held that it would introduce words into a legislative provision if such an order was appropriate. In deciding whether such an order was appropriate, the court held that there are two primary considerations. Firstly, the need to afford appropriate relief to successful litigants and secondly the need to respect the separation of powers, and in particular

[20] At para 62.

the role of the Legislature as the institution constitutionally entrusted with the task of enacting legislation. In *Dawood, Shabala and Thomas* above the court stated that it would be inappropriate for this court to seek to remedy the inconsistency in the legislation under review and that it would be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured and that the court should be slow to make the choices which are primarily the choices suitable for the legislature.[21] The Constitutional Court in *National Coalition* supra found it appropriate to suspend the order of invalidity for a period of two years, which should be sufficient time to permit the Legislature to attend to rectifying the cause for constitutional complaint in the legislation. The court in *Dawood* supra took into account the fact that the department published a fundamental review of the legislation under scrutiny and therefore suspended the order of invalidity for a period of two years and further afforded appropriate interim relief to affected persons.

[58] The unconstitutional provisions contained in section 30 of the Act in this case cannot be cured by a suspension of invalidity. This is so because the fourth respondent cannot rectify the constitutional complaint under consideration with an appropriate substitute. In contrast to *Dawood, Shabala and Thomas* above it was said that there are a range of possibilities that the Legislature may have adopted to cure the unconstitutionality of the provision. The Constitutional Court in the latter instance granted relief in the form of a mandamus pending the amendment or replacement of the Act.

[59] In *Matatiela Municipality and Others v President of Republic of South Africa and Others* 2007 (6) SA 477 (CC) the Constitutional Court dealt with the constitutional challenge to the Twelfth Amendment to the Constitution and the Repeal Act in question. The court in this instance had to deal with the appropriate remedy for the

[21] Para 62-62

unconstitutional conduct of a provincial legislature. In considering whether it was just and equitable to order a suspension of invalidity of a legislative provision or constitutional amendment the courts should have regard to the potentiality of prejudice being sustained if an order of invalidity is not suspended, the interests of the parties as well as that of the public; and the need to promote the constitutional project and prevent chaos.[22]

[60] In *Mabuza v Mbatha* 2003 (4) SA 218 (C), the court had to decide upon the declaration of section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 insofar as it conflicted with section 9 of the Constitution; and a declaration that the customary marriage be regarded as a marriage in community of property as envisaged by section 7(2) in the Recognition of Customary Marriages Act 120 of 1998. The court emphasized the constitution as the supreme law as set out in section 2 of the Constitution.

The court stated the following:

> "...if one accepts that African customary law is recognized in terms of the Constitution and relevant legislation passed thereunder, such as the Recognition of Customary Marriages Act 120 of 1998 referred to above, there is no reason, in my view, why the Courts should be slow in developing African customary law. Unfortunately one still finds *dicta* referring to the notorius repugnancy clause as though one were still dealing with a pre-1994 situation...The proper approach is to accept that the Constitution is the supreme law of the Republic. Thus any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny....The Courts have a constitutional obligation to develop African customary law, particularly given the historical background

[22] *Zondi v MEC Traditional and Local Government Affairs and Others* 2006 (3) SA 1 (CC) para [47]

> referred to above. Furthermore, and in any event, section 39(2) of the Constitution enjoins the Judiciary when interpreting any legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights. . . the test is not, in my view, whether or not African customary law is repugnant to the principles of public policy or natural justice in any given case. The starting point is to accept the supremacy of the Constitution, and that law and/or conduct inconsistent therewith is invalid. Should the Court in any given case come to the conclusion that the customary practice or conduct in question cannot withstand constitutional scrutiny, an appropriate order in that regard would be made. The former approach, which recognizes African law only to the extent that it is not repugnant to the principles of public policy or natural justice, is flawed. It is unconstitutional. (At 227J-228F emphasis added)

[61] The question of severability was dealt with by the Constitutional Court in *Coetzee v Government of South Africa* above where it was said (at 644 I-645A) that:

> ". . . there are two questions to be answered with regard to the possible severance of the provisions of the law not consistent with the Constitution. First, can one excise the provisions which render the option of imprisonment unconstitutional because they do not distinguish between those that can pay but will not from those who cannot pay? If not, can the provisions which provide for imprisonment itself be severed from the rest of the system for enforcement of judgment debts? "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?"

The court concluded that it is possible to sever the provisions which make up the option of imprisonment and still the object of the statute will nevertheless remain to be carried out. Severance in terms of section 30(3) of the Act is not an option. Should the court sever the provisions relating to the option of imprisonment, the provision will then become redundant. Severance in terms of section 30(1) however is possible as the object of the section relating to the enforcement of judgment debts will not be

prejudicially affected as there are other less drastic measures which may be utilized for this purpose.

[62] Fourth respondent did not oppose the application to declare section 30(3) of the Act unconstitutional. However he argued that the order of invalidity should not be made regarding the common law rule of *suspectus de fuga*. In my judgment it is not possible to separate the good from the bad i.e the common law rule is inconsistent with the constitutional rights relating to freedom, equality and dignity. Fourth respondent argued for the enactment of remedial legislation over a period of 24 months to enable it to draft legislation replacing section 30(3) of the Act. Applicant argued that such was totally unnecessary as it was not possible to sever the good from the bad provisions of section 30(3).

[63] In my view Parliament need not be given the opportunity to correct the constitutional defect contained in section 30 of the Act through the adoption of a fresh amendment. In *Matatiele Municipality* above the court was able to order a suspension of invalidity of the legislation for a period of 18 months as it was capable of being replaced or amended by the legislature. It remains a mystery to the court why Parliament did not abolish Section 30 of the Act and the common law rule of arrest *suspectus de fuga* after the *Bid Industrial Holdings* judgment which was reported in 2008. Surely had Parliament done that, this application would not have been necessary in the first place. I therefore find that the appropriate remedy would be to sever the offensive wording contained in section 30 (1) of the Act, the offensive words being " arrest *tanquam suspectus de fuga*" and that section 30(3) of the Act should be deleted in its entirety. Accordingly the common law is struck down in its entirety.

[64] Section 172(2) of the Constitution provides that an order of constitutional invalidity

has no force unless it is confirmed by the Constitutional Court. Accordingly this matter (declaration of section 30 and the related common law) is referred to the Constitutional Court in terms of section 172 (2) of the Constitution.

Costs

[65] In regard to costs, applicant submitted that fourth respondent should pay the costs of this application, including the costs of two counsel. The Constitutional Court has previously ruled that the state has an obligation to amend legislation, which violates constitutional rights. To date there is no forthcoming legislation in respect of section 30 of the Act. Section 30 remains unconstitutional insofar as it allows for arrest *suspectus de fuga.* The court considers that it is just and equitable that fourth respondent should therefore pay the costs of this applicaton.

> Accordingly the fourth respondent is ordered to pay the costs of this application such costs to include the costs of two counsel.

[66] In the result the following order is made:

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 authorizes arrests *tanquam suspectus de fuga* is declared to be inconsistent with the Constitution and invalid.

4. Fourth respondent is to pay the costs of this application including the costs of two counsel.

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Hlophe JP