

**Insolvency interrogations: An investigation into sections
64, 65, 66 and 152 of the *Insolvency Act* 24 of 1936**

**Dissertation submitted in fulfilment of the requirements
of the degree Magister Legum in Insolvency Law at the
North-West University: Potchefstroom Campus.**

by

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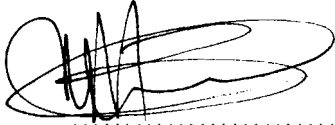
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DECLARATION

I declare that:

“Insolvency Interrogations: An investigation into sections 64, 65, 66 and 152 of the *Insolvency Act 24 of 1936*”

is my own work, that all sources used have been indicated and acknowledged by means of complete references, and that this thesis was not previously submitted by me for a degree at another university.



.....
MB Mwelase
December 2005

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Summary

This dissertation is the analysis of sections 64, 65, 66 and 152 of the *Insolvency Act* 24 of 1936. Sections 414 to 418 of the *Companies Act* 61 of 1973 are also touched upon in so far as they relate to these sections of the *Insolvency Act*. These sections entail the compulsory attendance of the creditors 'meetings by the insolvent. At these meetings the interrogation of the insolvent regarding his insolvent estate is conducted. Its purpose is to ensure that the insolvent accounts for the assets of his estate and supply reasons for his bankruptcy. The information gathered thereat will assist in the due and fair distribution of his assets amongst his creditors. The purpose of this research is to examine whether the application of these sections to the insolvent person (juristic or natural) is in compliance with the *Constitution of the Republic of South Africa*, 1996.

The provisions provided for by this sections appears to be good, however there is another viewpoint. The fact that the insolvent and any other person interrogated may be compelled to divulge certain privilege information, even to the extent of incriminating himself (themselves) in the process seems to be violating certain rights of the person interrogated, for example, one's right not to incriminate himself. This right especially comes to mind when one considers the fact that information divulged at the interrogations may be used against the person giving it in subsequent proceedings relating to perjury, administration of the insolvent estate, taking of oath and so forth. These sections also provides for the detention of the person who fails to comply with the provisions of this *Act*. The detention is said to be a mechanism that the legislature needs to ensure compliance and is not regarded as detention without trial. However, the detention has to be ordered by a judicial officer presiding over the meeting of creditors and not a person from the executive organ of the state.

Case law has however indicated that there is nothing unconstitutional about these sections as long as they are applied with precautionary measures, taking into consideration the rights of the interrogatee or person examined as entrenched in the *Bill of Rights*. The principles of justice also require that every one shall be entitled to fair proceedings.

Opsomming

Hierdie ondersoek behels die analisering van artikels 64, 65, 66 en 152 van die *Insolvensiewet* 24 van 1936. Artikels 414 tot 418 van die *Maatskappywet* 61 van 1973, in soverre dit betrekking het op die genoemde artikels van die *Insolvensiewet*, word ook na verwys. Hierdie artikels gaan oor die verpligte bywoning van skuldeisersvergaderings deur die insolvent. Gedurende die vergaderings word die insolvente persoon ondervra. Die doel is om toe te sien dat die insolvente persoon rekenskap gee van die bates in sy boedel, asook redes verskaf vir die insolvensie. Die inligting wat so verkry word, word gebruik om 'n regverdige verdeling te maak van die bates tussen sy krediteure. Die doel van hierdie navorsing is om vas te stel of die toepassing van hierdie artikels op die insolvente persoon (juridies of natuurlik) in ooreenstemming is met die *Grondwet van die Republiek van Suid Afrika*, 1996.

Die voorskrifte wat deur hierdie artikels gestel word blyk goed te wees, alhoewel daar 'n ander siening ook bestaan. Enkele aspekte wat ondersoek word, is byvoorbeeld die feit dat die insolvent en enige ander persoon wat ondervra word, verplig word om inligting te openbaar selfs indien dit homself (hulleself) kan inkrimineer. Dit noop die vraag of sekere regte nie geskend word nie byvoorbeeld 'n persoon se reg om homself nie te inkrimineer nie. Hierdie artikels maak ook voorsiening vir die aanhouding van die persoon wat nie die voorskrifte van die *Insolvensiewet* met betrekking tot die genoemde artikels nakom nie. Aanhouding is 'n meganisme om te verseker dat nakoming van die *Insolvensiewet* nie gesien word as aanhouding sonder verhoor nie. Onmiddellik is die vraag of die aanhouding regsgeldig is indien dit beveel word deur iemand anders as 'n regsbeampte wat voorsit in op die vergadering van krediteure skuldeisers, en nie deur byvoorbeeld 'n uitvoerende beampte van die staat nie. Hierdie is maar enkele aspekte wat in die ondersoek aangespreek word.

Hofuitsprake dui egter aan dat hierdie artikels nie sonder meer ongrondwetlik is nie dui. Die ondervraagings procedure moet versigtig hanteer word met inagneming van die regte van die ondervragde. Of die persoon wat die ondersoek word, soos voorgeskryf deur die *Handves Van Regte*. Die beginsels van die reg verwag ook dat elke persoon geregtig is op regverdige regsprosesse.

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Insolvency interrogations: An investigation into sections 64, 65, 66 and 152 of the *Insolvency Act 24 of 1936*

Chapter 1

1 Introduction

This dissertation is an analysis of the constitutionality of the interrogation of witnesses and other persons in terms of the *Insolvency Act*.¹ The presiding officer at the meeting of creditors is empowered by sections 64, 65, 66 and 152 of this *Act* to summon and interrogate any person who might be able to give any material information. The main focus of the research will be the relevant sub-sections posing a constitutional problem. These will be thoroughly analysed.

2 Problem statement

The main object of the *Insolvency Act* is to ensure a due and just distribution of the insolvent's assets among his² creditors in their order of preference as provided for in the *Insolvency Act*.³ The sequestration order crystallises the insolvent's position. The hand of the law is laid upon the estate and the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to the estate matters by a single creditor to the prejudice of the general body.⁴ Although it is inevitable that some creditors might not be paid and others might receive little or nothing at all, the *Insolvency Act* attempts to ensure that the interest of the creditors as a group enjoys preference over the interests of individual creditors.⁵ This is secured by means of the *concursum creditorium*.⁶

¹ *Insolvency Act 24 of 1936* (hereinafter "the *Insolvency Act*").

² For convenience, the generic pronoun "he" will be used to refer to both male and female insolvent and any other person in this research.

³ According to Sharrock *Hockly's Insolvency Law* 4, the purpose of the sequestration is to secure an orderly and equitable distribution of a debtor's estate, especially in that there might be insufficient funds to meet the claims of all the creditors.

⁴ *Walker v Syfret* 1911 AD 141-166.

⁵ Sharrock *Hockly's Insolvency Law* 4. On this point he relies on the case of *Richter v Riverside*

The law of insolvency thus exists **primarily** to protect the creditors of a debtor. It is not there to alleviate the position of the debtor.⁷ Therefore sequestration must be to the advantage of the creditors of the debtor. In order to achieve this objective the *Insolvency Act* lays down strict provisions for interrogations in sections 64, 65, 66 and 152 to **maximise** chances of an **advantageous** distribution process in an insolvent estate where the interest of the creditors are paramount. But are these provisions constitutional? This is a crucial question when one realises that the sequestration revolves around the underlying principle of creditors' benefit.

Section 64(1) of the *Insolvency Act* is mandatory in that it **compels** the insolvent and certain other persons to attend the first and second meetings of the creditors of the insolvent estate. The above mentioned persons are also **compelled** to attend every adjourned first and second meeting. The insolvent "**shall**" also attend any subsequent meeting of creditors if required to do so through the written notice by the trustee of his insolvent estate. Non-attendance of these meetings by persons so subpoenaed, results in sanctions. Section 66(1) of the *Insolvency Act* empowers the presiding officer to issue a warrant for the apprehension of any person who fails to answer to the summons issued under section 64 of the *Act*. The person so apprehended shall be brought before the presiding officer to answer for his failure to attend the meeting in terms of section 64(1).⁸ Section 66(2) provides for the detention of that person if he fails to provide a reasonable excuse for his failure to attend.⁹ The officer in charge of the prison to which the said person or insolvent was committed, shall detain him and produce him at the time and place appointed by the first mentioned officer for his production.

Estates Ltd 1946 OPD 209-223.

⁶ The coming together of creditors as a group.

⁷ However, sequestration may coincidentally relieve the debtor from harassment by creditors and enable him through rehabilitation to free himself of all unpaid pre-sequestration debts. See *Ex parte Pillay* 1955 (2) SA 309 (N) 311 and section 129(1) (b) of the *Insolvency Act*.

⁸ The same will be the case where the insolvent fails to remain in attendance at that meeting.

⁹ The same will be the case where the insolvent fails to attend any meeting of creditors in terms of section 64(1) of the *Act* or fails to remain in attendance at that meeting.

Are these means employed to ensure attendance not perhaps unconstitutional? If so, to what extent?

One of the controversies this research will concentrate on, revolves around the applicability of section 36 of the *Constitution*.¹⁰ Section 36 provides for the limitation of certain rights in the *Bill of Rights*.¹¹ Accordingly, if there is a limitation, the limitation must be reasonable and justifiable in an open and democratic society. In determining the justification and reasonableness of the limitation, factors such as human dignity, equality and freedom are considered. Furthermore, factors that ought to be taken into consideration when deciding this question should also include the yardstick of “less restrictive means to achieve the purpose”. The question therefore is: Are the means provided for in section 64 necessary to ensure that the **purpose of discovery** is not jeopardized?

Section 65(1) of the *Insolvency Act* empowers the presiding officer to administer the oath and interrogate the insolvent and other witnesses that might have been summoned. One may ask whether the administering of an oath is constitutional? This might be a problem in instances where the insolvent or any witness belongs, for example, to the Muslim religion and taking an oath contravenes his beliefs.

Section 65(2) of the *Insolvency Act* as amended by section 3(a) of the *Insolvency Amendment Act* compels any person giving evidence in terms of section 65 to answer any question directed at him, notwithstanding the fact that he might be incriminated by such answers in subsequent proceedings.¹² The presiding officer shall, notwithstanding the provisions of section 39(6) of the *Act*, order that such part of the proceedings (the answering of questions) be held *in camera* and he may further order that no information regarding

¹⁰ *The Constitution of the Republic Act* 108 of 1996 (hereinafter “*the Constitution*”).

¹¹ Chapter 2 of the *Constitution*.

¹² Section 39(6) of the *Insolvency Amendment Act* 89 of 1989 provides that the place where a meeting of creditors is held shall be accessible to the public, and the publication of any statement made at such a meeting shall be privileged to the same extent as is publication of a statement made in a court of law.

such questions and answers may be published in any manner whatsoever.¹³ The question may be asked whether section 65(2) is perhaps a violation of the right to remain silent or not.

Section 66(3) of the *Insolvency Act* further empowers the presiding officer to issue a warrant of arrest against any person who appears but refuses to produce a book or document at the meeting of creditors. This person shall be detained until he has undertaken to do what is required. The position will be the same if any person who may be interrogated at a meeting of creditors in terms of section 65(1) of the *Insolvency Act* refuses to be sworn in by the presiding officer at a meeting of creditors. If that person further fails to give evidence or refuses to fully answer any question lawfully put to him under the said section, the latter may be detained.

The constitutionality of section 66(3) came under attack in *De Lange v Smuts*¹⁴ where it was declared invalid by the Cape High Court.¹⁵ The declaration of invalidity was referred to the Constitutional Court for confirmation.¹⁶ The court had to decide whether this section violated the substantive or procedural aspect of section 12(1) of the *Constitution* which provides protection of freedom and security of a person.¹⁷ The court came to the conclusion that committal to prison under section 66(3) did not constitute a violation of the substantive aspect of section 12(1) of the *Constitution*.¹⁸ The substantive aspect implies that it is proper to detain a person for failing to comply with a statutory requirement. But the court held that the power of presiding officers other than magistrates to commit recalcitrant witnesses to prison infringes the procedural aspect of section 12(1) of the *Constitution*. The infringement of the right was not justifiable in terms of section 36 of the *Constitution*. When analysing the court's decision, one comes to the

¹³ See footnote 10.

¹⁴ *De Lange v Smuts* 1998 (1) SA 736 (C).

¹⁵ Because of the fact that also an officer in the executive organ of the state may be appointed to preside over the insolvency proceedings.

¹⁶ In terms of section 172(2)(a) of the *Constitution*.

¹⁷ Section 12(1) of the *Constitution* provides that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial.

¹⁸ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at 786.

conclusion that if the officer who committed a witness to prison was a magistrate, then the committal would **not** be unconstitutional. It is this aspect of the Constitutional Court's decision that should be scrutinized further because it is still controversial.

Section 66(5) of the *Insolvency Act* makes provision for immunity in favour of the presiding officer who issues a warrant of detention and who commits a witness to prison. The presiding officer shall enjoy the same immunity enjoyed by a judicial officer in connection with the performance of his duties. One may ask whether the availability of immunity in favour of presiding officers, other than magistrates is perhaps a loophole in the system or not. Is this immunity not perhaps open to abuse?

The *Insolvency Act*¹⁹ makes provision for the subpoena and interrogation of any person, including the insolvent and trustee of the insolvent estate by the Master. The person so summoned is required to provide any information that the Master might require.²⁰ The possibility of the violation of the rights under section 35 of the *Constitution* by the provisions of section 152 should be investigated. Section 35 of the *Constitution* protects the rights of the arrested, detained and accused persons. The rights that may be violated are the right to remain silent, the right not to be compelled to make any confession or admission that could be used as evidence against that person and to be brought before a court as soon as reasonably possible. One might further ask whether section 36 of the *Constitution* applies in these circumstances?

Section 414, 415, 417 and 418 of the *Companies Act* also relate to the subpoena of persons to the interrogation process and to sanctions for failure without sufficient cause to attend such examination. In *Bernstein v Bester*²¹ the constitutionality of sections 417 and 418 was analysed. Again the court had to decide on the question of the constitutionality of the detention of a recalcitrant witness. The court held that there was nothing wrong in detaining

¹⁹ Section 152.

²⁰ Information that may concern the insolvent, his estate or the administration of such estate and any claim or demand made against the estate.

²¹ *Bernstein v Bester* NO 1996 (2) SA 751 (CC).

a recalcitrant witness and that the process was reasonable and necessary to safeguard the normal interrogation proceedings. On the basis of this case and other cases related thereto, it is critical to investigate whether these sanctions are necessary to enforce the legislation or not. This is so since more cases are referred to the Constitutional Court on this issue, showing dissatisfaction with the legal position. To what extent may these provisions (and case law in this regard) be taken as authority for the position regarding sequestration?

The *Access to Information Act*²² provides that everyone has the right of access to any information held by another person that is required for the exercise or protection of any rights. Thus the trustee of an insolvent estate has a right of access to any material information held by another person in order to protect the interests of the creditors. But is it not justifiable then that any other person appearing before the Master²³ to provide information regarding the insolvent or his estate should **likewise** be given an opportunity to prepare for the interrogation and therefore be given certain information? Also, the question is whether the *Access to Information Act* is in conflict with the right to privacy as entrenched in the *Bill of Rights*?²⁴ or not.

3 Research question

The *Insolvency Act* makes thus provisions for the examination of certain individuals, including the insolvent debtor. This is done in order to ensure that all relevant information necessary for trustees and liquidators to execute their duties in terms of the *Insolvency Act* is brought forward. The research question can therefore be formulated as follows: Are the provisions of the *Insolvency Act* with regard to the interrogation of witnesses constitutional? If there are constitutional defences available to the examinees, the next question is whether these jeopardize chances of a fair liquidation process to

²² Act 2 of 2000.

²³ Or other presiding officer.

²⁴ Chapter 2 of the *Constitution*.

the disadvantages of creditors or not? The purpose of this dissertation is to investigate these questions.

Chapter one concentrates on the procedures followed in the sequestration of the insolvent estate. This will include the summoning of the insolvent, his or her spouse and any other person that the presiding officer might deem required for the purpose of the interrogation. The *Insolvency Act* also provides sanctions where there is non compliance with the requirements of the *Act*. These will be investigated. In chapter two follows a complete exposition of sections 64, 65 and 66 of the *Insolvency Act*, their application, effect and shortcomings. In so far as they relate to the *Insolvency Act*, sections 414 to 418 of the *Companies Act*,²⁵ will also be referred to. Chapter three concentrates on the provisions of the *Constitution* in this regard and related cases. Views of different writers on the subject matter and the constitutionality of these sections will be discussed. Sections 12 and 35 of the *Constitution* will be discussed in so far as they impact on the constitutionality of the above mentioned sections of the *Insolvency Act*.

An analysis of section 152 of the *Insolvency Act* and section 418 of the *Companies Act*, in so far as it relates to the subject matter, will be given in chapter 4. Section 152 of the *Insolvency Act* provides for the interrogation by the Master of any person who is deemed to be in a position to provide any necessary information that the Master might deem fit. Such persons might include the insolvent and the trustee of that insolvent estate. In chapter 5 Constitutional Court cases relating to section 152 of the *Insolvency Act* will be investigated. Constitutional Court cases relating to section 418 of the *Companies Act* will be discussed as well, because these sections complement each other. In chapter 6 the *Draft Insolvency Bill* and the review of the law of insolvency done by the Law Commission will be accessed. A conclusion and recommendations will be made in chapter 7.

²⁵ *Companies Act* 61 of 1973 (hereinafter “the *Companies Act*”).

Chapter 2 Exploring sections 64, 65 and 66

2 Introduction

This chapter will focus on a critical analysis of sections 64, 65 and 66 of the *Insolvency Act*. Sections 414, 415 and 417 of the *Companies Act* will be discussed as well, in so far as they are related to the relevant provisions in the *Insolvency Act*. Only those aspects posing a constitutional problem will be dealt with.

2.1 Section 64 procedure to secure attendance at meetings

2.1.1 Attendance of meetings of creditors by the insolvent

Subsection (1) of the section provides:

An insolvent shall attend the first and second meetings of the creditors of his estate and every adjourned first and second meeting, unless he²⁶ has previously obtained the written permission of the officer who is to preside or who presides at such meeting granted after consultation with the trustee to absent himself. The insolvent shall also attend any subsequent meeting of creditors if required to do so by written notice of the trustee of his estate.

De la Rey²⁷ submits that it is the duty of the insolvent to make inquiries as to the dates and venues of the meetings of creditors of his insolvent estate. This, she submits, is necessary because the insolvent is bound by section 64(1) to attend such meetings. It is, however my opinion that the insolvent should be informed of such meetings.²⁸ The insolvent can absent himself provided

²⁶ For the purposes of the *Insolvency Act* the male connotation of the insolvent and any officer who preside at the meeting of creditors is used throughout, however, it is the intention of the *Act* that an insolvent or any officer may be female as well. For the purposes of convenience, I shall use the male connotation of every person referred to in this research, including the trustees, attorneys, advocates and liquidators.

²⁷ De la Rey *Law of Insolvency* 300.

²⁸ Insolvents are laymen. They usually do not know their rights and duties in terms of the *Insolvency Act*. Trustees works with the insolvency law everyday .They know what should be done. It is not unreasonable to expect that they would inform the insolvents

written permission has been obtained from the presiding officer after consultation with the trustee. She submits further that the trustee cannot lawfully give permission. I agree. The wording of section 64(1) is clear. The trustee should interfere as little as possible with the proceedings, otherwise the proceedings will be delayed. She emphasises that the court will be slow to interfere with the decision of a presiding officer, refusing such permission. She further quotes an instance where the insolvent was refused permission to absent himself from a meeting which was to be held two months later. Such was refused regardless of the fact that the insolvent produced a medical certificate, indicating the fact that the state of his health rendered it imperative that he should leave the country for the next five months.²⁹ This decision appears to be too strict. I am of the view that the strict provision in the case referred to by De la Rey is necessary in order to safeguard against the insolvent improvising any excuse not to attend the interrogation proceedings. The provision should be relaxed only where the insolvent has a solid reason for failure to appear for interrogation. In my opinion, a medical condition supported by a medical certificate indicating a serious health risk is or should be a good enough reason.

Although the insolvent is not bound to attend any other subsequent meetings unless he receives a written notice from his trustee to do so, it would be wise for him to attend all the meetings of creditors in his estate.³⁰ This will ensure that he is given an opportunity to state his side of the story.

Sharrock,³¹ Smith³² and Meskin³³ agree with this interpretation of section 64(1). They are however silent on the issue of the court interfering in the granting of permission to an insolvent to absent himself from the meetings of creditors. No examples of acceptable excuse are given either. The textbook writers are also silent on the issue of the insolvent's spouse in this regard. Where the spouses are married in community of property, both spouses are

²⁹ De la Rey *Law of Insolvency* 300. She relies on *Ex parte Hertzfelder* 1907 TS 1056.

³⁰ See also De La Rey *Law of Insolvency* 300.

³¹ Sharrock *Hockly's Insolvency Law* 112.

³² Smith *The Law of Insolvency* 212.

³³ Meskin *Insolvency Law* 8-4.

insolvent. Thus **both should attend** the meetings. This fact is often overlooked. Where spouses are married out of community of property, it is my opinion that the solvent spouse should also be part of the proceedings, unless the presiding officer or the trustee of the insolvent decides otherwise. It is my opinion that compelling the insolvent's spouse to attend the meetings of creditors might be necessary in the circumstances; she is expected to be in a position to provide material information relating to the insolvent when called upon to do so. This comes naturally in that they share an intimate relationship and surely such spouse might know the whereabouts of the assets of the insolvent as well as (some) of his dealings. Thus section 21 of the *Insolvency Act*³⁴ makes it compulsory for the assets of the insolvent's spouse to vest in the trustee. These will remain with the trustee until such time the solvent spouse proves a true title to such assets.³⁵ It is my opinion that this is intended to curb any collaborated fraudulent transactions or collusive dealings between the spouses. The strict provisions of the *Act* ensure that any dispositions that can be set aside, are detected.

2.1.2 Attendance of any person who could give material information

Section 64(2) provides:

The officer who is to preside or who presides at any meeting of creditors may summon any person who is known or upon reasonable ground believed to be or to have been in possession of any property which belonged to the insolvent before the sequestration of his estate or which belongs or belonged to the insolvent estate or to the spouse of the insolvent or believed to be indebted to the estate, or any person (including the insolvent's spouse) who in the opinion of the said officer may be able to give any material information concerning the insolvent or his affairs (whether before or after the sequestration of his estate) or concerning any property belonging to the estate or concerning the business, affairs or property of the insolvent's spouse, to appear at such meeting or adjourned meeting for the purpose of being interrogated under section *sixty-five*".

³⁴ Section 21 of the *Insolvency Act*, makes provisions for the attachment of the solvent spouse's assets who is married to the insolvent out of community of property.

³⁵ A detailed discussion of section 21 falls outside the scope of this dissertation.

Sharrock³⁶ quotes this subsection as it is. He is silent on the nature and content of the term “material information”. Like Sharrock, Meskin³⁷ quotes the subsection as it is, but in addition to this, explains that “material information” may be any information concerning matters which may be the subject of the interrogation. This, to my mind does not bring one closer to the interpretation of this term. Smith³⁸ submits that “material information” may be any information concerning the insolvent or his affairs, property belonging to the estate or concerning the business affairs or property of the insolvent’s spouse. Again it is my opinion that this does not explain much.

De la Rey³⁹ does not give a clearer meaning to the term “material information” either. It is my opinion that such material information is any information that might be relevant with regard to the claim of a creditor (s),⁴⁰ the assets of the insolvent estate and the **liabilities** of the estate. The information should also be of **financial interest to the insolvent estate**.⁴¹ Obviously the insolvent’s dealings and trading should be of material interest to the trustees because it could affect the principle of the financial “advantage of the *concursum creditorum*”. This viewpoint accords with Smith’s⁴² remark that the object of the meeting of creditors is to enable the trustee and creditors who have proved claims to conduct an enquiry on the widest basis into the affairs of the insolvent. She submits that the power given to the presiding officer to summon witnesses therefore is very wide.⁴³

With regard to the word “spouse” Meskin explains that section 64 of the *Insolvency Act* does not give this word the extended meaning assigned to it in section 21⁴⁴ of the *Act*. He explains that regardless of that omission, it is

³⁶ Sharrock *Hockly’s Insolvency Law* 112-113.

³⁷ Meskin *Insolvency Law* 8-4.

³⁸ Smith *The Law of Insolvency* 212.

³⁹ De la Rey *Law of Insolvency* 358.

⁴⁰ Concerning the existence, amount or classification of his claim.

⁴¹ Thus information which may assist a fair and equitable distribution of the assets.

⁴² Smith *The Law of Insolvency* 212.

⁴³ For this point, she relies on the cases of *Yiannoulis v Grobblers* 1963 1 SA 559 (T) 601 and *Spain v Officer Designated under Act 24 of 1936* 1958 3 SA 448 (W) 492.

⁴⁴ For the purposes of section 21 of the *Insolvency Act*, it is my opinion that the solvent spouse should also include a partner living with the insolvent as husband or wife. This is so

obvious that one who is the insolvent's spouse, within such meaning may be subpoenaed in any event as a spouse. All the other writers are silent on this point. In my opinion a spouse may, for this purposes, be a person who lives with the insolvent as husband or wife, even in the case of same sex couples. It might be a girlfriend-boyfriend relationship, without a valid marriage.⁴⁵ One must remember the purpose of section 64. It is to interrogate any person who will be able to give information on the insolvent. For this reason it is my opinion that spouse, in this content, should also have an extended meaning.

2.1.3 Attendance to produce books or documents

According to section 64(3):

The said officer may also summon any person who is known or upon reasonable grounds believed to have been in possession or custody or under his control any book or document containing any such information as is mentioned in sub-section (2), to produce that book or document, or an extract therefrom at any such meeting of creditors.

Smith⁴⁶ does indeed explain "material information with reference to section 64(3). Such information may be any information that the presiding officer might regard as **essential** in the meeting of creditors. This is again a very vague definition.

Sharrock⁴⁷ is silent on the wide powers given to the presiding officer regarding the compulsory production of the said documents or books. Meskin⁴⁸ teaches that it is not an abuse of the process if the subpoena does not specify in precise terms the documentation required of the witness. However, the subpoena should not be unlimited in scope and should not go beyond what is

regardless of their gender. Spouses can be persons of the same sex and living together as husband and wife.

⁴⁵ A valid marriage could be either in terms of the civil law and what we refer as a civil marriage. Customary unions are now also recognised as valid marriages, they have the same legal consequences as civil marriages.

⁴⁶ Smith *The Law of Insolvency* 212.

⁴⁷ Sharrock *Hockly's Insolvency Law* 113.

⁴⁸ Meskin *Insolvency Law* 8-4. For this pointer he relies on *Pitsiladi v Van Rensburg* 2002 (2) SA (SEC) at 162.

permissible for the investigation.⁴⁹ He further explains that the subpoena is in the form of a notice to attend the interrogation. It must be served on the person concerned by the messenger of the Magistrate's Court having jurisdiction in the area where a person summoned resides.⁵⁰ The manner of such service is that provided for the service of a subpoena issued in a civil case. This provision emphasises the importance of the witness appearing before the presiding officer.

From his comments, it is clear that Meskin is of the view that the presiding officer has the widest powers with regard to the information, books and documents that may be required at the meeting of creditors. I think that for the purpose of Meskin's view what is **permissible** for investigation purposes, is any information lawfully required. Obviously any information relating to the dealings and trading of the insolvent is permissible. To my mind what may not be permissible is any defamatory information regarding the insolvent.⁵¹ In addition to what is said, I also believe that Meskin used the word "permissible" instead of "admissible" in order to emphasise the need that there should be safeguards to prevent abuse of the provisions of sections 64 and 65. In *Pitsiladi v Van Rensburg*⁵² the court does not clearly specify what does the term "permissible" entail, it only states that the subpoena should not go beyond what is permissible and it further emphasises the purpose of sections 64 and 65 of the *Insolvency Act*.

De la Rey⁵³ points out that it is a competent course to summon one person both for interrogation, and to produce books or documents at the meeting of creditors. She agrees with Meskin on the wide powers given to the presiding officer regarding the scope of the summons.

2.1.4 Importance of procedure for the insolvency process

⁴⁹ The word "permissible" may beg the question whether the term "relevant" should not rather have been used in this context. See below.

⁵⁰ Meskin *Insolvency Law* 8-4.

⁵¹ For example information that may reveal the insolvent's promiscuous relationship which may not assist the trustee in any manner.

⁵² *Pitsiladi v Van Rensburg and others* NNO 2002 (2) SA (SEC) at 161-162.

⁵³ De la Rey *Law of Insolvency* 358.

From the viewpoints of the different writers on section 64 of the *Act*, it is submitted that the legislature, through the mandatory nature of this section, secures attendance of creditor meetings by the insolvent. This is achieved by empowering the presiding officer to compel (by means of summons) all relevant persons to attend the creditor meetings.⁵⁴ Persons so summoned may be in a position to assist the liquidators in gathering sufficient information relating to the insolvent **which may assist a fair and equitable distribution of the insolvent estate assets**. It is submitted that if persons were not compelled to attend such meetings, the purpose of a fair liquidation process through sufficient information would **not** be achieved.

The fact that a person so summoned may not absent himself at such meetings without prior permission of the presiding officer after consultation with the trustee of such estate, emphasises the mandatory nature of this section. The courts are also reluctant in interfering in the granting or refusal of the permission to be absent from the meetings.

The information required by the presiding officer from persons so subpoenaed should be **material** in that it relates to the insolvent and his estate's affairs, including the affairs of the latter's spouse. Thus, only persons who can supply material information may be summoned by the presiding officer. It is my opinion that material information in this regard is any information that may have a real effect on the financial situation of the estate or the claim of a creditor in the sense that it will materially influence the important and basic principle of the advantage of the *concursum creditorum*

2.1.5 Constitutionality of the procedures in section 64

Section 64 of the *Insolvency Act* is mandatory in nature in that the word "**shall**" is used throughout the section. It is reiterated that if the meetings are not attended as required, the purpose of discovery might be jeopardised. One

⁵⁴ This is any person whom he reasonably believes will be of assistance to the gathering of information.

should ask whether the means employed by this section are constitutional and whether there are not less radical or drastic means to achieve the purpose. A person so summoned may allege that the summons violates his rights to privacy as entrenched in the *Constitution*,⁵⁵ in that he will be expected to divulge material information he holds in confidence. He may further allege that his right to property is also violated⁵⁶ in that he will be expected to part with some documents or books at the meeting of creditors.

Amongst other rights that may be violated, is the right to remain silent and be given adequate time to prepare for a defence.⁵⁷ A further right that may be violated by compulsory attendance of meetings of creditors is the right to an administrative action that is lawful and procedurally fair.⁵⁸ This will be the case were the presiding officer is not a magistrate and he is given powers to summon persons he believes to be in a position to give material information.⁵⁹ The question may be asked whether it is a just and lawful administrative action to summon a person on the basis of a hunch of a presiding officer who is not a magistrate. This is so in that such officer may not have the ability to detect the materiality of the information so required at the meeting of creditors and as a result the system could be open to abuse. On the other hand the trustee may rely on certain material information, in order for him to properly perform his duties.

In terms of section 36 of the *Constitution* the rights in the *Bill of Rights*⁶⁰ may be limited only in terms of law of general application. These are the rights to equality, dignity, freedom and security of the person, privacy, property, religion, access to information, just administration action, access to courts and a cluster of rights protected by section 35 of the *Constitution*. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Amongst **factors** that may be

⁵⁵ Section 14 of the *Constitution*.

⁵⁶ Section 25 of the *Constitution*.

⁵⁷ Section 35(1)(a) and section 35(3)(b) of the *Constitution*.

⁵⁸ Section 33(1) of the *Constitution*.

⁵⁹ An official in the executive arm of the state may be appointed to preside at the meeting of creditors.

⁶⁰ Chapter 2 of the *Constitution*

considered when limiting a right entrenched in the *Bill of Rights* are (i) the importance of the purpose of the limitation; (ii) availability of less restrictive means to achieve the purpose; (iii) the nature and extent of the limitation; and (iv) the relation between the limitation and its purpose. In relation to section 64 of the *Insolvency Act*, one may ask whether there are not less restrictive means that may be applied to achieve the same purpose and will those less restrictive means suffice to achieve that purpose?

According to Jeffery⁶¹ the rights contained in the *Bill of Rights* may be limited by laws of **general application**, provided the limitation is **reasonable**. Such limitation must also be **justifiable** in an open and democratic society based on freedom and equality. The limitation must further not negate the essential content of the right in question. In some circumstances the limitation must be necessary as well. In determining whether the limitation is reasonable and necessary, one must weigh up competing values and make an assessment based on proportionality. There are no absolute rules regarding the limitation. **The determination will depend on the circumstances of each case.** The balancing of different interests is also an important factor to be considered. The nature of the right that is limited, its importance in an open and democratic society based on freedom and equality, the purpose for which the right is limited and the importance of that purpose to such a society as well as the extent of the limitation and efficacy are some of the factors that might be used in the process of balancing competing rights.

De Waal⁶² submits that rights and freedoms are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society. Factors such as public order and democratic values justify the imposition of restrictions on the exercise of fundamental rights.⁶³ He further submits that "limitation" is a synonym for "infringement" or perhaps, "justifiable infringement". A law which limits a right infringes that right. However, the

⁶¹ Jeffery *Bill of Rights Report* 1996/1997 133. On this point she quotes section 33 of the *Constitution of the Republic of South Africa Act* of 1993, hereinafter "*the Interim Constitution*"

⁶² De Waal *The Bill of Rights Handbook* 144-145.

⁶³ De Waal *The Bill of Rights Handbook* 144. For this view he relies on Erasmus 'Limitation and suspension' in Van Wyk (ed) *Rights and Constitutionalism* 629.

infringements will not be unconstitutional if it takes place for a reason that is recognised as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. He explains that, not all infringements of fundamental rights are unconstitutional. Where an infringement can be justified in accordance with the criteria in section 36 it will be constitutionally valid.

De Waal further acknowledges that the existence of a general limitation clause does not mean that rights can be limited for any reason. It is not simply a question of determining whether the benefits to others of a limiting measure will outweigh the cost to the right-holder. He is of the view that if rights can be overridden simply on the basis that the general welfare will be served by the restriction, then there is little purpose in the constitutional entrenchment of rights.⁶⁴ He submits that the reasons for limiting a right need to be exceptionally strong. The limitation must serve a purpose that most people would regard as particularly important.⁶⁵

But, however important the purpose of the limitation, restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose. The purpose it achieves must be the one which the limitation was designed for and there must be no other way in which the purpose can be achieved without restricting rights.⁶⁶

Applying these principles to the subject under discussion, the insolvency law and especially section 64 is in my opinion in the context in which it finds application, of **general application**. This is confirmed by the wide definition of "persons interested" and the wide powers given to the presiding officer with reference to the insolvency interrogations. Further, it is apparent that it may be necessary and reasonable in an open and democratic society to limit the

⁶⁴ De Waal *The Bill of Rights Handbook* 144. He also refers to Dworkin *Taking Rights Seriously* chapter 7.

⁶⁵ De Waal *The Bill of Rights Handbook* 144. He also refers to Meyerson *Rights Limited* 36-43.

⁶⁶ De Waal *The Bill of Rights Handbook* 144-145.

rights of the insolvent and other witnesses.⁶⁷ With reference to the provisions of sections 64, it is my opinion that the limitation is necessary and reasonable. Without such proceedings the interests of innocent and credulous creditors as well as the interests of the society at large and therefore economic stability in the country will be jeopardized. The necessity of the creditor meetings which is intended to discover material information for the trustees and liquidators seems to be competing with other rights in the *Constitution*, for example the right to privacy. The limitation of this right is fair and just, not only in the case of insolvent debtors, but also in the case of insolvent companies. Insolvent debtors as well as directors of insolvent companies should not be entitled to refuse to answer questions regarding their business and its affairs on the basis of the fact that their right to privacy is violated. It is my opinion that directors especially lose the right to privacy, **with regard to issues that affect the affairs of the companies of which they are directors**, immediately when they assume the position of directorship. Therefore they have a statutory duty to properly disclose and account to both creditors and shareholders. Such expectation from them is justified and would in the process assist the company to litigate on equal footing with its debtors and creditors.

As a result of competing rights, section 36 comes into place and the balancing process has to occur. During this process there will be “casualties” of course. It is submitted that the interest of the *concursum creditorum* should not be sacrificed to the benefit of an individual debtor, who through no fault of the creditors, finds himself in financial constraint. The legislature has the duty to protect the public interest. Compelling the insolvent and any other witnesses to attend the meeting of creditors might serve as a deterrent to any person who may be involved in scams to defraud creditors, and public interest will thus be served. To my mind it is therefore not unconstitutional to compel the insolvent or any other person who is summoned to attend and to furnish information so required at the meeting of creditors. This is so, in that without

⁶⁷ In limiting such rights, the following should be considered: (i) The importance of the purpose of the limitation, (ii) the availability of less restrictive means to achieve the purpose, (iii) the nature and extent of the limitation and (iv) the relation between the limitation and its purpose.

such information which the trustees do not possess, it will almost be impossible to recover the assets of the insolvent estate which is required for a fair distribution amongst the creditors. That will be a great relief to debtors and a loss to creditors.

2.1.6 Section 414 of the Companies Act

Section 414 of the *Companies Act* has the same provisions as section 64 of the *Insolvency Act*. The first mentioned *Act* compels the directors and officers of the company unable to pay its debts to attend the meetings of creditors. The *Companies Act* also makes provision for the subpoena of any person who is believed, on reasonable grounds, to be indebted to the company. Unlike section 64, this section provides for an extended duty to directors and officers of the company unable to pay its debts, to keep themselves informed as to the dates of meetings where they are expected to attend. Although a director or officer of a company unable to pay its debts ceases to be such, he is nevertheless expected to attend the meeting and keep himself informed as to any new developments. The *Companies Act* also makes provision for sanctions in the case of non-compliance with the requirements. When one compares section 64 of the *Insolvency Act* with section 414 of the *Companies Act*, there is little if no difference at all.

2.2 Section 65- the interrogation procedure

2.2.1 The interrogation of witnesses

Subsection (1) provides for the interrogation of the insolvent and other witnesses:

At any meeting of the creditors of an insolvent estate the officer presiding thereat may call and administer the oath to the insolvent and any other person present at the meeting who was or might have been summoned in terms of subsection (2) of section *sixty-four* and the said officer, the trustee and any creditor who has proved a claim against the estate or the

agent of any of them may interrogate the person so called and sworn concerning all matters relating to the insolvent or his business affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his or her spouse: Provided that the presiding officer shall disallow any question which is irrelevant and may disallow any question which would prolong the interrogation unnecessarily.

(a) Administering the oath

With reference to the constitutionality of administering the oath to witnesses that might be negatively affected by taking an oath as in the case of the Muslim religious group, the textbook writers seems to have no problem with that. They quote the subsection as it is.⁶⁸ It is my opinion that the *Insolvency Act* should make provision for the taking of a solemn declaration from witnesses who have a problem taking an oath.⁶⁹ This, to my opinion will **minimise** constitutional attack by virtue of section 31(1) of the *Constitution*.⁷⁰

(b) Interrogation only at certain meetings

Regarding the interrogation of the insolvent and other witnesses, Sharrock⁷¹ provides that the interrogation may be conducted by either the trustee or any creditor who has proved a claim against the estate. He states that the interrogation may be conducted at **any** meeting of creditors.⁷² It may take place, for instance at a special or general meeting. He further highlights the point that the meeting must be properly called. If not, the interrogation cannot proceed.⁷³ He contends that the general meeting is convened by the trustee for the purpose of giving him directions concerning any matter relating to the administration of the estate and nothing else.⁷⁴ It is therefore not competent for the trustee to call the general meeting **solely for the purpose of**

⁶⁸ See Smith *The Law of Insolvency* 212, De la Rey *Law of Insolvency* 359, Sharrock *Hockly's Insolvency Law* 114, Meskin *Insolvency Law* 8-5.

⁶⁹ This provision should also apply to section 415(1) of the *Companies Act*.

⁷⁰ Section 31(1) of the *Constitution* provides that persons belonging to a religious community may not be denied the right to enjoy and exercise their religious customs.

⁷¹ Sharrock *Hockly's Insolvency Law* 113.

⁷² See also *Lubbe v Estate Lubbe* 1935 CPD 299 and *Essop v The Master and another* 1983 (1) SA 926 (C).

⁷³ See also *Essop v The Master and another* 1983 (1) SA 926 (C).

⁷⁴ See Meskin *Insolvency Law* 8-3.

interrogating the witnesses.⁷⁵ Smith and De la Rey are silent about the specific meetings at which the interrogation of either the insolvent or any witness may take place. They however, acknowledge that the interrogation might be conducted by either the trustee or a creditor who has proved a claim. Meskin's view is that the interrogation could take place at any meeting of creditors, including the second meeting notwithstanding that it is also a meeting of members.⁷⁶ Meskin's view is in line with section 65(1) of the *Insolvency Act*. Section 65(1)⁷⁷ provides that an interrogation may be conducted at **any** meeting of creditors. It is my opinion that the interrogation should take place at any meeting, but the fact that an interrogation will take place must be mentioned in the notice. This, in my opinion should be so as to ensure that an examinee or the creditors are not taken by surprise. The principles of justice and fairness will be upheld if an examinee or the creditors are afforded an opportunity to prepare for the interrogation proceedings and there will be no *Constitutional* attacks.

(c) The scope and relevancy of the interrogation

Sharrock states that the subject matter of the interrogation is very broad.⁷⁸ There are no issues formulated beforehand and the inquiry is conducted for the purpose of discovery to obtain facts. The facts are so required because the creditors and trustees do not possess them⁷⁹ and might be of financial benefit to the creditors.⁸⁰ He submits that, the presiding officer is restricted in the exercise of his authority regarding permissible questions. The presiding officer is obliged to disallow any question which might be irrelevant. He is further permitted to disallow a question which would prolong the interrogation unnecessarily.

⁷⁵ See also *Marques v De Villiers* NO 1990 (4) SA 415 (W). Meskin *Insolvency Law* 7-2 where she agrees with this view.

⁷⁶ See Meskin *Insolvency Law* 8-3. He refers to the *Companies and Close Corporations Act*.
⁷⁷ Of the *Insolvency Act*.

⁷⁸ Sharrock *Hockly's Insolvency Law* 113-114. He states that issues such as the business or affairs of the insolvent, either before or after the sequestration of his estate, any property belonging to the estate and the business or affairs or the property of the solvent spouse are amongst the subjects on which the insolvent and other witnesses may be interrogated.

⁷⁹ Because they are not privy to the contacts, dealings and business of the insolvent. They do not have inside information.

⁸⁰ Sharrock *Hockly's Insolvency Law* 114. See also *Agyrikis v Gunn* 602 (T) 604.

It is my opinion that questions should be precluded if they are not calculated to produce **material information**.⁸¹ The purpose of section 64 is to summon any person who can provide material information and the purpose of section 65 is to interrogate those persons about the material information required. With reference to section 65(1) of the *Insolvency Act* material information is information that will benefit the insolvent estate financially. Thus material information in this regard is any information that may have a real effect on the financial situation of the estate or the claim of a creditor in the sense that it will materially influence the important and basic principle of the advantage of the *concursum creditorum*. It is my opinion that the sole purpose of the section is to discover information that will assist the trustees to recover any property that was disposed of by the insolvent, especially where he did not receive any benefits. In my mind, any information that is calculated not to benefit the estate financially is immaterial. An example of such information is information relating to the insolvent's personal affairs. Although offences under the *Insolvency Act* might be discovered in the process of interrogation, it is not the purpose for which this section was inserted in the *Act*.

Sharrock provides that questions may be further precluded if the information regarding the insolvent can be obtained from another source.⁸² I submit that information relating to the insolvent's banking details may be obtained from the insolvent's banker if he is present and will be interrogated. Interrogating others in this regard should be precluded, because it will prolong the interrogation unnecessarily. Sharrock thus sees the interrogation process as the necessary means to achieve the purpose of the *Insolvency Act*. The interests of the creditors are considered as paramount to those of the insolvent.

Smith submits that the interrogation is aimed at eliciting information **which the creditors and trustees do not possess**. The interrogation is further aimed at

⁸¹ However, questions intended to establish the credibility of a witness generally are permissible. But again the presiding officer should use his discretion.

⁸² Sharrock *Hockly's Insolvency Law* 114. See also *Agyrakis v Gunn* 605.

ascertaining what the **true state of affairs is regarding the insolvent's estate**.⁸³ Smith is of the view that the broad scope (given to the trustee) of the interrogation is necessary in order to obtain **sufficient information** regarding the insolvent. She is however, not in favour of the narrow compass of this section which sets out that the presiding officer must disallow any question which is irrelevant and may disallow any question which would prolong the interrogation unnecessarily.

De la Rey⁸⁴ submits that once a question is relevant, the presiding officer has no discretion to allow it or not. His only discretion is to disallow any question which would prolong the interrogation unnecessarily.⁸⁵ With regard to the relevance of questions at the interrogation proceedings, she submits that the interrogation may cover a very wide field. The decision of the presiding officer as to what is relevant depends upon the general scope of the enquiry. Thus questions relating to a company of which the insolvent was a director may be relevant, but lengthy cross-examination to test credibility should not be allowed.⁸⁶ I agree. If the presiding officer's decision is brought on review the court will not make a declaratory order as to admissibility of evidence during the future conduct of the enquiry.⁸⁷ I also agree with the view that the presiding officer should have the power to disallow a question that would prolong the interrogation unnecessary. Any person with any practical experience in insolvency interrogations knows that such discretion is essential to curb the abuse of the system. I further agree with the court's interference as to the admissibility of evidence, especially where there are irregularities on the part of the presiding officer. It is my opinion that the court should at (subsequent criminal proceedings) refuse to hear irregular obtained evidence given at the interrogation proceedings and make a declaratory order as to

⁸³ Smith *The Law of insolvency* 213. For this view she relies on the case of *Costas Yiannoulis v Grobler*. An extract of this unreported case appears in a judgement by judge Galgut in *Agyrakis v Gunn* 1963 (1) SA 602 (T) 604.

⁸⁴ De la Rey *Law of Insolvency* 359.

⁸⁵ De la Rey *Law of Insolvency* 359. See also *R v Mahomed* 1933 ELD 136; *Pretorius v Marais* 1981 (1) SA 1051 (A) 1064B-D.

⁸⁶ De la Rey *Law of Insolvency* 359. See also *Yiannoulis v Grobler* 1963 (1) SA 559 (T); *Agyrakis v Gunn* 1963 (1) SA 602 (T); *Pretorius v Marais* 1981 (1) SA 1051 (A) at 1063H.

⁸⁷ De la Rey *Law of Insolvency* 359; *Yiannoulis v Grobler* 1963 (1) SA 559 -601 (T).

admissibility of such evidence. This should be so in order to render the criminal proceedings fair.

De la Rey's view regarding questions meant to test the **credibility of a witness** is thus different from that of Smith's. Meskin⁸⁸ agrees with the views of De la Rey regarding the **scope of the interrogation**. He however, goes a step further in explaining why it may be important in certain circumstances to interrogate for the sole purpose of testing a witness's credibility. He specifies that if the witness's testimony is not credible, the purpose of the legislature will be defeated.

Meskin⁸⁹ holds an interesting view regarding the issue of the relevancy of the questions that may be asked. Whether or not the question is relevant, he submits, depends on the facts of each case. This, according to him, does not depend on the discretion of the presiding officer. Such presiding officer must decide whether the purpose of the interrogation relates to the affairs of the insolvent. Only if the **affairs** have a financial consequence or impact it is not irrelevant.⁹⁰ He further submits that the presiding officer has no discretion in regard to the issue of relevancy.⁹¹ He states that in **other context**, a person may not be interrogated merely to ascertain whether he is a credible witness.⁹² The witness may however, be interrogated for that specific purpose **where the credibility is itself** relevant, for example if it relates to the insolvent's affairs. Meskin's viewpoint of credibility can be criticised on the ground that credibility of a witness is always relevant. In my mind I cannot think of any instance (during the interrogation proceedings) where the credibility of a witness could be irrelevant. This process should however not be abused.

⁸⁸ Meskin *Insolvency Law* 8-11.

⁸⁹ Meskin *Insolvency Law* 8-11, see also *Pretorius v Marais* 1981 (1) SA 1051 (A) 1063.

⁹⁰ I can think of doing business without financial consequences (like training my employees).

⁹¹ Meskin *Insolvency Law* 8-11. On this point he relies on the case of *Pretorius v Marais* 1981 (1) SA 1051 (A) 1063.

⁹² Meskin *Insolvency Law* 8-11, thus agrees with the case of *Agyrakis v Gunn* 1963 (1) SA 602 (T) 605.

Regarding the issue of the relevancy of the questions, it is my opinion that this should depend on the facts of each case. What is relevant to one case might not necessarily be relevant to another. After all, questions should relate to the affairs of the insolvent and his dealings. With reference to the credibility of a witness, I submit that establishing the credibility of a witness is necessary in the facilitation of gathering required information; otherwise the entire interrogation process will be a "sham".

(d) Interrogation regarding pending legal proceedings

It is Meskin's view that there is a limitation on the right to interrogate in relation to pending legal proceedings.⁹³ That will be the case where the interrogation would constitute an abuse of the provisions of section 65 of the *Insolvency Act*. He submits that the interrogation will be an abuse, where the proceedings have reached such a stage that the purpose of the interrogation is no longer the acquisition of information, but a pre-trial enquiry. The required information (thus the object of the interrogation) should be one that will assist the trustee to determine his course of action, or to learn about the matters of which he was ignorant.⁹⁴ Thus the subject matter of the interrogation should be about material information. The limitation of the scope of interrogation in this sense is intended to avoid the pre-trial enquiry, which would be duplicated if the situation was otherwise. He submits that the abuse of the section 65 provisions may be curtailed if the trustee or presiding officer bears in mind that the purpose of the interrogation is the collection of information.⁹⁵

It seems as if there are no other means of obtaining information regarding the insolvent, except by way of interrogation. The public interest is usually at risk of being sacrificed in cases of insolvency, especially where there are not strict regulations. It is therefore the duty of the legislature to make provision for

⁹³ Meskin *Insolvency Law* 8-11 and 8-12.

⁹⁴ Meskin *Insolvency Law* 8-12

⁹⁵ Information so collected must be material information that will benefit the insolvent estate financially, the information should also be regarding facts unknown to the trustee and knowledge of which is required in order to effect the proper administration of the estate. The provisions of section 65 of the *Insolvency Act* also applies to companies under section 415 of the *Companies Act*. The interrogations are conducted for the sole purpose of **obtaining information** by way of interrogation.

means of obtaining material information that may assist in the fair distribution of the insolvent assets amongst creditors.

Although the mandatory nature of this section seems to be violating the right to remain silent⁹⁶ and privacy of the individual as entrenched in the *Constitution of the Republic*, sacrifices have to be made to the interest of the innocent creditors and the public at large. It is not the creditors' fault that the debtor is insolvent. There is no reason why they should be prejudiced or their rights to full payment should unnecessary be curtailed.

To summarise, it is my opinion that if the presiding officer persists that the oath should be taken, it would then be unconstitutional, in circumstances where a person is a non-Christian. On the other hand, if the presiding officer requires a solemn declaration (which has the same legal effect as an oath) in the case of non-Christians, it would not be unconstitutional.

Further, on the issue of the interrogation, insolvency law writers seem to be of the same mind with regard to the interpretation and purpose of the legislative provisions. It is my view that if the insolvent and any person summoned are given sufficient time and facilities⁹⁷ to prepare for the interrogation, then there should not be a problem of constitutional conflicts. Taking into consideration the discussion above, I do not see how the insolvency interrogation violates the right to freedom and security of the person,⁹⁸ privacy of the person⁹⁹ or human dignity.¹⁰⁰ If persons were given a choice whether to attend or not, they probably would not attend, even if they were innocent. The fact of an interrogation is not a problem. How it is conducted, may pose a constitutional issue. At this stage it looks like that the manner in which the interrogation is conducted might be unfair (or unconstitutional). This will be looked into in

⁹⁶ Section 35(1)(a) of the *Constitution*. The right will be discussed under section 65(2) of the *Insolvency Act*.

⁹⁷ In terms of section 35(3)(b) of the *Constitution* which provides as follows: Every accused person has a right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence. Although an insolvent or any witness is not an accused *per se*, it is not predictable if he would or not be such in subsequent proceedings.

⁹⁸ Section 12 of the *Constitution*.

⁹⁹ Section 14 of the *Constitution*.

¹⁰⁰ Section 10 of the *Constitution*.

detail in chapter 3. An interrogation serves to my mind an important purpose, which is to accumulate sufficient information for the fair and equitable liquidation process to the advantage of all the creditors.

2.2.2 Privileged information

Section 65(2)¹⁰¹ provides as follows:

In connection with the production of any book or document in compliance with a summons issued under sub-section *sixty-four* or at an interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness summoned to produce a book or document or giving evidence in a court of law, shall apply: Provided that a banker at whose bank the insolvent in question or his or her spouse has kept or at any time kept an account shall be obliged to produce, if summoned to do so under subsection (3) of section *sixty-four*, any cheque in his possession which was drawn by the insolvent or her spouse within one year before the sequestration of the insolvent's, or if a cheque drawn is not available, then any record of the payment, date of payment and amount of that cheque which may be available to him, or a copy of such record and if called upon to do so, to give any other information available to him in connection with such cheque or the account of the insolvent or his or her spouse; and provided further that a person interrogated under subsection (1) shall not be entitled at such interrogation to refuse to answer any question upon the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer.

Privileged information is information that will, when divulged, prejudice the person who gave it in a prior statement. An example of privilege information is client-attorney privilege, where on consultation the client divulges information to his attorney in confidence so that the latter can prepare a defence for the client. The attorney is obliged to keep such information confidential, because when disclosed it might incriminate the client. Another example is the privilege against **self-incrimination** and the **right to remain silent**.

(a) Bankers privilege

Usually a banker is expected to keep silent with regard to any financial information about his client. Now he is obliged to produce any cheque or its

¹⁰¹ As amended by section 3(a) of the *Insolvency Amendment Act 89 of 1989*.

copy drawn by the insolvent and any added information that he may have in his possession. Is this justified? It is my opinion that the banker-client relationship is different from that of an attorney-client one. Therefore there should be no problem, requiring him to produce any information he might have regarding the insolvent's finances. First of all it is not expected that the insolvent would have disclosed any financial irregularities to his banker, which when disclosed at the meeting, would prejudice the insolvent. Secondly, it is my view that the requisition of such information might be necessary for a **justifiable purpose** (for example of setting aside disposition intended to defraud creditors) where the interests of the creditors, who are already in a very detrimental position because of the sequestration of the insolvent debtor's estate, should be given preference. Sharrock also agrees that a banker of the insolvent or the latter's spouse should, if summoned to do so, produce all copies drawn by the insolvent or his spouse.¹⁰²

(b) Privilege against self incrimination

With reference to section 65(2), Smith¹⁰³ submits that the law relating to privilege as applicable to a witness summoned to give evidence or to produce a book or document **in a court of law** is applicable to an interrogatee. However she emphasises that privilege will **only** apply to such persons provided that the person interrogated **is not entitled to refuse** to answer any question on the grounds that the answer would tend to incriminate him.

It is submitted that a person giving evidence at the interrogation has privilege over such information in the sense that it **should not be used** against the latter at any subsequent proceedings. However, the *Insolvency Act* makes provision for the admission of such evidence in **criminal proceedings** relating to perjury¹⁰⁴ against the person giving it. As incriminatory as it is, a witness is obliged to divulge such information.¹⁰⁵

¹⁰² Sharrock *Hockly's Insolvency Law* 114.

¹⁰³ Smith *The Law of Insolvency* 213.

¹⁰⁴ Section 65(2A)(b) provides: "No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge relating to the administering or taking of an oath or the administering or making an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and

In the midst of all this arguments, one may ask whether the infringement on the right to remain silent, the right not to be compelled to make any confession or admission that could be used in evidence against that person, and the right not to be compelled to give self-incriminatory evidence, as entrenched in the *Constitution*¹⁰⁶ is reasonable and justifiable? Are there not less drastic means to obtain information that might assist the fair liquidation process to the advantage of creditors? Regardless of the fact that the insolvent or any other witness is neither an arrested person, neither a detainee nor an accused, is he given sufficient time to prepare for interrogations? Does the *Insolvency Act* make provision for access to the records by the interrogatee?¹⁰⁷

Smith¹⁰⁸ submits that the stringent provision of this section might perhaps appear to be unjustifiable, **especially when a person other than the insolvent is questioned**. She states that in the 1916 *Insolvency Act* no witness other than the insolvent was deprived of the right to refuse to answer incriminatory questions. The insolvent was deprived of this right in order to ensure that he does not withhold any information regarding the affairs of his estate to the disadvantage of creditors. She points out that the present act has extended the deprivation of this right to any person giving evidence at the meeting of creditors. She is of the view that the meetings of creditors are in a form of an enquiry, the purpose of which is to find out if any person has

answers, and in criminal proceedings contemplated in section 139(1) relating to a failure to answer lawful questions fully and satisfactorily”.

¹⁰⁵ Incriminatory evidence is information when divulged, will lend the person giving it in a disadvantageous position than he would have been in, but for the information given by the latter.

¹⁰⁶ Section 35(1)(a)(c)(j) of the *Constitution of the Republic of South Africa*.

¹⁰⁷ A detailed discussion of this will be made in chapter 6 below.

¹⁰⁸ Smith *The Law of Insolvency* 213. She maintains that should a person so interrogated refuse to answer questions lawfully put, then the purpose of the enquiry will be defeated. She is however silent on the issue of the interrogation venue, whether it is held in public or *in camera*. Smith does not make any distinction between section 65(2) and 65(2A) (a)(b) of the *Act*. The reason being that the book was written before the amendments of this section. Although she is silent on the fact that evidence at the interrogation is admissible at later proceedings relating to perjury **against a person giving it**, she states that such evidence will not be admissible against a third party to a suit. This is more so if these evidence or admissions are not made contemporaneously with the transaction attacked, but after a lapse of time.

fraudulently colluded with the insolvent to the creditor's prejudice. Sharrock,¹⁰⁹ is of the view that if persons giving evidence at the interrogation, were given the right to refuse to answer incriminating questions, the purpose of the interrogation would be defeated. De la Rey submits that a person interrogated is not entitled to refuse to answer any question on the ground that the answer would tend to incriminate him or anybody else.¹¹⁰ According to Meskin a witness interrogated under section 415 of the *Companies Act* (which has the same provision as section 65 of the *Insolvency Act*) is obliged to answer to answer any question lawfully put, notwithstanding the fact that the answer might incriminate him. His evidence is admissible in civil proceedings against him and in civil and criminal proceedings against a body corporate of which he is or was an officer.¹¹¹

(c) Attorney-client privilege

According to De la Rey¹¹² an attorney shall not refuse to submit to an interrogation or to answer any question, on the basis of the fact that he has been the insolvent's legal advisor. Such attorney is obliged to attend and answer questions at the interrogation proceedings and may claim client-attorney privilege **only** if and when the occasion for claiming privilege arises during the interrogation. Although De la Rey points out that privilege could only be claimed when the occasion for claiming privilege arise during the interrogation, she does not specify when exactly the time to claim privilege arises.¹¹³ Regarding the provision of this sub-section De la Rey,¹¹⁴ Meskin¹¹⁵ and Sharrock¹¹⁶ seems to be satisfied; they quote the subsection almost as it is.

Thus, an attorney cannot refuse to be sworn in as a witness. But if he is required to testify about what his client had told him, he may refuse to answer.

¹⁰⁹ Sharrock *Hockly's Insolvency Law* 114.

¹¹⁰ De la Rey *Law of Insolvency* 360.

¹¹¹ Meskin *Insolvency Law* 8-17.

¹¹² De la Rey *Law of Insolvency* 360-361.

¹¹³ All other writers are silent on this issue.

¹¹⁴ De la Rey *Law of Insolvency* 360-361.

¹¹⁵ Meskin *Insolvency Law* 8-9, 10.

¹¹⁶ Sharrock *Hockly's Insolvency Law* 114.

Therefore the claiming of privilege by an attorney is acceptable in relation to aspects that the client has divulged to him and not regarding other aspects which the attorney might know generally. The provision that privilege may be claimed **only if and when** the occasion for claiming privilege arises seems to be problematic. It is my view that client-attorney privilege should always be available. If the trustee or creditor(s) need certain information, they should get it from the insolvent himself and not from his attorney. It is my opinion that the attorney-client relationship should be honoured (in the same way as the relationship between a person and his minister). Regarding the client-attorney privilege, it is my view that it should not be sacrificed.

The one year period provision for the production of documents or cheques drawn by the insolvent prior to his sequestration is in my opinion too short. The process leading to insolvency might be more than a year. It is thus my view that in order to effectively collect the insolvent estate assets for distribution amongst his creditors, it is imperative that the trustee be given greater latitude instead of an arbitrary period. If not, a minimum period of two years should be considered.

2.2.3 Proceedings to be held in camera

Section 65(2A)(a) provides that:

Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions which may incriminate him or, where he is to be tried on a criminal charge, may prejudice him at such trial, the presiding officer shall, notwithstanding the provisions of section 39(6), order that such part of the proceedings be held *in camera* and that no information regarding such questions and answers may be published in any manner whatsoever.

Sharrock¹¹⁷ quotes this subsection as it stands and provides no opinion of his own. A meeting of creditors held for the purpose of interrogation is a public meeting, in the sense that it is advertised. The place where the meeting is

¹¹⁷ Sharrock *Hockly's Insolvency Law* 114.

held must be accessible to the public. One can thus compare it with an open court proceeding. According to section 39(6) of the *Insolvency Act* the statement made at such meeting is privileged as in a court of law. The rule regarding open court proceedings is that what is said in an open court may be published unless the court orders that it should not. This subsection, however emphasises that the proceedings will be held *in camera* regardless of the provisions of section 39(6) of the *Insolvency Act*. The *in camera* proceedings may be ordered in circumstances where an interrogatee might be compelled to divulge incriminatory evidence.

The presiding officer is **obliged** to order the *in camera* proceedings for that portion of the proceedings.¹¹⁸ He is also **obliged** to order that such information not be published. For the purposes of the *Insolvency Act*, it is my opinion that the *in camera* proceedings entails that no member of the public unaffected by the proceedings, shall be allowed at the creditor's meeting, especially where the insolvent or any witness divulges incriminatory information that might be used at any subsequent proceedings against the person giving it. Therefore only parties that are **closely affected** by the specific questions to be asked may be allowed at such interrogation.¹¹⁹ The word "not to be published" in my mind prohibits publication of information of any kind in this connection in any media, forum, meeting or public document where the public might have access to such information. The information will obviously concern the insolvent, his assets and his business affairs or actions in relation thereto.

I do not see the advantage of *in camera* proceedings. The very people that might be a threat to the insolvent (trustee and proved creditors) are allowed at the meeting. They would obviously accumulate all the information they require for future civil litigation, even though they would not be able to use the information or evidence directly. It is submitted that the *in camera proceedings*

¹¹⁸ Meskin *Insolvency Law* 8-9 agrees with Sharrock on the provisions of the *in camera* proceedings. However Smith and De la Rey are silent on the issue of the *in camera* proceedings, the reason being the fact that they wrote their books prior to the amendments on this section.

¹¹⁹ For example creditors and their agents, insolvent's attorney and trustees are persons affected.

and a bar against publication of information could in circumstances still be very detrimental to the insolvent. De Waal¹²⁰ points out that, although the Constitutional Court in *Bernstein v Bester*¹²¹ stated that information obtained in an investigative enquiry may be used in subsequent civil proceedings against examinees, it must be noted that the case was decided under the *Interim Constitution*. The *Interim Constitution* did not explicitly guarantee the right to a **fair civil trial**. The latter right now forms part of the right to access to courts as entrenched by section 34 of the *Constitution*. De Waal is optimistic as to the likelihood of the court arriving at a different conclusion.

2.2.4 Evidence not admissible in subsequent trials or proceedings

Section 65(2A)(b) makes provision for the following:

No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers, and in criminal proceedings contemplated in section 139(1) relating to a failure to answer lawful questions fully and satisfactorily.

Sharrock¹²² explains that, where evidence tendered appears to be incriminatory against a person giving it, the *Insolvency Act* provides that it shall not be admissible in any criminal proceedings. However, this exclusion will not be allowed in the case of criminal proceedings based on perjury.¹²³ All textbook writers are silent on the issue of any civil proceedings that might be instituted against the person giving evidence.

With reference to the admissibility of evidence tendered at the meeting of creditors, De la Rey¹²⁴ submits that any statement duly made by a witness

¹²⁰ De Waal *Revitalising the Freedom Right* 226.

¹²¹ *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC).

¹²² Sharrock *Hockly's Insolvency Law* 114.

¹²³ See also Meskin *Insolvency Law* 8-9.

¹²⁴ De la Rey *Law of Insolvency* 362. She specifically relies on the repealed sub-section (5) of section 65 of the *Insolvency Act*. This is so, because she wrote her book before the said

when interrogated shall be admissible in evidence against the latter. The admissibility of such evidence applies to **any proceedings** that might subsequently be instituted against the person giving it. This will be the case not only at civil proceedings, but at criminal proceedings too.¹²⁵ She further submits that a statement made by the insolvent at an interrogation is admissible against the latter, but not against others.¹²⁶ She states that although a confession in the statement may be admissible even if not made freely and voluntarily, the normal rules as to relevancy must otherwise be applied. These rules are applied in deciding on the admissibility of a statement made. She further submits that proper safeguard must be taken in deciding both the admissibility as well as inadmissibility of evidence.

From De la Rey's comments on the admissibility of evidence at subsequent proceedings, it is apparent that she wrote her commentary prior to the 1989 amendments of the *Insolvency Act*. Smith and De la Rey seem to be of the same view regarding the admissibility of evidence submitted by the insolvent. Like De la Rey, Smith wrote her commentary prior to the amendment of the *Insolvency Act* which came into effect in 1989.

Although the *Insolvency Act* thus makes provision for the "safe keeping" of such **incriminatory** evidence, it may nevertheless be used at subsequent civil proceedings against the witness.¹²⁷ A question may be asked whether this provision is sufficient for the protection of the constitutional right of the person so interrogated. Would the admission of evidence (unfavourable to an interogatee) at civil proceedings grant an unfair advantage to the creditors, trustee or liquidator? If so, the proceedings might be subjected to constitutional attacks. However, there is another viewpoint. According to

subsection was repealed.

¹²⁵ De la Rey *Law of Insolvency* 362. She states that this will be the case notwithstanding the provisions of sections 207 and 253 of *Criminal Procedure Act* 51 of 1977. On this point she relies on the case of *R v Carson* 1926 AD 419. This is so because the book was written before the *Insolvency Act* was amended. In the light of section 65(2A) this view is not incorrect.

¹²⁶ De la Rey *Law of Insolvency* 362. On this point she relies on the case of *Estate Lala v Mahomed* 1944 AD 324, where this point decided by the Transvaal Provincial Division, was left open.

¹²⁷ See also *Du Plessis NO v Van Zyl* 1995 (3) SA 604 (O) and *Wessels NO v Van Tonder en 'n ander* 1997 (1) SA 616 (O).

Sharrock,¹²⁸ although evidence given at the interrogation is admissible in civil proceedings instituted against the person who gave the evidence, it does not simultaneously serve as proof of the facts which it reveals. He further points out that in this regard the court must consider the evidence as a whole and decide how much weight should be given to it. He submits further that the court may, if it sees fit, accord different degrees of credence or credibility to different parts of the evidence.¹²⁹

The provision under section 65(2A) of the *Insolvency Act* regarding the admission of evidence given at the meeting of creditors against the interogatee at later proceedings is in conflict with a cluster of rights under section 35 of the *Constitution*. The following rights comes to mind: the right to remain silent,¹³⁰ the right not to be compelled to make any confession or admission that could be used in evidence against that person,¹³¹ the right to be given adequate time and facilities to prepare a defence¹³² and the right not to be compelled to give self-incriminatory evidence.¹³³ Although this right accrues only to arrested, detained and accused persons evidence derived thereat may be used in criminal proceedings relating to perjury. This may violate rights under section 35. On the basis of this, it is submitted that section 65(2A) should be interpreted very narrow.

My proposition is therefore that the incriminatory evidence given at the insolvency interrogation must solely be used for the purpose of determining the insolvent's estate and collecting the insolvent's assets, for a proper, fair and even distribution amongst his creditors. It is submitted that such evidence **should not be used in proceedings of any kind**. The prosecution (criminal proceedings) or plaintiff (civil proceedings) should advance its or his own evidence and not rely on the *in camera* insolvency interrogation outcomes. Regarding the admissibility of incriminatory evidence in criminal proceedings relating to perjury, administering or taking of an oath or the administering or

¹²⁸ Sharrock *Hockly's Insolvency Law* (2002) 138.

¹²⁹ See *Du Plessis NO v Oosthuizen en 'n ander* 1999 (2) SA 191 (O) 206.

¹³⁰ Section 35(1)(a).

¹³¹ Section 35(1)(c).

¹³² Section 35(3)(b).

¹³³ Section 35(3)(j).

making of an affirmation, it is my view that at times the principles of fairness might require that evidence obtained unconstitutionally be included. It is further my view that the court should exercise its discretion to stay insolvency proceedings until all pending criminal proceedings against the insolvent have been completed. This should be the case where there are possibilities that the insolvent may be prejudiced at his defence in the subsequent trial. Although this might cause delays in the sequestration proceedings, at least there will be fewer objections to the *Constitution*.

2.2.5 Legal representation

Section 65(6) relating to legal representation provides that:

Any person called upon to give evidence under this section may be assisted at his interrogation by counsel, an attorney or agent.

Regarding representation at the interrogation, Smith¹³⁴ and De la Rey¹³⁵ explains the subsection as is. They seem to be satisfied with its provisions. Meskin¹³⁶ submits that in addition to the right to representation *per se*, a witness is also entitled **to be informed** by the presiding officer of his rights to legal representation. He further explains that this right to representation is intended to be a right to **effective** representation. According to him the representative is entitled to question the witness whom he represents. This questioning is done for the purpose of enabling such a witness to explain something stated under interrogation. He submits that if this entitlement does not exist, it would be difficult to see what benefit the right to representation confers on the witness, except having someone available to require the presiding officer to act in compliance with the provisions of the *Act*.

I agree with the provision of the right to representation. However, I am of the view that effective representation should include more than the rephrasing of questions to the insolvent by his representative. With due respect, it is submitted that effective representation should also entail interrogation by the

¹³⁴ Smith *The Law of Insolvency* 104. See also Sharrock *Insolvency Law* 114.

¹³⁵ De la Rey *Law of Insolvency* 359.

¹³⁶ Meskin *Insolvency Law* 8-10.

insolvent's attorney. The attorney or counsel should also assist the insolvent in answering the questions and not only rephrase interrogator's questions.

Although a person may be assisted at the interrogation by an attorney, the interrogation still proceeds and such a person will still answer incriminatory questions.

It is my view that, with regard to the representation of a witness, insolvency interrogations should take a form of civil proceedings in a court where the proceedings will be presided by a judicial officer in a court structure established by the *Constitution*. Furthermore, it is submitted that insolvency interrogations should be conducted by professionals as in a court of law, with a view of establishing amongst other things, the possibility of any fraud on the part of the insolvent or other witnesses. This would only be possible if parliament consents to the institution of special insolvency courts. It is my submission that the time has come to place the institution, course (including interrogations), and conclusion of the sequestration or liquidation process under proper insolvency courts.

2.2.6 Section 415 of the Companies Act

Section 415 of the *Companies Act* has the same provisions as section 65 of the *Insolvency Act*. This section provides for the examination of directors, officers and any other person who is deemed to be in a position to provide material information. The distinction in these two sections is that evidence given under section 65 of the *insolvency Act* is admissible only against the person giving it,¹³⁷ while section 415(5) provides that any evidence given under this section shall be admissible against the person giving it **or the body corporate of which he is or was an officer**. This distinction, it is submitted is due to the fact that the company as a juristic person is unable to give evidence personally. Another distinction lies in the admissibility of derivative evidence in subsequent proceedings. Section 65 provides that such evidence

¹³⁷ Section 65(5).

is admissible in any proceedings. Only incriminating evidence may not be used in criminal proceedings. Section 415 provides that such evidence is admissible in both civil and criminal proceedings. Section 415 as it read now provides that, a witness who is interrogated under this section may be obliged to answer any question lawfully put, notwithstanding the fact that the answer may incriminate him. His evidence is admissible in civil proceedings against him and in civil and criminal proceedings against a body corporate of which he is or was an officer. However, his evidence is not admissible in criminal proceedings against him or a body corporate, of which he is or was an officer, save in the limited circumstances described in subsection 5.¹³⁸ Furthermore, the direct use of immunity as provided by section 65(2A)(b) of the *Insolvency Act* does not correspond with the provisions of section 415.¹³⁹ This section does not expressly provide for the use of such immunity and consequently one may assume that it is not applicable. Furthermore, section 415 does not specify the type of proceedings in which such incriminatory evidence shall be admissible and this entails that it is admissible in both criminal and civil proceedings against any person giving it. This differentiation may be challenged on the basis of inconsistency in bankruptcy matters, leading to the presumption that insolvency of a natural person is considered by our law as not so serious compared to the insolvency of companies.

I agree with the provisions of this section. Directors should be in a position to provide information about the company and the whereabouts of its funds. They owe it to the shareholders, from whose funds the company was enabled to do business and to the public, to submit to the interrogation and provide any information that might assist in the fair liquidation process. The provisions of this section are appropriate and necessary to achieve certain public policy aims. I cannot think of any provision that can be less limiting on the rights of those called upon to provide the required information.

¹³⁸ See also Meskin *Insolvency Law* 8-17.

¹³⁹ *Companies Act* 61 of 1973.

To emphasise the importance of the above mentioned section's provision, Judge Broome in the case of *Botha v Strydom*¹⁴⁰ stated as follows:

The Legislature has deemed it necessary to authorise the constitution of enquiries of this nature and to deprive witnesses of many privileges which they might otherwise have enjoyed. This has been the case for many generations in the *Insolvency Act* and the earlier *Companies Acts*. The Legislature obviously recognises that there are often machinations which require exposure and that the only way that exposure can be obtained is by the drastic "draconian" methods of these enquiries, to get people there, to get them to produce documents and to answer questions. Really, when all is said and done, this goes no further than to remove all possible obstacles from the course of discovering the truth and it has been said in this Court in a different context that it is difficult to see how a person who truthfully answers questions on oath can be prejudiced by being required to do so.

I agree with this legislative interpretation. The provisions of both section 65 of the *Insolvency Act* as well as section 415 of the *Companies Act* is much needed, taking into account that hundreds of close corporations and small companies have been formed and gone insolvent, their assets having disappeared (to the prejudice of creditors and especially the shareholders) only to reappear strangely in the hands of new close corporations or private companies brought into being.¹⁴¹

2.3 Section 66 of the Insolvency Act- failure to co-operate

2.3.1 Failure to attend any meetings

Subsection (1) provides as follows:

If a person summoned under section *sixty-four* fails to appear at a meeting, in answer to the summons, or if an insolvent fails to attend any

¹⁴⁰ 1992 (2) SA 155 (D & C) 159-160.

¹⁴¹ See Bennett 1995 *Juta's Business Law* 50.

meeting of creditors in terms of subsection (1) of section *sixty-four*, or fails to remain in attendance at that meeting, the officer presiding at such meeting may issue a warrant, authorising any member of the force to apprehend the person summoned or the insolvent, as the case may be, and to bring him before the said officer.

This subsection mentions three contingencies. These are (1) failure to appear at a meeting in answer to summons, (2) failure to attend the meeting of creditors, and (3) failure to remain in attendance.

Smith, Sharrock, De la Rey and Meskin agree with the provision for the detention of an insolvent or other person under the authorisation of the presiding officer. They do not add any opinion as to constitutional conflicts that may occur as a result of such detention, where the presiding officer is not a member of the judiciary

This section needs revision. This I submit on the basis of the fact that it is not a just and lawful administration to order the detention of a person on the basis of a decision of an officer in the public service. This person may have all the integrity, but he might not necessarily have the proper legal knowledge, legal training and legal experience to order the detention of a person to prison. It is my view that an insolvency interrogation should be conducted by members of the judiciary. Public officers presiding at the meeting of creditors may have all the experience in the world, but they might lack independent judgement especially in the absence of any guidelines and formalities to be complied with, when an order for detention is issued. Public officers also lack the independence of the judiciary. On the surface it appears that this provision is good. But the fact is that not all presiding officers are educated in the law. The presiding officer may be the Master or an officer appointed by the Master.¹⁴² In practice this appointed person is usually someone without legal training. In such a case it would be unconstitutional to make a legal decision.

2.3.2 *Recalcitrant witnesses*

¹⁴² See section 39 (2) of the *Insolvency Act*.

Section 66(2) provides for the continuous detention of a recalcitrant witness:

Unless the person summoned or the insolvent, as the case may be, satisfies the said officer that he had a reasonable excuse for his failure to appear at or attend such meeting, or for absenting himself from the meeting, the said officer may commit him to prison to be detained there until such time as the said officer may appoint, and the officer in charge of the prison to which the said person or insolvent was committed, shall detain him and produce him at the time and place appointed by the first-mentioned officer for his production.

The textbook writers agree on the interpretation and application of this subsection¹⁴³ in this respect, they add nothing to the interpretation of this subsection. To my mind the continued detention is not just, let alone having been ordered by a public official who might not be independent like the judiciary or learned in the law. In order to conform to the principles of justice, it is my opinion that as soon as the presiding officer realises that the interrogatee does not want to comply, he should refer the matter to the court. The court should thereafter deal with the matter in accordance with the principles of justice and convict the person if necessary under the charge created by section 66 the *Insolvency Act*.

2.3.3 Sanctions for refusal to comply

Section 66(3) makes provision for the following:

If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book or document which he was supposed to produce, or if any person who may be interrogated at a meeting of creditors in terms of subsection (1) of section *sixty-five* refuses to be sworn in by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the questions fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of subsection (5).¹⁴⁴

¹⁴³ See Meskin *Insolvency Law* 8-5, Smith *The Law of Insolvency* 214, Sharrock *Hockly's Insolvency Law* 115.

¹⁴⁴ Section 66(5) of the *Insolvency Act* provides that any person committed to prison under this section shall apply to the court for his discharge from custody and the court may order his discharge if it finds that he was wrongfully committed to prison or is being wrongfully detained.

The subsection refers to the following contingencies: (1) failure to produce a book; (2) refusing to be sworn in by the presiding officer; (3) refusing to answer questions lawfully put; and (4) failure to answer any questions fully and satisfactorily.

With reference to the answering of questions, Sharrock submits that where the party gives an answer which is incomplete or unsatisfactorily, the presiding officer must decide whether the party has answered to the best of his or her ability. If the answer is clearly untrue or evasive, it may be considered to be a form of intentional refusal to answer the question. However, he emphasise that if the answer is not nonsensical or evasive, even if it is improbable, it cannot be said that the party has failed to answer the question to the best of his ability.¹⁴⁵ It is my opinion that this is the correct interpretation of the subsection.

Both Sharrock¹⁴⁶ Meskin¹⁴⁷ and Smith¹⁴⁸ emphasises the detention of the defaulter until the latter has undertaken to do what is required of him. Meskin is, however, silent on the issue of determining from the witnesses' answer, whether such answer is tantamount to the refusal to answer a question lawfully put. De la Rey¹⁴⁹ agrees with the rest of the writers on the point of the detention of a defaulter under this subsection, although she places no duty on the presiding officer to determine on the question of evasive answers. She further adds that the presiding officer is not required to make a finding as to whether a witness or the insolvent is telling the truth. She adds that the said officer is only required to ensure that the witness complies with his duty to be sworn in and to answer questions fully and properly. She agrees with Sharrock on the point of evasive and credible answers.¹⁵⁰

¹⁴⁵ Sharrock *Hockly's Insolvency Law* 115. For this view, he relies on the case of *Nieuwoudt v Faught en andere* 1987 (4) SA 101 (C).

¹⁴⁶ Sharrock *Insolvency Law* 115.

¹⁴⁷ Meskin *Insolvency Law* 8-5 -8-6.

¹⁴⁸ Smith *The Law of Insolvency* 214.

¹⁴⁹ De la Rey *Law of Insolvency* 361.

¹⁵⁰ They both rely on the case of *Nieuwoudt v Faught* 1987 (4) SA 101 (C) for their views.

It is my view that evasive answers are tantamount to the refusal to answer questions lawfully put. If a witness is permitted to "get away with answers", then the purpose of interrogation will be defeated. Determining whether a witness is evading answering questions, requires a judicial skill that can **only** be found in persons who had legal training. Therefore it is my submission that a legally qualified officer conducts such proceedings.

2.3.4 Compulsory means to obtain information required

Section 66(4) provides for the following:

If a person, who has been released from prison after having undertaken in terms of subsection (3) to do what is required of him, fails to fulfil his undertaking, the said officer may commit him to prison as often as may be necessary to compel him to do what is required of him.

All the writers interpret the section as is. Not one of them mentions any dissatisfaction as to any constitutional clash.¹⁵¹ I submit that this subsection is way too harsh and needs to be amended, regarding the continuous detention. It is my opinion that if a person has been released from prison after having undertaken in terms of subsection (3) to do what is required of him, fails to fulfil his undertaking, there should be a trial and refusal to answer questions should be treated as an insolvency offence in terms of section 138 of the *Insolvency Act*. The matter should be handled by courts and sentences be imposed instead of detention without trial. However section 66(3) may be criticised because it does not provide that the person who refuses to answer questions lawfully put may have a reasonable excuse as is the case with section 66(2).

2.3.5 Immunity for presiding officer

Section 66(6) makes provision for immunity in favour of a presiding officer:

¹⁵¹ See Sharrock *Hockly's Insolvency Law* 115, De la Rey *Law of Insolvency* 362, Smith *The Law of Insolvency* 215 and Meskin *Insolvency Law* 8-6.

In connection with the apprehension of a person or with the committal of a person to prison under this section, the officer who issued the warrant of apprehension or committal to prison shall enjoy the same immunity which is enjoyed by a judicial officer in connection with any act performed by him in the exercise of his functions.

None of the textbook writers¹⁵² express any opinion different from the section. It seems that they are satisfied with the provisions of this section. Regarding the availability of immunity to presiding officers, it is my view that the system might be open to abuse.¹⁵³ This might be the case in instances where the presiding officer is less experienced and legally unqualified. Such officer might be ignorant of the implications of being vexatious and biased.

Section 416 of the Companies Act corresponds with the above mentioned insolvency provision and should be read with this section. The provisions of the *Insolvency Act*¹⁵⁴ apply *mutatis mutandis* to the section 416 provisions as long as they are not in conflict with this section.

With reference to section 66 of the *Insolvency Act* a question might be asked whether the apprehension and detention of witness under the authorisation of an officer other than the magistrate is in line with the constitution. Would it make a difference if the said officer was a magistrate? Would the continuous detention without trial be constitutional? Is section 35 applicable to insolvency, notwithstanding the fact that these are not criminal proceedings? Is the compulsory oath constitutional? What if, for example, a Muslim refuses to take the oath on the basis of religion? Does the *Insolvency Act* provide for that? One may ask whether there are not less restrictive means to achieve the purpose of the Act. Is the availability of immunity to the presiding officer, not perhaps questionable? Answers to these questions will be given when the case law on this aspect is discussed in chapter three of this research.

¹⁵² See Sharrock Hockly's *Insolvency Law* 115.

¹⁵³ Especially if there is no code of conduct stated in simple terms, for example a code of professional ethics expected from members of the executive.

¹⁵⁴ Section 66.

On the basis of the above comments, it is submitted that the insolvent (or any other witness) is not a criminal offender and should not be treated as such. If the insolvent or other witness is continuously detained, then in the circumstances the proceedings have taken a criminal turn. To my mind section 35 of the *Constitution* should then be applied where continuous detention crops up.

On the basis of the above note, it is submitted with due respect that the interrogation proceedings should be handled by persons learned in the law. These officers should exercise an unquestionable independent judicial discretion in ordering the apprehension and detention of witnesses who fails to comply.

2.4 Conclusion

With regard to section 64(1), it is my opinion that the insolvent should be informed of meetings to attend as he is bound to attend such meetings by this section. The provision of compulsory attendance should be relaxed only where the insolvent has a solid reason for failure to appear for interrogation. It is my opinion that a medical condition supported by a medical certificate indicating a serious health risk is or should be a good enough reason. Regarding section 64(2), it is my opinion that material information required at the meeting of creditors is one that may be relevant with regard to the claim of a creditor(s), the assets of the insolvent estate and the liabilities of the estate. It is also my view that information that may be required from a person summoned at meetings of creditors should be one which is permissible. Non permissible information may be defamatory information regarding the insolvent. For example information that may reveal the insolvent's promiscuous relationship which may not assist the trustee in any manner. The information required by the presiding officer from persons so subpoenaed should be material in that it relates to the insolvent and his estate affairs, including the affairs of the latter's spouse. Thus, only persons who can supply material information may be summoned by the presiding officer. With reference to section 64 provisions it is my opinion that the limitation on the

rights of interrogatees is reasonable and necessary. Without such proceedings the interests of innocent and credulous creditors as well as the interests of the society at large and therefore economic stability in the country will be jeopardized. The necessity of the creditor meetings which is intended to discover material information for the trustees and liquidators seems to be competing with other rights in the *Constitution*, for example the right to privacy.

Regarding the provisions of section 65(1), it is my opinion that the *Insolvency Act* make provision for the taking of a solemn declaration from witnesses who have a problem taking an oath. This provision should also be applicable to section 415(1) of the *Companies Act*. This, in my opinion will minimise constitutional attack by virtue of section 31(1) of the *Constitution*. With regard to interrogations at meetings, it is my view that it should take place at any meeting, but the fact that an interrogation will take place must be mentioned in the notice. This, in my opinion should be so as to ensure that an examinee or the creditors are not taken by surprise. The principles of justice and fairness will be upheld if an examinee or the creditors are afforded an opportunity to prepare for the interrogation proceedings and there will be no attacks on the *Constitution*. Regarding the credibility of a witness at interrogations I cannot think of any instance (during the interrogation proceedings) where the credibility of a witness could be irrelevant. This process should however not be abused. It is also my view that if the insolvent and any person summoned are given sufficient time and facilities to prepare for the interrogations, there should not be a problem of constitutional conflicts. Taking into consideration the discussion above, I do not see how the insolvency interrogation violates the right to freedom and security of the person, privacy of the person or human dignity.

With reference to section 65(2), it is my opinion that the banker-client relationship is different from that of an attorney-client one. Therefore there should be no problem, requiring him to produce any information he might have regarding the insolvent's finances. It is also my opinion that the requisition of such information might be necessary for a justifiable purpose

(for example of setting aside disposition intended to defraud the creditors). The one year period provision under section 65(2A)(a) for the production of documents or cheques drawn by the insolvent prior to his insolvency is in my opinion too short. The process leading to insolvency might be more than a year. It is thus my view that in order to effectively collect the insolvent estate assets for distribution amongst his creditors, it is imperative that the trustee be given greater latitude instead of an arbitrary period. If not, a minimum period of two years should be considered. The *in camera* proceedings and a bar against publication of information could in circumstances still be very detrimental to the insolvent. Regarding the incriminatory evidence given at the insolvency interrogation, it is my proposition that such evidence should be used solely for the purpose of determining the insolvent estate and the collecting of the insolvent's assets, for a proper, fair and even distribution amongst his creditors. With regard to representation of an insolvent at meetings, it is submitted that effective representation should also entail interrogation by the insolvent's attorney. The attorney or counsel should also assist the insolvent in answering questions and not rephrase interrogator's questions.

Regarding the provisions of section 66(2), it is my view that in order to conform to the principles of justice the presiding officer should refer the matter to the courts as soon as he realises that the interrogatee does not want to comply. The court should thereafter deal with the matter in accordance with the principles of justice and convict the person if necessary under the charge created by section 66 of the *Insolvency Act*. Regarding evasive answers given by the interrogatee under section 66(3), it is my view that evasive answers are tantamount to the refusal to answer questions lawfully put. If a witness is permitted to "get away with answers", then the purpose of interrogation will be defeated. Determining whether a witness is evading answering questions requires a judicial skill that can only be found in persons who had legal training.

In conclusion, it is my submission that where a recalcitrant witness has been released from prison after having had undertaken in terms of subsection 3 to

do what is required of him, fails to fulfil his undertaking, there should be a trial and refusal to answer should be treated as an insolvency offence in terms of section 138 of the *Insolvency Act*. Section 66(3) should, however, be criticised because it does not provide that the person who refuses to answer questions lawfully put may have a reasonable excuse, as is the case with section 66(2).

The next chapter will be dealing with case law, as decided by the Constitutional Court and as analysed and criticised by various constitutional law writers. The aim is to investigate the way in which the above questions have been answered by the courts.

Chapter 3 An analysis of Constitutional Court cases relating to sections 64, 65 and 66 of the *Insolvency Act*

3 Introduction

This chapter will focus on the insolvency cases relating to the above mentioned sections, as decided by the Constitutional Court. Although cases decided by other courts will be analysed as well, the emphasis will be on the constitutional conflicts that may be posed by sections 64, 65 and 66 of the *Insolvency Act*. Views of different journal writers regarding the subject matter will be looked at. Sections 12 and 35 of the *Constitution* will be discussed in so far as it impacts on sections 64 to 66 of the *Insolvency Act*.

3.1 *James v The Magistrate, Wynberg*¹⁵⁵

The applicant was the sole member of a close corporation that was liquidated. He sought an order preventing his interrogation in terms of section 415 of the *Companies Act*¹⁵⁶ at the meeting of creditors, at the instance of the second respondent. The applicant had taken an insurance policy against damage to the books he had purchased for his business which subsequently burnt down. The first respondent being the Magistrate, the second respondent was the liquidator in the close corporation's insolvent estate and the third respondent was the insurer, the only proved creditor in the close corporation's insolvent estate.

The basis of this application was that the interrogation would be oppressive of him and that he would be harassed thereat. He alleged that his examination at such a meeting would amount to an abuse of the machinery of sections 414

¹⁵⁵ *James v The Magistrate, Wynberg and Others* 1995 (1) SA 1 (C).

¹⁵⁶ This section corresponds with section 65 of the *Insolvency Act* and should be read with section 414 of the *Companies Act* (which corresponds with section 64 of the *Insolvency Act*)

and 415 because the second respondent had shown himself to be strongly biased against the applicant. He further alleged that the second respondent had identified himself exclusively with the interests of Protea (the third respondent) in the acrimonious dispute¹⁵⁷ which had arisen between Protea and the applicant. This, applicant, alleged was apparent from the fact that since the beginning of the proceedings the second respondent had employed the services of the same attorneys and counsel who had and who continued to represent Protea in the corporation's litigation with Protea and in the winding-up proceedings. He further alleged that Protea, as the only proved creditor, was funding the winding-up and the second respondent had been appointed as the corporation's liquidator at Protea's behest. The applicant further alleged that the second respondent had agreed to the order that the corporation pay Protea's costs on an attorney and own client basis. Furthermore, the second respondent had apparently abandoned the corporation's claim against Protea¹⁵⁸ without consulting either the applicant or the legal practitioners who had represented the corporation in the action against Protea.

Before the court decided whether the actions of the liquidator amounted to an abuse of section 415, it explained the position of the liquidator in relation to the insolvent estate. It held that the liquidator had to observe both the procedural and substantive fairness principles in conducting his duties. **The liquidator will be incapable of observing those requirements or of being seen to be doing so if his independence or impartiality has been compromised.**¹⁵⁹ It further held that this principle is particularly important where what is in issue is the prospective application by a liquidator of the far-reaching machinery of interrogation which is created by section 415 of the *Companies Act*.¹⁶⁰

¹⁵⁷ The dispute was whether the applicant had intentionally caused the fire that destroyed the book shop he (applicant) had insured with the first respondent (Protea Insurance). The third respondent denied liabilities on the basis of these allegations.

¹⁵⁸ The claim was for compensation in terms of the insurance policy taken by the applicant with Protea Insurance against fire on the building the applicant used for his bookshop business.

¹⁵⁹ Or if it appears to an independent, informed and reasonable observer to have been compromised.

¹⁶⁰ Section 415 of the *Companies Act* provides that no person interrogated shall be entitled to refuse to answer any question upon the ground that the answer would tend to incriminate him,

On the powers of interrogation granted to the Master¹⁶¹ the court held that this section practically deprives the examinee of his common-law protection against self incrimination and might be open to abuse. The court also held that because the section is so far-reaching and the powers thereunder may so easily be abused,¹⁶² great care must be taken to ensure that it is not used to oppress, harass or vex. The court warned that if there is a danger that an examinee may be subjected to an oppressive or vexatious interrogation, the court has a discretion to intervene to prevent it.

I agree with this safeguard that the court had provided concerning section 415. The liquidator is usually for the creditors. He is in a fiduciary position and has to do what is **best for the creditors**. His duty towards debtors is secondary. However, the liquidator is expected to act fairly and the presiding officer has a duty to intervene where the proceedings are vexatious and biased. Though the continuous interference by the courts in the winding-up proceedings might tend to delay the process, it is necessary in certain circumstances. Section 415¹⁶³ has far-reaching consequences in relation to the rights of an examinee. Precautionary measures should be taken when it is applied. It is my view that the presiding officer has a **positive duty** to take such precautionary measures to ensure that he is impartial, independent and detached.

On the basis of the alleged oppression of the insolvent applicant, the court held that, if there is danger that the applicant might be subjected to (or be seen to be subjected to) an oppressive or vexatious interrogation,¹⁶⁴ the court had to give serious consideration to intervening to prevent a possible abuse of the machinery of section 415 of the *Companies Act*.

and that any evidence given under this section shall be admissible in any proceedings instituted against the person who gave that evidence.

¹⁶¹ The presiding officer, liquidator and creditors who have proved claims.

¹⁶² To the prejudice of persons against whom it is applied.

¹⁶³ And section 65 of the *Insolvency Act*.

¹⁶⁴ Or even if such danger only appeared to exist, because in this case the second respondent seemed to be biased against the applicant and in favour of Protea.

Regarding the possibility of impartiality on the side of the liquidator, the court held that it should have been obvious to the liquidator that as sole member of the close corporation, the applicant had a direct interest in the winding-up proceedings. The liquidator should have consulted the applicant when he consented to an order against the corporation in liquidation to pay Protea's massive costs bill on an attorney and own client scale.¹⁶⁵ It also appears that the liquidator had been convinced of the correctness of an order sought by Protea and of the fact that the applicant had allegedly caused the fire that burned down the corporation's building. The court also held that the second respondent had created an impression of having aligned himself with Protea against the applicant because he had been convinced (by the corporation's erstwhile attorneys) that Protea was in the right and that the applicant was in the wrong in the dispute about the fire. The court further held that the second respondent had not attempted in the papers before the court to rebut the allegation against him being biased.

The court's opinion was that, although there was no basis on the papers for supposing that the second respondent had acted with the intention to oppress the applicant in any way, he had nevertheless failed to be sufficiently on the guard. This was imperative especially in the acrimonious atmosphere surrounding the dispute between the applicant and Protea. The second respondent should not have done anything which might create any reasonable appearance that he may have compromised his position of impartiality and have failed to ensure that he had not placed in jeopardy his independence in the discharge of his duties. On the basis of the above, the court held that that was sufficient to disqualify the second respondent as a liquidator.

I agree with the decision of the court regarding the duty of the liquidator and his removal from office in this case. From the allegations by the applicant it is apparent even to a lay person that the liquidator was unreasonably biased. As

¹⁶⁵ It is not difficult to see that such an agreement could have an immense impact and it is not ordinary.

standing in a fiduciary relationship¹⁶⁶ to the company or corporation and to the body of creditors as a whole and to the members as a whole, it is expected of the liquidator to act honestly and with good faith in all his dealings in the course of the administration of the insolvent estate in order to ensure a fair liquidation process.¹⁶⁷ The fiduciary duty¹⁶⁸ includes amongst other things, the duty to ensure that none of the parties is unfairly treated in the process and the liquidator must have the company's creditors' and the members' best interest at heart and thus not abuse the process. He should further investigate and collect every outstanding debt. In insolvent estates this is the most important part of the trustee's duty (namely to gather all the debtor's assets, to liquidate and distribute the assets of the estate)¹⁶⁹. It is my opinion that the liquidator took to heart only the requirement that the liquidation should be to the advantage of the creditors (in this case the only proved creditor) and therefore lost sight of fairness and objectivity to the insolvent corporation. The liquidator accepted allegations against the insolvent as true, without it being validated and tested in court. He neglected his fiduciary duty.

The application of section 65 of the *Insolvency Act* and section 415 of the *Companies Act*, although they appear alike, differ in the sense that section 65 provides that answers given at the interrogation proceedings could be used in evidence against the person giving it in civil proceedings and not in criminal proceedings. Section 415 provides that such evidence could be used against the person in **any proceedings**. That entails both civil and criminal. It is therefore my opinion that this section should be applied with serious precaution. Nothing is said about the constitutionality of these sections by the court or other writers.

3.2 Harksen v The Magistrate, Wynberg¹⁷⁰

¹⁶⁶ Thus having a duty to further all the interest of the creditors and that of the insolvent estate. One of these duties includes collecting outstanding debts in order to ensure a fair and justifiable liquidation process.

¹⁶⁷ See Meskin *Insolvency Law* 4-63

¹⁶⁸ See also Cilliers and Benade *Entrepreneurial Law* 147.

¹⁶⁹ The vesting of the assets in the trustee, the sale of those assets and the distribution of the proceeds amongst the creditors is the concern of the *Insolvency Act*.

¹⁷⁰ *Harksen v The Magistrate Wynberg and Othesr* 1997 (2) All SA 205 (C).

The facts of this case can be summarised as follows: The applicant's (Harksen) estate has been sequestrated. He was facing extradition to Germany for fraud related cases involving more than 300 investors' money. The applicant had been summoned to appear before the meeting of the creditors for the purpose of giving the required information to the trustees of his insolvent estate. He then requested that his evidence be heard *in camera* under section 65(2A)(a). The Magistrate granted an order to that effect. The basis of this order was the fact that the applicant might be harmed by such evidence in a criminal trial. The applicant further sought an order to the effect that all his evidence be given *in camera* and not be published in any way, even in civil proceedings until his criminal trial in Germany or his extradition has been decided.¹⁷¹

In a counter application against the Magistrate's order in favour of the applicant,¹⁷² the provisional trustees in turn sought an order that the order under section 65(2A)(a) be limited to specified questions and answers and that it did not apply to the whole or part of the proceedings. The trustees further alleged that the *in camera* proceedings did not prevent the lawful use of the applicant's evidence in civil proceedings against him. In an answer to the trustees' contention about the extent of the section 65(2A)(a) application, the court held that section 65(2A)(a) applied and cover more of the proceedings than merely questions and answers. The court further held that it might be hard to distinguish beforehand the incriminating issues from the harmless ones. It also held that it would be inconvenient and impractical for the Magistrate to clear the court in anticipation of every potentially harmful question or answer. The provisional trustees' application on this point failed.

¹⁷¹ The court refused to grant the order that the evidence should not be admissible in civil proceedings until his criminal trial or extradition has been decided. The basis of this decision was that the application was too wide. The court based its decision on the fact that the Magistrate enjoyed a discretion to decide as to which part of the proceedings were governed by section 65(2A)(a). I agree with this decision. No one knew exactly when the criminal trial in Germany would take place. Furthermore, it was difficult to determine how long the process would last and it was unknown when the extradition process would commence, let alone a criminal trial in Germany. The liquidation process had to commence and this obviously is to the benefit of the creditors. Furthermore, the application for the prohibition of the use of the information derived through the interrogation proceedings is in line with section 65(2A)(a).

¹⁷² Regarding the *in camera* proceedings.

The court thus in effect ordered that all the evidence should be given *in camera* because it could harm the applicant.

Subsequently thereafter¹⁷³ the provisional trustees sought to attach part of the record of the applicant's (insolvent) *in camera* evidence in an affidavit filed in civil proceedings. His counsel sought an order from the High Court that the above order under section 65(2A)(a) prevented publication of the evidence **in any way** because it contained incriminatory evidence.

With regard to the order sought by the insolvent to prevent **incriminatory evidence** from being published, judge Farlam held that the court had the discretion **to stay the interrogation proceedings** of an insolvent until the end of criminal proceedings because that interrogation might harm the defence in the case. The court had to balance the possible harm to the insolvent against any possible harm to his creditors.¹⁷⁴ **Regardless of this, the insolvent still has to show that giving evidence would harm him more than suspending his testimony would harm his creditors.** This is a new requirement not stated in section 65(2A). If the insolvent succeeds in his claim, the presiding officer will make an order under section 65(2A)(a).¹⁷⁵ (The insolvent has succeeded, he showed that he will be incriminated).

The court had to answer a further question regarding the term "publish" and whether the ban on publication prevented a witness' evidence from being used in **civil proceedings**. The court stated that the ban in section 65(2A)(a) did not prevent the use of the evidence which tend to be incriminatory in civil proceedings. **The word "publish" was held not to refer to the giving of evidence.** In *Pressey South Africa v Reci Import Export*¹⁷⁶ the court held that the prohibition on the disclosure or publication of information did not prevent the giving of evidence in a court of law. This was held not to be the intention of the legislature. Judicial freedom to ascertain the truth by considering all

¹⁷³ *Lane NO and Another v Magistrate, Wynberg and Others* 1997 (2) All SA 205 (C).

¹⁷⁴ The cited case *De Jager v Booyesen NO and Swanepoel* 1963 4 SA 760 (W) 764H.

¹⁷⁵ The proceedings to be held *in camera*.

¹⁷⁶ *Pressey South Africa (Pty) Ltd and others v Reci Import Export (Pty) Ltd and Others* (an unreported case no 8818/1982 19 May 1983 (CPD).

evidence relevant to the issues was fundamental.¹⁷⁷ It was then submitted that this should be the case in insolvency interrogation proceedings. The applicant's attempt to prevent the trustees from using his evidence in civil proceedings failed on the basis of the above clarification of the meaning of the word "publish".

Although the court did not clarify the exact meaning of the word "publish", it did make it clear that such a word does not prevent the use of derivative evidence in civil proceedings. I agree with this interpretation of the word publish. It is my opinion that the term refer to making known to the public the content of the interrogation proceedings through any media. This prohibition is in my opinion appreciable in that it ensures that no defamatory or incriminatory information may be leaked to the media regarding the insolvent person. Prohibition on publication does not in my mind prevent the usage of the information as evidence in civil proceedings. I do not see any wrongdoing if the information is used in civil proceedings for example to set aside impeachable transactions and in an attempt to recover the estate assets.

The court held that the application that all the proceedings concerning the insolvent being held in *camera* and not be published even in **civil proceedings** until the insolvent's criminal trial in Germany or his extradition has been decided, was too wide and therefore refused to grant it.

3.3 Parbhoo v Getz¹⁷⁸

The applicant was summoned under section 414 of the *Companies Act* to appear before the meeting of creditors for the purpose of being interrogated under section 415 of the said Act. He had refused to provide information at the meeting on the basis that section 415(3)' read with section 415(5), was unconstitutional. The argument had been that section 415 compelled an

¹⁷⁷ This has, however certainly changed in the light of the *Constitution*.
¹⁷⁸ *Parbhoo v Getz* 1997 (4) SA 1095 (CC).

examinee to answer questions that tend to be incriminatory, and that answers derived thereat might be used against that person in criminal proceedings.¹⁷⁹ The Witwatersrand local division had to decide on the constitutionality of this section. It granted an order declaring this section unconstitutional to the extent that section 415(5) allows evidence given under this section to be admissible in criminal proceedings instituted against the person who gave the evidence.¹⁸⁰ The court then referred the matter to the Constitutional Court for confirmation in terms of section 167(5) of the *Constitution*.¹⁸¹

The Constitutional Court as *per* judge Ackermann confirmed the decision of the Witwatersrand local division. He explained that the provisions of this section and its subsections is similar to that of section 417(2)(b) of the *Companies Act*. This section was declared to be inconsistent with the criminal trial guarantees of the *Interim Constitution* explained in *Ferreira v Levin*.¹⁸² These guarantees are a right to a fair trial and the right not incriminate oneself.

It is my view that section 415(3) read with section 415(5) has to be read very narrow and the prosecution has to advance its own evidence in subsequent proceedings.

3.4 Harksen v Lane¹⁸³

The applicant being the insolvent's spouse¹⁸⁴ was summoned in terms of section 64 of the *Insolvency Act* to appear before the meeting of creditors. She alleged that the provisions of both sections 64 and 65 were

¹⁷⁹ No reference to a provision such as section 65(2A).

¹⁸⁰ Including criminal proceedings other than perjury and related offences.

¹⁸¹ Section 167(5) of the *Constitution* provides that 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.

¹⁸² *Ferreira v Levin* 1996 (1) SA 984 (CC), a complete discussion of this case will be done in chapter five of this research.

¹⁸³ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

¹⁸⁴ Mrs Harksen and her husband were married out of community of property. As a result, they had separate estates. In section 21 the *Insolvency Act* provides that the assets of the solvent spouse vests in the Master and thereafter the trustee until such time the solvent spouse proves a true title to the assets. See section 21 of the *Act*.

unconstitutional in that they infringed upon her rights to **equality**, property, privacy and freedom and security of the person under the *Interim Constitution*.

The court held that there was nothing unconstitutional about sections 64 and 65. These sections provides that the insolvent's spouse is amongst persons that might be summoned to give information concerning the insolvent and that the insolvent's spouse was required to provide information concerning her own affairs, business and property. This, the court held was relevant to the insolvent estate because of the solvent spouse's relation to the insolvent. The fact that the insolvent and his spouse were in a special relationship is a fact that cannot be ignored and therefore relevant to the insolvent estate.

The court further held that the extended enquiry provided by sections 64 and 65 is to enable the trustee fully to investigate and untangle the affairs of the spouses and, in particular, to enable the trustee to identify and recover all the assets of the insolvent estate. The trustee is given great latitude in order to identify and recover all the assets in an insolvent estate. This should be the case in that the trustee might be ignorant as to the insolvent's affairs and thus any person who may assist in clarifying the state of affairs should be summoned. In this regard the court acknowledged that **if the focus of the provisions remains the estate of the insolvent, and not an enquiry into the independent affairs of the solvent spouse**, there can be little constitutional objections to the provisions of sections 64 and 65 of the *Act*.¹⁸⁵

Regarding the obligation to answer incriminatory questions, the court clearly stated that the examinee should not be compelled to answer a question which would result in the infringement of her chapter three rights.¹⁸⁶ The court further held that refusing to answer incriminatory question would constitute "sufficient cause" for refusing to answer the question **unless such a right of the examinee has been limited in terms of section 33(1) of the *Interim Constitution***. The right may be limited (1) in terms of the law of general

¹⁸⁵ See *Nel v Le Roux* 1996 (3) SA 562 (CC).

¹⁸⁶ *Interim Constitution Chapter 3 Bill of Rights*. These are the rights to equality, property, privacy and freedom and the security of the person.

application and (2) where it is just and reasonable in an open and democratic state and (3) for the purpose of serving the interest of justice. Section 65 complies with all these requirements as the public interest is at stake and it is reasonable and justifiable in a democratic state that the rights of all persons be protected. However, section 65(2A)(a) of the *Insolvency Act* provides protection to a witness whose evidence might be prejudicial.¹⁸⁷ The latter section only provides protection in **criminal proceedings** and is not applicable in civil proceedings.¹⁸⁸ In addition, the court stated that the examinee would not be obliged to answer a question **unlawfully put**. Although the court omitted to state clearly when a question will be unlawfully put, it is my opinion that a question will be unlawful where it is irrelevant, vexatious, malicious or oppressive on the part of the interrogatee or encroach upon his constitutional rights.

Concerning **committal to prison** the court held that a presiding officer may not commit to prison any person who with “reasonable cause” refuses to attend a meeting or a person who refuses to answer a question not “lawfully put to him”. A question lawfully put would thus in my mind not necessarily invade a constitutional right of an examinee. On the basis of the court’s decision in the *Harksen* case, I do not see how the provisions of sections 64 and 65, if properly executed can possibly infringe any of the examinee’s rights.¹⁸⁹ The only infringement that may occur is of the right to freedom and security of the person in case the examinee is detained for failure to appear at the creditors’ meeting while he has a sufficient reason for the failure.

The court acknowledged that the provisions of sections 64 and 65 discriminated against persons on the basis of their marital status. It further acknowledged, however that the discrimination was **not unfair** because solvent spouses were **not a vulnerable group** who had suffered

¹⁸⁷ The latter section provides that if answers to questions may incriminate the examinee or where he is to be tried on a criminal trial, the presiding officer shall order the *in camera* proceedings and that no such information may be published in any way.

¹⁸⁸ The effect is that derivative evidence could be used against the examinee in subsequent civil proceedings.

¹⁸⁹ The rights alleged to have been infringed is the right to equality, property, privacy and freedom and security of the person.

discrimination in the past. On the basis of that it held that the sections¹⁹⁰ were consistent with the values underlying the right to equality. Regarding the inconveniences caused to the privacy and dignity of the solvent spouse, the court held that the said inconveniences could be suffered by any person litigating and as such could not impair the dignity of the person. Therefore the challenge to the provisions of sections 64 and 65 failed.

In my opinion the provisions of the sections are of general application and are obviously applicable to every person married out of community of property and to any person who is in a position to provide information relating to the insolvent as prescribed in the section. The argument that the solvent spouse is discriminated against on the basis of marital status does in my view not hold water. After all, this provision is applicable to any spouse regardless of the gender and the fact remains that spouses are in a specific relationship to one another as against the rest of the world. It is fair that they should be treated differently.¹⁹¹

With reference to the possible violation of rights of persons summoned to appear at the interrogation, the court referred to in *Podlas v Cohen*¹⁹² where it was held that the Master's decision to hold an enquiry and to issue summons did not prejudicially affect a person's liberty, privacy or property. These notices were said to be simple subpoenas. The court emphasised that a person called upon to testify before any legally constituted tribunal empowered to summon witnesses is generally speaking, obliged to do so. This is so because he is called upon to perform a public duty.¹⁹³ Personal freedom therefore becomes subordinate to the public interest. The court in *Podlas v Cohen* also found that a person who has been sequestered has effectively sacrificed his right to privacy (at least regarding pre-sequestration

¹⁹⁰ Specifically section 21 of the *Insolvency Act*.

¹⁹¹ Regarding the right to property, I do not see how the temporary deprivation of property should be an issue here. I agree with these provisions if they applied **justly, fairly and equitable** because it ensures that there are no collusive dealings between spouses. They assist the trustee in tracking the assets of the insolvent estate. Unless an examinee has nothing to hide, I do not see why it should pose a problem to appear at the meeting and provide whatever information required by the trustee to secure fair sequestration proceedings.

¹⁹² *Podlas v Cohen and Bryden NNO and Others* 1994 (4) SA 662 (T) 675D-I.

¹⁹³ The court relied on *Van Aswegen v Lombard* 1965 (3) SA 613 (A) 623E.

patrimonial matters). The court further found that as far as section 33(1)¹⁹⁴ is concerned, it is reasonable and justifiable in an open and democratic society that the rights of creditors shall take precedence to those of insolvents. This is so regardless of the fact that they became insolvent through no fault of their own. With regard to the right to equality, the court held that such a right does not imply that a person (specifically an insolvent or any person who might have information relating to the insolvent) has to escape justice. Simply put, this means that a persons' right may be limited by law in certain circumstances, in this case the insolvency interrogations. The court¹⁹⁵ decided that the *Interim Constitution* did not oblige the Master to hear both sides of the parties before ordering an interrogation under section 152, because the order did not infringe the applicant's constitutional right to administrative justice.

The court in *Harksen v Lane* agreed with this interpretation. In his examination of the freedom right¹⁹⁶ Freedman¹⁹⁷ hold the view that equality is a core value underlying the democratic society envisaged by both the *Interim* and final *Constitution*.¹⁹⁸ According to him until recently the Constitutional Court has resisted developing a coherent jurisprudence on the proper approach to be taken when an applicant alleges that his right to equality has been infringed. He, however, acknowledges the court's ruling in *President of the Republic of South Africa and another v Hugo*¹⁹⁹ and *Prinsloo v Van der Linde and another*.²⁰⁰ He is of the view that the court in these cases handled a very thorny subject and set out the different stages of inquiry which must be satisfied whenever a law is challenged on the basis that it infringes the right to equality. The approach adopted in the *Hugo* and *Prinsloo*²⁰¹ cases has been reconfirmed by the Constitutional Court in *Harksen V Lane*.²⁰² According to Freedman the *Harksen* case is significant, not only because it reconfirms the

¹⁹⁴ Of the *Interim Constitution* .

¹⁹⁵ *Podlas v Cohen and Bryden NNO and Others* 1994 (4) SA 662 (T) 675D-I.

¹⁹⁶ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

¹⁹⁷ Freedman W "Understanding The Right To Equality" 1998 *SALJ* 243-251.

¹⁹⁸ See also *Fraser v Children's Court, Pretoria North, and others* 1997 (2) 261 (CC), 1997 (2) BCLR 15 (CC).

¹⁹⁹ 1997 (4) SA 1 (CC).

²⁰⁰ 1997 (3) SA 1012, 1997 (6) BCLR 759 (CC).

²⁰¹ See *Harksen v Lane NO and Others* 1998 (1) SA 300.

²⁰² See the discussion of the case above.

approach adopted earlier by the Court but because it clarifies the nature of the inquiry at each stage of the analysis as well as the court's approach towards the principles underlying the right to equality. The three stage analysis entails that the court must first determine whether the law or conduct in question differentiates between individuals and groups of people. If the law or conduct in question does differentiate then, in order not to fall short of the equality right there must be a rationale connection between the differentiations in question and the legitimate governmental purpose it is designed achieve. The second question is whether the differentiation amounts to unfair discrimination. If the discrimination is found to be unfair, then the law or conduct in question will be a violation of section 8(2). It will then be necessary to determine whether the unfair discrimination can be justified in terms of the limitation clause. The onus to show that the differentiation drawn by the law in question has no rational connection to a legitimate governmental object rests on the aggrieved person. According to Freedman, the reasons for this are that it is extremely unlikely that in a modern democratic society there will be situation in which the government, although having a legitimate objective, chooses irrational means to achieve it. Secondly, that the courts are likely to exhibit extreme difference both to objectives chosen by the legislature and to selections made by the legislature among different means, either out of judicial sympathy for the difficulties of the legislative process or out of a belief in judicial restraint generally. Lastly, that it will always be possible to define the legislative purpose in such a way that the statutory classification is rationally related to it. Accordingly, it will be rare for the courts to find that a law is not rationally connected to a legitimate purpose.²⁰³ Freedman emphasises that this has been the approach adopted by the American and Canadian Supreme Courts.²⁰⁴ He points out that this is not to say that the threshold test at this stage should be low. This is so in that differentiation which does involve unfair discrimination will be dealt with in terms of the prohibition of unfair discrimination.²⁰⁵ It is thus appropriate that the standard of review adopted in respect of differentiation which does not involve unfair discrimination should

²⁰³ See Anonymous "Legislative Purpose, Rationality and Equal Protection" 1972 *Yale LJ* 123.

²⁰⁴ See Woolman S "Limitations" in Chaskalson M, (eds) *Constitutional Law of South Africa* Juta Cape Town 1996 12-5 to 12-10.

²⁰⁵ Section 9(3) and 4 of the *Constitution*.

be deferential to the legislature. Freedman is of the view that it is the test for fairness which is at the heart of the Constitutional Court's equality-clause analysis. This test, which primarily assesses the impact of the discrimination from the point of view of the victim, has largely been adopted from the minority judgement of *Egan v Canada*²⁰⁶

Freedman highlights the point that the test adopted by the Constitutional Court clearly indicates that an important purpose behind the prohibition of unfair discrimination is the eradication of entrenched and systematic forms of social disadvantage. Accordingly, it seems that the courts will use the subsection to alleviate the plight of those groups within society which have been and continue to be its victims.²⁰⁷ Given that South African society is characterised by deep and pervasive patterns of discrimination, Freedman acknowledges that the Constitutional Court's approach is understandable. He, however, warns that this approach is not without its problems. This is so in that the institutional role the courts are designed to play severely limits the extent to which the judiciary can eradicate social disadvantages.²⁰⁸ The adjudicative model is designed to deal with discrete wrongs and not with systematic inequality. This limits the court's ability to engage in the kind of systematic review and correction called for by this idea of equality. Judicial review focuses on the effect of particular laws and the fate of particular groups. It does not attempt to restructure the overall distribution of benefits in

²⁰⁶ *Egan v Canada* (1995) 124 DLR 609 at 642 where justice L'Heureux-Dubé in her minority judgement explained that when assessing the discriminatory impact of a law, two categories of fact should be taken into account: Firstly the nature of the group adversely affected by the distinction. The judge explained that the more socially vulnerable the affected group is to having its most fundamental needs and concerns overlooked or discounted, and the more fundamental to the popular conception of personhood the characteristics which forms the basis of the distinction, the more likely that the distinction will be discriminatory (or unfairly discriminatory in the South African context). Secondly, the nature of the interest adversely affected by the distinction. The more fundamental the interest affected is to full participation in society, or the more serious the consequences of the distinction, the more likely that the distinction will have a discriminatory impact (or unfairly discriminatory impact in the South African context), even with respect to groups that occupy a position of advantage in society. It was according to this aspect of the test for fairness that judge Goldstone and judge O'Regan were divided.

²⁰⁷ See Donald J and Galloway C "Three Models of (In) Equality" 1993 *McGill LJ* at 79-80.

²⁰⁸ See Moon R "Discrimination and Its justification: Coping with Equality Rights Under the Charter" 1988 *Osgoode Hall LJ* 673 at 699-700, where he explained that the adjudicative model is designed to deal with discrete wrongs and not with systematic inequality.

the community. The evaluation and determination of all the different means available to equalize the social position of disadvantaged groups and the implementation of the method determine to be most appropriate is a complicated political task for which the courts appears to be ill equipped and ill trained and which is in most instances best left to the legislature.²⁰⁹ I agree. Inequalities are created by the political systems and it is the political system through legislation that is best suited to eradicate inequalities in societies. However, what also must be remembered is that where sequestration supervenes and where the sequestration procedure and the whole sequestration process is concerned, yet another purpose comes to the fore. And that is that the unfortunate creditors of an insolvent now take the place of "past disadvantaged groups".

Evans²¹⁰ has an interesting view regarding both the property and equality right discussed in *Harksen v Lane*.²¹¹ He discusses these rights along the lines of section 21 of the *Insolvency Act*. Although section 21 of the *Insolvency Act* falls outside the scope of this dissertation, the readers' attention will be drawn to Evans introductory remarks on section 21 which will eventually lead to the discussion of the right to property and the equality right. According to Evans²¹² the fact that the Constitutional Court in *Harksen v Lane* found it unnecessary to consider the relationship between section 21(2) and the provisions of *Insolvency Act* relating to impeachable transactions is unfortunate. This is so in that a thorough consideration thereof may have rendered section 21 superfluous and unjustifiable when tested against section 33 of the *Interim Constitution*.²¹³ The basis of his argument is that the *amicus curiae* who contended in this case that the provisions of sections 64 and 65 of the *Insolvency Act* are unconstitutional as the primary objective of the extended enquiry into aspects of those sections, is to enable the trustee fully to investigate and untangle the affairs of the spouses. In particular to enable the trustee to identify and recover all the assets of the insolvent. According to this

²⁰⁹ See Moon 1998 *Osgoode Hall LJ* 699-700.

²¹⁰ Evans R G "The Constitutionality of section 21 of the *Insolvency Act* 24 of 1936" 1998 STELL LR 3.

²¹¹ *Harksen v Lane NO* 1997 11 BCLR 1489 (CC).

²¹² Evans RG, STELL 359-358.

²¹³ Section 33 provided for the limitation of rights where justifiable and reasonable.

argument, the trustee is armed not only with the powers to set aside impeachable dispositions, but also with vast interrogatory powers²¹⁴ to assist him in the search for assets that belong to the insolvent estate. This argument therefore renders section 21 unnecessary.

Regarding the property right Evans²¹⁵ is of the view that since the applicant chose to regard the vesting of the property in the Master and thereafter to the trustee as a transfer of ownership, it would have been more appropriate to have argued along the line of a deprivation of rights as envisaged in section 28(1) and (2).²¹⁶ According to him, it might then be argued that such deprivation is unjustified when measured against section 33 of the *Interim Constitution*, since the provisions in the *Insolvency Act* regarding impeachable dispositions and interrogations are at the disposal of the trustee and serve a very similar purpose to that served by section 21.

Evans' analysis of the equality rights concentrates on section 21 of the *Insolvency Act*. However, important for this dissertation is the point that the solvent spouse's affairs are relevant to the affairs of the insolvent and such solvent spouse has a duty to come forward when called upon to do so, either by the Master or the trustee of an insolvent person of which she is a spouse to. This however should also be the case to any person who had a special relationship with the insolvent prior to his sequestration. This view of his emphasises the importance of sections 64, 65 and 66 of the *Insolvency Act*. Accordingly no equality right of the solvent spouse is violated by these provisions of the *Insolvency Act*.

Regarding the issue of privacy it is apparent that, although the right to privacy is one of the fundamental rights in the Constitution, there are circumstances that permit its limitation especially where the **public interest** is involved. In my opinion the right to privacy of an individual should **not be entertained**

²¹⁴ The trustee has vast powers to interrogate any person he deems necessary and who might be in a position to provide material information that will assist him in the performance of his duties, that including the solvent spouse.

²¹⁵ Evans RG, STELL 362-363.

²¹⁶ These two sub-sections of the *Interim Constitution* deals with the rights to property, and the deprivation of rights to property in accordance with the law.

where the rights of the majority is at stake. I do not see how providing **necessary** information at the meeting of creditors could possibly violate one's privacy; the examinee is only expected to divulge **information relating to the insolvent estate** and might be expected to explain the origin of debts of the estate or claims against the estate or of some of his or her own assets or that of the estate. This is necessary because it is easier for spouses to divert assets between themselves in order to defraud the creditors. The limitation of this right is therefore just and equitable in the circumstances.

3.5 De Lange v Smuts²¹⁷

In this case the applicant, who was a director and the only member of three close corporations that subsequently went insolvent, was summoned in terms of section 64(2) of the *Insolvency Act* to attend the second meeting of creditors of the corporations in which he was a director. Amongst other things, the applicant was required to produce books of account and other financial records of the corporations. The applicant failed to produce the documents as required by the presiding officer. It was alleged that he even refused to answer questions lawfully put to him under section 65(1) fully and satisfactorily.

On the basis of the above allegations an application was lodged on behalf of the liquidators of the corporations for the issue of a warrant, committing the applicant to prison.²¹⁸ The warrant was issued and subsequently suspended on the request of the applicant. The applicant advanced two arguments in support of his claim that section 66(3) was in violation of his constitutional right not to be detained without trial. **Firstly** he alleged that the subsection unjustifiably infringed his right **not to be deprived of freedom arbitrarily or without just cause** in terms of section 12(1)(a) of the *Constitution*. He argued that the objectives sought to be achieved by obtaining the oral and documentary information with which the meeting and interrogation under sections 64 and 65 are concerned, do not constitute such **just cause**. The

²¹⁷ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC).

²¹⁸ Under section 66(3) of the *Insolvency Act*.

objectives are the gathering of information concerning the insolvent and his affairs or in the case of a juristic person, the affairs of such a person. The applicant's argument to my mind does not hold water. There is nothing unjust about gathering information through interrogation proceedings. The gathering of relevant information with regard to an insolvent estate is for a **just cause**, which is the fair distribution of the insolvent assets among his creditors who are already prejudiced by the sequestration

The applicant further argued that the proceedings were even more unfair, especially where examinees were deprived of their physical freedom by imprisonment under the impugned provisions of section 66(3). It was argued on behalf of the applicant that the only **just cause** for which a person can be imprisoned is the prevention or punishment of a crime (or maintenance of law and order) and not for any other punitive coercion. Another argument was that our courts emphasise that imprisonment should only be resorted to after other appropriate forms of punishment have been considered and excluded.

Secondly the applicant alleged that section 66(3) infringed section 12(1)(b) of the *Constitution* because committal of an examinee constituted detention without trial.

The High Court had to decide on the alleged violation of section 12(1)(b) of the *Constitution*.²¹⁹ This section guarantees the right not to be detained without a trial. In its findings it declared section 66(3) invalid and referred the invalidity to the Constitutional Court for confirmation in terms of section 172(2)(a) of the *Constitution*.

The Constitutional Court had to decide two aspects: Whether section 66(3) violated the substantive or procedural aspects of section 12(1). The substantive aspect of section 12(1) protected individuals against deprivation of freedom arbitrarily or without a just cause. The procedural aspect of this section permitted judicial officers to commit individuals to prison with just

²¹⁹ By section 66(3) of the *Insolvency Act*.

cause. The court²²⁰ as per majority concurred that committal to prison under section 66(3) **did not constitute a violation of the substantive aspect** of section 12(1). It further held that the power of presiding officers other than magistrates to commit recalcitrant witnesses to prison **infringes the procedural** aspect of section 12(1) of the *Constitution*. It held that this infringement was not justifiable in terms of section 36 of the *Constitution*.²²¹ The order of constitutional invalidity in the Cape High Court in *De Lange v Smuts* was therefore confirmed to the extent that section 66(3) read with section 39(2) of the *Insolvency Act* was constitutionally invalid.²²²

The Constitutional Court based its findings on the fact that these sections²²³ read together authorised a presiding officer who was not a magistrate to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65 of the *Act*. This the court held to amount to an **unfairness** as guaranteed by section 12(1)(b) which requires that the trial (in this case the creditors' meeting) is only fair if it is presided over by a member of the judiciary in the established court structure, established by the 1996 *Constitution* (and not the executive organ of the state). Emphasising the importance of a fair trial, the court²²⁴ held that although non-judicial officers at the creditor's meetings are persons of integrity and suitably qualified by way of legal knowledge, skill and experience to discharge all the functions of the presiding officers under the relevant provisions of the *Insolvency Act* with high degree of competence, they are nevertheless members of the executive branch of the state. Being skilled and experienced in that field, the court held, does not explain why they must have the right to incarcerate examinees. The court also decided that there was no factual evidence indicating the actual deterrent effect of the summary committal procedure and therefore this ability

²²⁰ At 819C, 825B-C and 826E-F.

²²¹ Section 36 of the *Constitution* provides for the limitation of rights 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 consideration all relevant factors.

²²² At 828E-F/G.

²²³ Sections 66(3) and 39(2) of the *Insolvency Act*.

²²⁴ At 808I- 810A-E.

of the presiding officer to order the committal of recalcitrant witnesses to prison has no basis.²²⁵

On the basis of the above court's submissions, it was suggested in argument that if the public service officers did not have summary committal powers, this would give rise to delays which would undermine the efficacy of the sequestration process. In reply to that argument, the court held that it was not self-evident why there should be delays if the creditor meetings and courts are effectively run. The court's²²⁶ view was that these officers could be used in specialist insolvency or bankruptcy courts which could be established under the *Constitution* and that as judicial officers with true structural and constitutional independence, there could be no objection to them committing examinees to prison. I agree with the court's view on this point. It is my opinion that as reluctant as one could be about the time frame for the achievements of this goal, with proper training provided, this could be achieved in time, rather than to leave things as they are. It should also be emphasised that such officers **should be judicial officers** in order for them to have the committal powers, if not they will have no committal powers.²²⁷

It is the court's²²⁸ view that such powers to incarcerate recalcitrant witnesses should be handled by members of the judiciary enjoying judicial independence, which is foundational, fundamental and indispensable in such field. This judicial structural independence, the court insisted, was indispensable in that it is proclaimed, protected and promoted by section 165(2), (3) and (4) of the *Constitution*.

In the opinion of the court²²⁹ there was a need for our courts to develop a systematical model of separation of powers that will suit our distinct

²²⁵ Or the criminal sanction of section 139(2) of the *Insolvency Act*.

²²⁶ At 824F-G.

²²⁷ This should not be difficult (to get judicial officers to work at such courts) because there are enough skilled legal practitioners without work and students in law. Funds used to administer the insolvent estate and the whole process of sequestration and liquidation may be used to run specialised insolvency courts.

²²⁸ At 809I-810A-E and 824C-832I.

²²⁹ At 833A/B.

government as provided for by the *Constitution*. This the court held to be necessary in order to control government by separating powers and enforcing checks and balances and to avoid diffusing powers to the extent that the government is unable to take timely measures in the public interest. I agree with the court decision. In addition to this it is also my opinion that insolvency proceedings should take the form of civil proceedings and only take a criminal character where an examinee fails to comply with the provisions of the *Act*.

Judge Ackermann emphasised the need²³⁰ for the separation of powers and stated that the power to commit an unco-operative witness to prison is and should be within the very heartland of the judicial power. Therefore it cannot be exercised by non-judicial officers. In his findings he made reference to the United States where the principle of separation of powers has long been established. He quoted the case of *The Interstate Commerce Commission v Brimson*²³¹ as authority indicating the fact that the sole authority of judicial officers to commit recalcitrant witnesses was established as far back as 1893. In support for its findings, the court stated that no example has been given to it or found by it of any country which finds it necessary in the case of insolvency to permit a non-judicial officer to commit a recalcitrant examinee to prison. It further stated that no statutory provision in South Africa empowers any other tribunal or forum, not being an ordinary court in the judicial arm of the State, to commit a person to prison for civil contempt.

It must be emphasised that, regarding committal to prison, the court proclaimed²³² that **section 66(3) serves a compelling and indispensable public purpose**. It held that there is no severe measure which would adequately guarantee that the required information would be forthcoming from the examinee. The court emphasised that a mere fine would often be ineffective. I agree. The examinee might prefer to pay a fine rather than being subjected to interrogation proceedings because of the information that might be made available to financial institutions and his business partners of how

²³⁰ At 833B/C, 810I and 811C/D.

²³¹ *The Interstate Commerce Commission v Brimson* 154 US 447 (1893) at 485.

²³² At paragraph 33 and 40.

business is done by the examinee. It further held that even if the fine could be substantive the insolvent might pay it and consequently prejudice the creditors. The court²³³ decided that if an examinee was imprisoned for failure to comply, he nevertheless has a key to his release. This he could achieve by simply supplying the required information. In my mind the court's comments has extinguished the *Constitutional* attack based on the violation of the right not to be deprived of freedom arbitrarily. However, it is my opinion that the court omitted to clarify as to whether or not the right not to be detained without trial is limited by this compelling and indispensable public purpose.

In his introductory remarks of the discussion of the *De Lange* case, De Waal²³⁴ points out that this decision added to the Constitutional boundaries laid down in four earlier decisions²³⁵ for a statutory mechanism devised to secure compliance by witnesses in proceedings such as liquidation enquiries. Although he welcomes the contribution made by *De Lange* to the constitutional jurisprudence dealing with section 12,²³⁶ he appears not content with the extent with which the Constitutional Court judges agrees on the interpretation of the freedom right. The basis of his non contentment is that, although the plurality of judges agreed on the fact that the deprivation of the freedom right triggers both the substantive and procedural protection afforded by section 12, this is where the agreement amongst the members of the court ends. The basis of his submission is that judge Ackermann sets out a more detailed test for the analysis of the freedom challenges in his leading opinion. This test did not receive the support of the majority of the court.

According to De Waal²³⁷ the substantive and procedural protection entails that once a statute visualises the deprivation of physical freedom, **the reason for the deprivation of the freedom must be acceptable and the manner of depriving freedom must be procedurally fair.**

²³³ At 796.

²³⁴ De Waal J "Revitalising the Freedom Right?" 1999 *SAJHR* 217-233.

²³⁵ In chronological order: *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC); *Ferreira v Levin* 1996 (1) SA 984 (CC); *Bernstein v Bester* 1996 (2) SA 751 (CC); *Nel v Le Roux* 1996 (4) BCLR 592; 1996 (3) SA 562 (CC).

²³⁶ Section 12 of the *Constitution* provides for the protection of the freedom right.

²³⁷ De Waal 1999 *SAJHR* 219.

In my mind the analysis of the freedom right by the court in the *De Lange* case does not bring one closer to its meaning. One should, however, be optimistic about the future developments that are currently on the discussion table regarding the freedom right. In his analysis of the freedom right in the *De Lange* case, De Waal²³⁸ emphasises that the court did not say much on the deprivation of **physical freedom** and much of what it said was *obiter*. He states that this should not be the case since section 66(3) envisaged the committal of a person to prison, which undoubtedly constituted a deprivation of physical freedom. The court emphasised the significance and meaning of the phrase "detention without trial" which is used in section 12(1)(b). The court as *per* judge Ackermann argued that section 12(1)(b) is the safeguard of the procedural aspect generated by the freedom right. For judge Ackermann fairness is implicit in the "trial guarantee" of section 12(1)(b). The procedural aspect of the freedom right therefore means that everyone is entitled to a "fair trial before they are detained". The substantive aspect of the freedom right then entails that the liberty of a person should only be deprived with just cause.

In relation to the conflicts between the statutory provisions relating to insolvency enquiries and the *Constitution*, De Waal²³⁹ thinks that even though an examinee is not entitled to the protection of the right to a fair trial²⁴⁰ in a pre-trial examination such as in insolvency interrogation, the right to a fair trial under section 35(3)(j)²⁴¹ will be violated if the incriminating evidence, obtained under compulsion from an examinee in a pre-trial enquiry, is used against that examinee in subsequent criminal proceedings.²⁴² He correctly states that the insolvent is deprived of the right to a fair trial in terms of section 35(3) by

²³⁸ De Waal 1999 *SAJHR* 220.

²³⁹ De Waal 1999 *SAJHR* 226.

²⁴⁰ In terms of section 35(3). This right includes the right of every accused person to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before an ordinary court; to have their trial begin and conclude without unreasonable delay; and to be present when tried. See sub-section a-e.

²⁴¹ The right not to be compelled to give self incriminatory evidence against oneself.

²⁴² For this submission he relies on *Nel v Le Roux* 1996 (3) SA 562 (CC) and *Ferreira v Levin* 1996 (1) SA 984 (CC).

being detained for failure to comply with the provisions of section 64 of the *Insolvency Act*. This deprivation is due to the fact that such an examinee is **not an accused person** facing criminal prosecution. He, however, acknowledges that **the link between the pre-trial (insolvency proceedings) compulsion to provide self- incriminatory evidence and the subsequent civil or criminal proceedings that may be instituted against the insolvent makes the deprivation of that right unfair.**

With reference to the protection of the right of an examinee to a fair trial, he submits that to ensure a fair trial, the presiding officer in the subsequent trial has the discretion on the admissibility of the derivative evidence.²⁴³ I agree. The discretion should be exercised in such a manner that the presiding officer in the subsequent trial excludes, if necessary any evidence that might render the proceedings unfair. He, however, points out that the court has not in its findings directly addressed the issue of whether or not sections 35(1)(a)²⁴⁴ and 35(3)(h)²⁴⁵ applies in investigatory enquiries such as the insolvency proceedings. He submits that this should be applicable in as much as the courts are unlikely to uphold the constitutional validity of legislation that generally compels offenders to co-operate with the investigators of crimes. This would apply whether the person is technically arrested, accused or neither. It is therefore his view that legislation requiring offenders to co-operate with the investigators of crime limits the right to silence.

The implication of the court's construction in *De Lange v Smuts*²⁴⁶ is that the constitutional right to a fair trial will not apply at the interrogation. Only at the subsequent trial, **if any**, will or may it be raised. The question is whether this would play any role in the light of the court's contention that the presiding officer has the discretion on the admissibility of the derivative evidence.

²⁴³ He relies on judge Ackermann's view in *Ferreira v Levin* 1996 (1) SA 984 (CC).

²⁴⁴ Right to remain silent.

²⁴⁵ Right to be presumed innocent, to remain silent and not to testify during the proceedings.

²⁴⁶ *De Lange v Smuts NO and others* 1998 (3) SA 785 (CC).

Regarding the court's order in *De Lange v Smuts*,²⁴⁷ De Waal²⁴⁸ correctly agrees with judge Ackermann on the application of section 66(3) by stating that section 66(3) of the *Insolvency Act* justifies the deprivation of freedom. He, however, submits that the deprivation of freedom has to be procedurally fair. For example, the interrogation proceedings should be presided over by a judicial officer where committal to prison might be necessary. I agree with this opinion. **I am also of the view that where it appears impossible to acquire the services of a judicial officer, then the proposed order of detention be referred to the court of law for confirmation, the same way as the courts refer the matter to the Constitutional Court for confirmation of an order of constitutional invalidity.** This makes the proposition with regard to insolvency courts important and urgent.

In my mind I do not see any other alternative to ensure compliance of a recalcitrant examinee other than restricting his physical freedom of movement, as long as he is not subjected to dehumanising punishment. Although it is my view that this recalcitrance constitute a just cause to commit to prison an unco-operative witness as an aid to ensure compliance, it is also my opinion that the presiding officer should be a member of the judiciary. It is also my view that detention to prison for failure to comply should be a last resort. This I submit **should be so because committal amounts to detention without trial.** Taking into consideration the history of our country especially where physical freedom of persons was deprived arbitrarily, it is of paramount importance that fair proceedings should be upheld by our justice system. This could only be achieved where the proceedings are presided over by an independent judicial officer.

On the basis of the above argument I therefore submit that the substantive part of section 12(1)(a) is not violated in any manner whatsoever by the provisions of section 66(3). This provision in my view serves a necessary and compelling purpose in our democratic society where the individual rights of all persons should be protected. This includes the rights of creditors to be able to

²⁴⁷ *De Lange v Smuts NO and others* 1998 (3) SA 785 (CC).

²⁴⁸ De Waal 1999 *SAJHR* 228-229.

enforce their rights against insolvent debtors. Creditors are prejudiced already (in the sense that they will not be paid in full). They should be helped to at least get as much as possible from the proceeds of the insolvent's assets (but fairly). Insolvency should not be an escape goat for professional debtors.

It is my opinion that the procedural aspect of section 12 appears to be violated by section 66(3) in the sense that the proceedings are not fair. This I submit in that the section allows a presiding officer other than the magistrate to commit to prison an examinee failing to comply with the provision of the *Insolvency Act*. On the basis of my submission, I therefore submit that as soon as it becomes clear that an examinee refuses to comply, the proceedings should take a criminal character and there will be no objections to the detention of the examinee. This would be so because the trial would be presided over by a judicial officer. It is also my view that this will be reasonable and justifiable for the limitation of physical freedom right under section 36 of the *Constitution*. It would even be better if there are specialised insolvency courts.

Regarding the separation of power, it is submitted that this aspect would play a very huge role in our democratic society, for the purpose of ensuring that power is not concentrated in a single arm of the government and thus laying a foundation for corruption to the disadvantage of the public interest.

I agree with judge Ackermann's submission that there seems to be no risks of economical factors specifically where specialised insolvency courts are established and the officers presiding at the creditor's meeting are integrated into the judiciary system.

With reference to the provisions of section 66(5) it is submitted that, although the section provides the remedy to an arrested examinee, it is my opinion that this is insufficient to protect the constitutional right of a detained examinee. This is especially so where the person is innocent. It is therefore submitted that in order to ensure that the system is not open to abuse, the legislature includes a more extensive remedy for example providing an opportunity to the

examinee wrongfully detained to sue for any damage that he might suffer as a result.

3.6 *Pitsiladi v Van Rensburg*²⁴⁹

In this case the applicant (Pitsiladi) ran several business entities. Amongst them was a trust of which he was a trustee. In this trust was invested R10 m. This allegedly formed part of the pyramid scheme ran by him. After the sequestration of his estate the applicant was summoned to a meeting of creditors to be interrogated under sections 64 and 65 of the *Insolvency Act*. The summons had requested the insolvent to produce certain documents relating to his trust and certain other related entities of which he had dealings with. He alleged that the summons were too wide and amounted to an abuse of process. He instead offered the respondents access to all documents under his control. In his application to set aside the summons, he also applied for an order that the respondents grant him access to the information they had of any alleged financial transaction between himself and the entities named in the subpoena. The respondents were the trustees of the insolvent estate who requested the information for the purpose of the administration and liquidation of the insolvent estate.

On the basis of the alleged abuse of process, the court had to decide whether sections 64 and 65 of the *Act* were factually an abuse of process. The court came to the conclusion that there was nothing wrong with the provisions of sections 64 and 65. The purpose of an enquiry is for the trustees to gather as much information as possible. In my opinion, it was only natural that the insolvent was in a position to provide such information because he was the one controlling the trust and the one running the business of all the other entities. To my mind there seems to be no other way the information can be collected by an outsider like the trustee without the insolvent being present at the proceedings. A mere fishing expedition for information by the trustee

²⁴⁹ *Pitsiladi v Van Rensburg and others NNO* 2002 (2) SA 160 (SEC).

should however not be allowed. There should be a reasonable presumption by the trustee based on facts that improper conduct was taking place and therefore there is a need for thorough investigation.

In connection with the collection of information from the insolvent, the court held that it was not the intention of the section to place the insolvent in a better position than its debtors and creditors,²⁵⁰ rather the opposite. In my mind this entailed that the sections intend to place the insolvent's debtors and creditors in a better position, in that the gathering of information for future litigation was said to be permissible and therefore not an abuse of the process.²⁵¹ It was held that the gathering of such information was in fact one of the legitimate purposes of the enquiry. I agree with this view. Future litigation may be necessary where for example, the insolvent made a disposition not for value.²⁵² The interrogation may therefore assist in the recovery of the insolvent estate's assets to the advantage of the creditors. However one should not lose sight of the fact that the system might be open to abuse, especially where the purpose of interrogation is no longer the acquisition of material information, but a mere fishing expedition. There should be a reasonable and justifiable presumption on the liquidators' side that something is not right.

Regarding the wide scope of the subpoena, the court held²⁵³ that although the subpoena had been couched in wide terms, its terms did not go beyond what was permissible under section 64(2) of the *Insolvency Act*.²⁵⁴ It was further held that by offering the respondent access to all the documents in the applicant's possession did not relieve the applicant of his duty to supply the information at the meeting of creditors regarding the whereabouts of the assets of the insolvent estate. The court held that the respondents would not

²⁵⁰ At paragraph G-H page 160.

²⁵¹ Future litigation may be between the insolvent's trustees and any entity that might have had business dealings with the insolvent, to set aside an impeachable transaction.

²⁵² Section 26 of the *Insolvency Act* empowers the court to set aside a disposition not made for value. The onus is placed on the trustee to prove that the disposition was made not for value.

²⁵³ At paragraph I-J page 160

²⁵⁴ The information required by the trustees was within the category of information about the Insolvent's business, affairs, property and dealings.

know which documents, if any, related to the trust and other entities. This is correct, specifically where the insolvent intentionally structured his business in such a manner that it is difficult to comprehend any transactions from accounting records. This will also be the case where the intention was to defraud both the creditors and investors. That was the reason the insolvent had to appear before the meeting of creditors. Regarding the applicant's complicated business network, the court held that the applicant could not escape his duty to account to the public to provide the necessary information.

The court further held²⁵⁵ that the applicant had no constitutional right to require information, not even to prepare for the interrogation prior to the enquiry. This was held to be so because the applicant was neither in a position of a civil litigant nor that of an accused. His only duty was to assist by providing, rather than seeking, information. **The court is silent as to whether the insolvent would be entitled to access information held by the trustee for other purposes.** In my opinion the court's silence entails that the insolvent may not be entitled to access such information for the purpose of preparing for the interrogation, but he might be entitled to the information when either civil or criminal proceedings are instituted against him by the trustees of his insolvent estate.

Concerning the court's decision in the *Pitsiladi* case, it is my opinion that the interest of creditors is regarded paramount to those of the insolvent. This is so in that creditors are given the opportunity to investigate on a strong footing in comparison with the insolvent, all in the name of a fair and just administration, liquidation and distribution of the insolvent estate. However, the gathering of information for future litigation appears to be unfair and unjustified **in certain circumstances.**²⁵⁶ For example, where a debtor of the insolvent creditor or even the special partner in a partnership had nothing to do with the way the creditor or partnership conducted its business and the business became

²⁵⁵ At paragraph I-J page 162.

²⁵⁶ Section 64(2) provides that **any person** who is known to be in possession or have been in possession of any property of the insolvent estate or to be indebted to the estate. One can well imagine that a very "innocent" person may be summoned, because it is literally any person with information.

insolvent through no fault of the debtor or the special partner. If and when information is gathered for future civil litigation concerning the business of the insolvent, **he may at subsequent proceedings be prejudiced by the information gathered.** However, it is a known fact that taking the position of directorship in a company implies that one takes along the risks involved, especially where a company becomes insolvent. In the case of *Bernstein v Bester*²⁵⁷ the court per judge Ackermann stated that any person engaging in the businesses of a company as a director should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These responsibilities include, amongst other things, accountability to shareholders. This is so regardless of the negative effects this might have on the director himself. Directors have to be accountable for whatever mishaps in the companies they run. However, the gathering of information for future litigation will not necessarily be unfair and unjustified, especially where such litigation concerns the setting aside of impeachable transactions to the advantage of all the creditors instead of a single creditor and where directors fraudulently squanders the companies's assets.

With regard to the scope of the subpoena, I agree that the subpoena should be couched in such a manner that all aspects affecting the insolvent and his dealings are covered as provided for by section 64(2) of the *Insolvency Act*. The applicant may have provided access to all documents in his possession or under his control but that may not have been sufficient. He needs to be **physically present** at the meeting to explain every transaction he had with other entities and individuals, the origin of the funds and where they disappeared to, especially in very complicated business transactions. Looking at the transactions themselves can be futile to the trustees, especially in the absence of the insolvent who have a clear understanding of such transactions. The compulsory presence of the insolvent at the meeting should be a formality in order for him to be able to explain the complicated transactions on the documents. Clarity may be borne out of the insolvent's explanations and it might be possible for the trustee to recover the insolvent's

²⁵⁷ *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC).

assets from the debtors, including individuals who have benefited unlawfully from the insolvent.

With reference to access to information by the applicant, I do not see exactly why the insolvent needs such information. After all, the transactions that interest the trustee and creditors were made by him and his business associates. He already has all the information. He is thus expected to be frank and open and may not refuse to answer where he may be incriminated.²⁵⁸ Although the court is quick to state that the insolvent has no constitutional right requiring access to information prior to the enquiry, it does not clarify whether the insolvent will ever have access to such information, at least not in this case. If civil or criminal proceedings are instituted against the insolvent, he might have use of the information after the enquiry.

Smith²⁵⁹ contends that insolvency proceedings under sections 64 and 65 are necessary to assist the trustee and the creditors to examine the insolvent's affairs and determine his true financial position. **She emphasises the point that the purpose of the insolvency inquiry would be jeopardised if the insolvent would be allowed access to the documents held by the trustee.** She further points out that to avoid constitutional clashes sections 64 and 65 proceedings **have to be conducted fairly.** Smith thus agrees with these interrogation provisions.

3.7 Conclusion

From case law discussed in this chapter, several observations have been made. The main points are briefly the following: The case of *James v The Magistrate*²⁶⁰ has made it clear that section 415 of the *Companies Act* serves a compelling public purpose. However, the court highlighted the point that as a result of the far reaching consequences of this section great care must be taken to ensure that it is not abused. The court also pointed out that the

²⁵⁸ See discussion above.

²⁵⁹ Smith 2002 *Juta's Business Law* 78-80.

²⁶⁰ *James v The Magistrate, Wynberg* 1995 (1) SA 1 (C).

insolvent who feels oppressed or harassed by the application of this section has his remedy in a court of law. I agree with the court's decision regarding the duty of the liquidator and his removal from office if he is not objective. It is further my opinion that this section should be applied with serious precaution because evidence obtained at the interrogation may be used in any proceeding against the person giving it. This section has the same implications as section 65 of the *Insolvency Act*. Nothing is said about the constitutionality of these sections by the court or other writers.

In *Parbhoo v Getz*²⁶¹ the court recognised the unconstitutionality of section 415(3) read with section 415(5) of the *Companies Act* and declared it unconstitutional. Thus, it is an established principle that any evidence given at the interrogation proceedings should not be admissible in subsequent criminal proceedings against the person giving such evidence. On the basis of this provision, it is my view that section 415(3) read with section 415(5) has to be interpreted very narrow and the prosecution should advance its own evidence in subsequent proceedings.

From the *Harksen v The Magistrate*²⁶² the applicability of the *in camera* proceedings is clarified. Where the presiding officer is of the view that an insolvent may incriminate himself by answer certain questions at the interrogation he should order that that part of the proceedings be held behind closed doors (this should not be limited to certain answers and questions and it should declared that such information not be published) . This, however, does not entail that the information obtained at such proceedings may not be used against the insolvent at subsequent **civil proceedings** against him. The court, however, acknowledged the fact that where an answer may incriminate the interrogatee would constitute a sufficient cause for refusing to answer the question, unless such a right has been limited in terms of section 33(1) of the *Interim Constitution*. I agree with the interpretation of the word publish. It is my opinion that the term refer to making known to the public the content of the interrogation proceedings through any media. Publication does not prevent

²⁶¹ *Parbhoo v Getz* 1997 (4) SA 1095 (CC).

²⁶² *Harksen v The Magistrate, Wynberg* 1997 (2) All SA (C).

the use of the information as evidence in civil proceedings. This prohibition is in my opinion intended to ensure that no defamatory information regarding the insolvent is leaked to the media.

In *Harksen v Lane*²⁶³ the court clarified the provision of section 64 of the *Insolvency Act*. This section provides that the insolvent's solvent spouse²⁶⁴ is amongst persons that may be summoned at the meeting of creditors to provide information required. The solvent spouse is discriminated, but the discrimination is fair. The court stated clearly that this provision was relevant to the affairs of the insolvent. Therefore there were no rights violated by the provision of the said section.²⁶⁵ The court stated clearly that the provision enabled the trustees to fully investigate and untangle the affairs of spouses. In particular the provision is intended to enable the trustee to identify and recover all the assets of the insolvent estate. I agree. There is nothing wrong in requesting a person to come forward and provide the information required. A person has no right to be protected here, she has to honour the summons and provide evidence as required.

Although the court in this case omitted to state clearly when a question will be unlawfully put, it is my opinion that a question will be unlawful where it is irrelevant, oppressive, vexatious and malicious on the part of the interrogate or encroach upon his constitutional rights. It is further my opinion that the provisions of these sections are of general application and are obviously applicable to every person married out of community of property and to any person who is in a position to provide information relating to the insolvent as prescribed in the section. Furthermore, I do not see how providing necessary information at the meeting of creditors could possibly violate one's privacy; the examinee is only expected to divulge information relating to the insolvent estate and might be expected to explain the origin of debts of the estate or claims against the estate or of some of her own assets or that of the estate.

²⁶³ *Harksen v Lane NO and others* 1998 (1) SA 300 (CC).

²⁶⁴ Thus married out of community of property

²⁶⁵ For example the right to equality, the right to property, and the right to privacy.

In *Podlas v Cohen*²⁶⁶ the court emphasised that section 33(1) of the *Interim Constitution* it is reasonable and justifiable in an open and democratic society that the rights of creditors shall take precedence over those of insolvents. This was said to be so regardless of the fact that they (insolvents) become insolvent through no fault of their own. The right to equality does not imply that a person has to escape justice. Another pointer that was emphasised in this case was that even though the right to privacy is one of the fundamental rights in the Constitution, there are circumstances that permit its limitation, especially where the public interest is involved. The *Harksen* case confirmed this interpretation.

From *De Lange v Smuts*²⁶⁷ it is clear that a recalcitrant witness may be detained without being given an opportunity to section 35 of the *Constitution*, which provides protection to the arrested, detained and accused persons. The detention will be constitutional if both the substantive and procedural requirements of section 12 of the *Constitution* have been complied with.²⁶⁸ In this case the court confirmed that the detention of a recalcitrant witness is an indispensable tool to compel co-operation from insolvents. The court, however, omitted to clarify as to whether or not the right not to be detained without trial is limited by this compelling and indispensable public purpose. Regarding the process of interrogation for the gathering of material information, it is my opinion that there is nothing unjust about this provision. The gathering of relevant information with regard to an insolvent estate is for a just cause, which is the fair distribution of the insolvent assets among his creditors who are already prejudiced by the sequestration. I agree with the court's view regarding the creation of insolvency courts. As reluctant as one can be about the time frame for the achievement of this goal, with proper training provided, this could be achieved in time, rather than to leave things as they are. It should also be emphasised that officers appointed thereat should be judicial officers in order for them to have committal powers, if not they will have no committal powers. In addition it is also my opinion that insolvency

²⁶⁶ *Podlas v Cohen and Bryden (NNO) and Others* 1994 (4) SA 662 (T).

²⁶⁷ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC).

²⁶⁸ For the discussion of the substantive and procedural requirements under section 12 see paragraph 3.5 above.

proceedings should take the form of civil proceedings and only take a criminal character where an examinee fails to comply with the provisions of the Act.

Regarding the analysis of the freedom right in *De Lange*, it is my view that that interpretation does not bring one closer to its meaning. One should, however, be optimistic about the future developments that are currently on the discussion table regarding the freedom right. With regard to the admissibility of derivative evidence, it is my opinion that the discretion should be exercised in such manner that the presiding officer in the subsequent trial excludes, if necessary, any evidence that might render the proceedings unfair. Furthermore, it is my view that where it appears impossible to obtain the services of a judicial officer, then the proposed order of detention be referred to the court of law for confirmation, the same way as the courts refer the matter to the Constitutional Court for confirmation of an order of constitutional invalidity. This makes the proposition with regard to insolvency courts important and urgent. It is also my opinion that detention to prison for failure to comply should be a last resort. This I submit should be so because committal amounts to detention without trial.

Regarding the provision of section 66(3), it is my opinion that they serve a necessary and compelling purpose in our democratic society where the individual rights of all persons should be protected. The substantive aspect of section 12(1)(a) are complied with. However, the procedural aspect of section 12 seems to be violated by section 66(3). The fact that an officer who is not a judicial officer is empowered to order the detention of a recalcitrant witness is unacceptable. I agree with judge Ackermann's submission that there seems to be risks of economical factors specifically where specialised insolvency courts are established and the officers presiding at the creditor's meeting are integrated into the judiciary system. It is also my opinion that the remedy provided by section 66(5) is insufficient to protect the constitutional right of a detained examinee.

In *Pitsiladi v Van Rensburg*²⁶⁹ the court confirmed that there was nothing wrong with the provisions of sections 64 and 65 of the *Insolvency Act* and that this section is not an abuse of the process. Its purpose is to assist the trustee to gather as much information as possible. Furthermore, the court confirmed that the insolvent had no right to require information relating to the reason for his subpoena, even to prepare for the interrogation. He could only access the said information when either civil or criminal proceedings are instituted against him by the trustee. The court is silent as to whether the insolvent would be entitled to access information held by the trustee for other purposes. In my opinion the court's silence entails that the insolvent may not be entitled to access such information for the purpose of preparing for the interrogation, but he might be entitled to the information when either civil or criminal proceedings are instituted against him by the trustees of his insolvent estate. It should also be emphasised that a mere fishing expedition by the trustee should however, not be allowed. There should be a reasonable presumption by the trustee based on facts that improper conduct was taking place and therefore there is a need for thorough investigation.

I therefore conclude that in insolvency law the provisions of both sections 64, 65 and 66 of the *Insolvency Act* are necessary to ensure that the rights of all persons are protected by our justice system,²⁷⁰ including the rights of both the debtors and creditors alike. The corresponding sections of the *Company Act* are equally necessary for the economical and social developments. Only information that would put the insolvent in a disadvantaged position as against his **competitors** should be disallowed. For example, it should be reasonable not to disclose dealings when the insolvent is involved in business in competition with another business.

The next chapter will concentrate on the impact of the *Constitution* on section 152 of the *Insolvency Act* and the rights emanating from the *Constitution*.

²⁶⁹ *Pitsiladi v Van Rensburg and Others* NNO 2002 (2) SA 160 (SEC).

²⁷⁰ Where it is justifiable to do so.

Chapter 4 Exploring section 152²⁷¹ of the *Insolvency Act*

4 Introduction

This chapter will focus on the impact of the *Constitution* (and the rights flowing therefrom) on the provisions of section 152 of the *Insolvency Act* and the corresponding provisions of the *Companies Act*. Views of different textbook writers will also form part of the discussion.

4.1 Section 152(1)

The Master may **at any time** direct a trustee to deliver to him any book or document relating to any property belonging to the insolvent estate of which he is trustee.

De la Rey²⁷² quotes the section as is. She adds nothing and appears to have no problems regarding the provisions of this sub-section.²⁷³ It is submitted that the wide application of this subsection is problematic. This is so in that it does not specify the time scale allowed for further investigation, if there is any required, for the purpose of discovering the insolvent's assets that might have been misappropriated. It is therefore submitted that this wideness might give rise to challenges in future.²⁷⁴ The insolvent needs closure, especially where he became insolvent through no fault of his own.²⁷⁵ One should not, however, lose sight of the fact that there may be circumstances that might require the element of surprise on the side of the Master. This should be so in situations

²⁷¹ This section provide for the private interrogation of an insolvent and any other person the Master might deem necessary to interrogate for the purposes of gathering information.

²⁷² De la Rey *Law of Insolvency* 364. See also Smith *The Law of Insolvency* 215. Meskin and Sharrock are silent on this issue.

²⁷³ See also Meskin *Insolvency Law* 8-19; Smith *The Law of Insolvency* 215; Sharrock *Hockly's Insolvency Law* 115.

²⁷⁴ When comparing this provision with sections 417 and 418 of the *Companies Act* which empowers the Master to subpoena witnesses to provide the required information, there is a slight difference. According to section 417 the Master may issue summons after the winding up order is issued and the *Insolvency Act* provide that the summons in terms of section 152 may be issued any time before the insolvent is rehabilitated. This differentiation may be challenged on the basis of the fact that there is no justification for it either at common law or case law. The *Companies Act* does not specify the end time for the summons and this implies that there is no end date. This could take years. The Master may even summon a person after the distribution and liquidation account is issued.

²⁷⁵ Should therefore be "before confirmation of liquidation and distribution account by Master".

where there are suspicions that the insolvent may have disposed of his assets without receiving any value for them or may have given an undue preference to creditors. Those assets need to be brought back to the insolvent estate for the purpose of distribution among creditors. But I cannot see how a demand may be made by the Master after the confirmation of the final liquidation and distribution account. The provision uses the words "of which he is trustee." To my mind this means that the Master may even demand delivery of a book after rehabilitation. This I say, because any property which immediately before the rehabilitation is vested in the trustee **and remains vested in him** after rehabilitation for the purposes of realisation and distribution. I think a demand in terms of subsection (1) should be made before the confirmation of the liquidation and distribution account. The Master should conclude his investigation before he confirms the account in any event; not after rehabilitation.

4.2 Section 152(2)²⁷⁶

If at any time after the sequestration of the estate of a debtor and before his rehabilitation, the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice, at the place and on the date and hour stated in such notice, and to furnish the Master or the other officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate.

Although the *Insolvency Act* does not expressly regard the provision of information by the person so summoned as interrogation,²⁷⁷ Sharrock²⁷⁸ refers to this process as an interrogation by the Master of any person that

²⁷⁶ Sub-section (2) as substituted by section 46 of *Act no 99 of 1965*.

²⁷⁷ Specifically in sub-section (2).

²⁷⁸ Sharrock *Hockly's Insolvency Law* 115.

may provide information regarding the insolvent estate.²⁷⁹ He states that the Master may exercise this power at any time after the sequestration and before rehabilitation of the insolvent.²⁸⁰ Meskin²⁸¹ calls it an enquiry for the purpose of obtaining information. The information should be obtained at a private enquiry rather than at a meeting of creditors in the ordinary course. But then he goes on and say that the Master may interrogate the witness at the enquiry. Smith²⁸² does not say much about the provisions of this sub-section, except emphasising the fact that the period within which the Master may exercise his powers commences as from the date of the provisional order of sequestration.²⁸³ To my mind this is a significant view because valuable information may be discovered that may possibly lead to the quicker abolition of the provisional order if circumstances demand.

Regarding the issue of the unlimited time frame within which the Master may summon the insolvent, (or any other witness) to provide any information he regards desirable, it is my opinion that it might be necessary under certain circumstances to surprise the insolvent who had defrauded the creditors. This will be the case where the insolvent has disposed of most of his assets which might resurface after the sequestration of his estate. Because of the element of dishonesty, there should in my opinion not be any time limit. The Master should have the right according to section 152 **until the confirmation of the final liquidation and distribution account**. In the case of suspected fraudulence on the side of the insolvent, the Master should exercise this right even until rehabilitation.²⁸⁴

4.3 Section 152(4)

When any person summoned as aforesaid appears before the Master or other officer in question in compliance with a notice issued under subsection (2) or (3) the Master or such other officer may administer the

²⁷⁹ Even subsection (4) states that the trustee may **interrogate** the person summoned.

²⁸⁰ He relies on *Appleson v The Master* 1951 (3) SA 141 (T).

²⁸¹ Meskin *Insolvency Law* 8-19.

²⁸² Smith *The Law of Insolvency* 216. See also De la Rey *Law of Insolvency* 364; Meskin *Insolvency Law* 8-19.

²⁸³ For this view she relies on *Appleson v The Master* 1951 (3) SA 141 (T).

²⁸⁴ Subsection (3) will not be discussed as it speaks for itself.

oath to him and the Master or such other officer and if a person other than the trustee was summoned, also the trustee (or his agent) may interrogate the person summoned in this regard to any matter relating to the insolvent or his estate.

Meskin,²⁸⁵ like the rest of other writers, does not say much about the administering of an oath by the Master or any other officer. He nevertheless highlights the fact that the interrogation process is a private one. The purpose for making this process private, he submits is for the summary obtaining of confidential information for the purpose of facilitating the administration of the estate.²⁸⁶

Smith's²⁸⁷ contribution to the discussion is interesting. Although she is silent on the issue of the oath, she quotes judge Blackwell's opinion that there might be very good reasons for holding certain interrogations in private.²⁸⁸ Persons interrogated might be less loath to part with information if secure that such information would not be available to the public. Smith is, however, not convinced as to the validity of these reasons. She submits that it is unacceptable that the interrogation is not advertised and notice is not given to interested parties. She points out that there is nothing in the *Insolvency Act* to justify the conclusion that interested parties should be excluded from attending the interrogation. No one really explains what is meant by "private interrogation". After reading Smith, the implication is this viewpoint is that an interrogation is private if interested parties such as creditors are precluded from attending and do not receive notices to attend.

Although the other writers are silent on the oath issue, I am of the opinion that the *Insolvency Act* should provide for the admission of an oath sanctioned by religion or any other belief so as to accommodate both Christians and non

²⁸⁵ Meskin *Insolvency Law* 8-19. See also Sharrock *Hockley's Insolvency Law* 115; Smith *The Law of Insolvency* 216; De la Rey *Law of Insolvency* 364.

²⁸⁶ It is difficult to see how it can be regarded as a private process if the trustee may be present and may interrogate the person summoned, unless in a sense in the circumstances it is because of the absence of creditors.

²⁸⁷ Smith *The Law of Insolvency* 215 relies on the case of *Appleson v Bosman* 1951 (3) SA 515 (W) 517.

²⁸⁸ Smith *The Law of Insolvency* 215.

Christians. This will ensure that there are no constitutional challenges to this provision.

4.4 Section 152(5)²⁸⁹

The provisions of subsection (2) of section 65²⁹⁰ shall, subject to subsection (2A) of that section, *mutatis mutandis* apply in connection with the production of any book or document or with the interrogation of any person under the preceding provisions of this section.

Like the other writers, Smith²⁹¹ has summarised the applicability of sections 65 and 66 of the *Act* to section 152. She submits that a person summoned by the Master under section 152(2) is not entitled to refuse to answer any questions on the grounds that it might incriminate him.

Regarding the powers and immunity of the Master, Smith states that he shall be entitled to powers and immunity as afforded to the presiding officer who issues a warrant of detention against a witness that fails to comply with the requirements of the *Act*. Smith, however, points out that section 152 does not make any provision for legal representation for any person called upon to provide information to the Master. She submits that it has always been said that a person is not entitled to representation at such interrogations.²⁹² This she says, is due to the fact that the tribunal investigates the facts but does nothing further. The outcomes will not affect the rights of the individual under interrogation. Relying on judicial precedent, she submits that there is no reason either in common law or following the demands of natural justice why an insolvent appearing before such tribunal should be afforded the right to legal representation.²⁹³ She submits further that there is nothing under section 152 suggesting that the insolvent is entitled to representation or the right to cross-examine or question other persons who are being interrogated. To

²⁸⁹ Subsection (5) as substituted by section 4 of *Act* 89 of 1989.

²⁹⁰ *Insolvency Act*.

²⁹¹ Smith *The Law of Insolvency* 216. See also Sharrock *Hockly's Insolvency Law* 116 ; De la Rey *Law of Insolvency* 364.

²⁹² For this view she relies on the case of *Appleson v The Master* 1951 (3) SA 141 (T) 146.

²⁹³ For this view she relies on the case of *Van der Westhuisen v Roodt* 1986 (1) SA 693 (N).

support this view, Smith quotes judge Wilson²⁹⁴ as follows: “However, there appears to be what in my view is a desirable practice, which should be encouraged, that is that persons who are interrogated in this way should be entitled to have a legal adviser present whilst they are being interrogated to advise them of their rights generally unless there are very strong reasons to the contrary. I am satisfied, however, that this is a matter which lies within the Master’s discretion and I do not propose to make an order in this regard. It is a matter that I am quite satisfied can be left to the Master’s good sense and judgement.”

Meskin²⁹⁵ teaches that although the section is silent as to the right of representation afforded to the insolvent person, the Master has a discretion and he may under certain circumstances permit the witness to have a legal adviser present during the interrogation. The legal adviser is only there to advise the witness as to his rights generally **and nothing else**.²⁹⁶ Meskin appears to support the right to legal representation of an insolvent under interrogation. This is supported by his argument, where he relies on the provisions of the *Constitution* relating to the principle of fair justice and impartiality. Accordingly, he proclaims that in line with the principles of justice there is no reason why an insolvent should not be entitled to legal representation under section 152. This he states will amount to a fair and impartial enquiry.²⁹⁷

Regarding the applicability of the provisions of sections 65 and 66 of the *Insolvency Act* to section 152 of the same *Act*, it is my opinion that both the positive and negative provisions of sections 65 and 66 should apply *mutatis mutandis* to section 152. This should be the case in order to ensure that the principle of fair justice and impartiality is upheld even though there is a view that this process is a private enquiry. It is therefore submitted that the right to

²⁹⁴ In the case of *Van der Westhuisen v Roodt* 1986 (1) SA 699 (N).

²⁹⁵ Meskin *Insolvency Law* 8-20.

²⁹⁶ For this view Meskin relies on *Appleson v The Master* 1951 (3) SA 515 (W).

²⁹⁷ He relies on the case of *Advance Mining Hydraulics v Botes* 2000 (1) SA 815 (T) at 824. He submits that although the case deals with proceedings under section 418 of the *Companies Act* which permits legal representation, there appears in his view no reason why this provision should not apply in case of section 152 proceedings.

legal representation should be applicable regardless of the fact that the outcome does not affect the rights of the person under interrogation. The need to legal representation is necessitated by the fact that answers given thereat shall be admissible in any subsequent proceedings against the person giving it.

I agree with Meskin on the application of the principles of fair justice in all proceedings, regardless of whether they amount to administrative action or not. As long as there is a possibility of the proceedings affecting any subsequent proceedings relating to the insolvent then there is a need. Effective representation should therefore include both legal representation²⁹⁸ and the right to have any witness cross examined, even if it is only the insolvent himself that will be allowed to conduct the cross examination.

4.5 Section 152(6)

The provisions of section 66²⁹⁹ shall *mutatis mutandis* apply in connection with a person summoned, and with his interrogation under this section and the Master or other officer concerned shall, with reference to a person so summoned or with reference to such interrogation, have the powers and immunity conferred upon an officer mentioned in section 66.

Neither of the writers seems to have any problem regarding the applicability of section 66 of the *Act* to section 152(6).³⁰⁰ It is my opinion that the powers and immunity afforded to the Master may be open to abuse, especially where the insolvent is not entitled to legal representation. It is submitted that the provisions of section 152 of the *Act* are somewhat contradictory and not harmonious. **The fact that the outcome does not affect the person's right does not seem to be in harmony with the consequences of non compliance with the requirements of the Act.** The contradiction comes to the fore when one considers the fact that the *Act* makes it an offence for an insolvent not to comply with the summons and he may be detained in order

²⁹⁸ To clarify and to explain issues that may be complicated for the interrogate.

²⁹⁹ Section 66 of the *Insolvency Act* provides for immunity to a presiding officer who issued the warrant of apprehension or committal to prison against a recalcitrant witness.

³⁰⁰ See Meskin *Insolvency Law* 8-19; Sharrock *Hockly's Insolvency Law* 116; De la Rey *Law of Insolvency* 364; Smith *The Law of Insolvency Law* 216.

for him to comply and yet the interrogations do not affect his rights. Taking into consideration the seriousness of the consequences of non compliance with the summons or proceedings, one might be tempted in advocating for legal representation at such proceedings.

In *Strauss v The Master*³⁰¹ the court had to decide whether the summoning of certain witnesses by the Master under section 152, for the purposes of producing the required information was reviewable. The court had to further answer the question as to whether the applicants were entitled to access the documents relating to the reason behind the Master's decision to summon them (before the meeting of creditors). The court came to the conclusion that the Master's decision to summon the witnesses was not reviewable under section 151 of the *Insolvency Act*. This was so because section 152 provisions are not administrative in nature, they are purely investigative. The applicants further failed to show that the respondent had acted *mala fide* in issuing the summons. Regarding access to information by the applicants, the court held that the applicants were not entitled to such information because the enquiry under section 152 was a private one and that persons who provided the Master with information did so in confidence. On the basis of that argument, the applicants' application could not succeed.

Regarding the fair procedure, the court in *Strauss v The Master*³⁰² held that even though the examinee is entitled to a fair procedure that does not include entitlement to access the information held by the presiding officer. This information entailed the basis upon which the Master had decided to hold the enquiry. The court held that it was only where the enquiry was conducted in a vexatious or oppressive manner or might result in hardship to the examinee, that the court would exercise its powers to intervene. It further held that the applicants had not indicated how refusal by the Master to give them documents relating to the reason behind the holding of the enquiry could negatively affect them.

³⁰¹ *Strauss and others v Master of the High Court of SA and another* 2001 (1) SA 649 (T).

³⁰² *Strauss and others v The Master* 2001 (1) SA 649. This case deals with proceedings under section 152 of the *Insolvency Act* is private and confidential.

Regarding the application of section 32 of the *Constitution*,³⁰³ the court held that the applicants were not covered by this section in so far as none of their rights could be affected by the enquiry. This the court held to be so in that the insolvency proceedings did not amount to administrative action and did not affect the rights of persons who had been summoned to appear and to submit to interrogation. For the reason that they had no rights that needed to be protected or exercised the application was refused.

4.6 Sections 417 and 418 of the Companies Act

Both sections 417 and 418 of the *Companies Act* have the same provisions as section 152 of the *Insolvency Act*. Section 417 empowers the Master or the court to summon any person to appear either before the Master or the court to provide information that the Master or the court might deem necessary. The summons to give information could be served at any time after the winding up order has been issued. The main difference between these sections³⁰⁴ is that any person who may be affected by the insolvency under sections 417 and 418 will have closure. This is because winding up may be completed as soon as the Master has issued the distribution account and that may be less than a ten year period within which the insolvent may be rehabilitated under insolvency law. In the case of section 152 of the *Insolvency Act* the summons may be served at any time as long as the insolvent is not rehabilitated. Another difference is that section 417 makes provision for legal representation to a person summoned to appear before the Master or the court. Regardless of the above mentioned differences, it is proclaimed that section 152, 417 and 418 provide for a **private and confidential enquiry**, unless the Master or the court directs otherwise.

³⁰³ Section 32 provides that every person is entitled to access to information held by the State or any State organ in any sphere of government in so far as that information was required for the exercise or protection of any of their rights.

³⁰⁴ Sections 152 and 417-418.

In *Bernstein v Bester*³⁰⁵ the constitutionality of sections 417 and 418 came under attack. The applicants contended that the above named sections violated a cluster of interrelated rights³⁰⁶ and that they were entitled to constitutional relief. They further contended that sections 417 and 418 mechanism violated section 24 of the *Interim Constitution*. This was said to be so in that the said section permitted an administrative interrogation in violation of the provision of that section. The mentioned provisions were said to be violated in the sense that the mechanism permitted the liquidator (and the creditors of the company in liquidation) to gain an unfair advantage over their adversaries in civil litigation, the advantage of which they would not have enjoyed, but for the liquidation of the company. The applicants further claimed that the mechanism violated the guarantee of equality in terms of section 8 of the *Interim Constitution*. The court came to the conclusion that the mechanism of the sections 417 and 418 **served a reasonable and necessary public purpose**.³⁰⁷ The purpose served by the said mechanism was a legislative one and it could not be achieved in any other way that could encroach less upon an examinee's rights. The court stated that, apart from the provision permitting the derivative information to be used in subsequent proceedings, there is nothing unconstitutional about sections 417 and 418. The court, further held, that it was the purpose of the Legislature to place the company under liquidation (with its specific nature) on an equal footing with its creditors and debtors for the purpose of litigation.

I agree with judge Ackermann's decision in the *Bernstein* case regarding the compulsory methods of obtaining information from certain persons. I cannot think of any method of getting people to voluntarily submit to the interrogation proceedings, other than to compel them through the "draconian method". It is, however my opinion that where a person so summoned fails to comply with the requirements, such a person should be arrested and charged under the

³⁰⁵ *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC)

³⁰⁶ Amongst the rights they claimed were violated, is the right to freedom and security of the person (s 11(1)), the general right to personal privacy (s 13) and the right not to be subjected to seizure of private property or violation of private conversation under the *Interim Constitution*.

³⁰⁷ At paragraph I-J page 753 and paragraph A-C page 754.

insolvency law,³⁰⁸ instead of having him detained continuously without trial. It is my opinion that if such a person is arrested and charged, there will be less constitutional attacks.

4.7 Conclusion

From the discussion above it is apparent that section 152(1) of the *Insolvency Act* holds an element of surprise to an insolvent who may have squandered assets to the disadvantage of creditors. To achieve this purpose, to my mind means that the Master may even demand delivery of a book after rehabilitation. This I say because any property which immediately before the rehabilitation is vested in the trustee and remains vested in him after rehabilitation for the purposes of realisation and distribution. It is my opinion that a demand in terms of subsection (1) should be made before the confirmation of the liquidation and distribution account. The provisions of section 152(2) regard the interrogation as a simple information collection process and not an interrogation as such. The proceedings are held behind closed doors. No notice of the enquiry is given to the public or interested parties. The reason being that some witnesses more readily submit the required information in confidence; as a result the said information should be kept confidential. The period within which the Master may exercise his power to summon commences as from the date of the provisional order of sequestration. To my mind this is a significant view because valuable information may be discovered that may possibly lead to the quicker abolition of the provisional order if circumstances demand. Detention of recalcitrant witnesses is regarded as an indispensable tool to compel compliance.

Furthermore, persons subpoenaed are not entitled to the specific information that induced the Master to hold the enquiry because the findings of the Master do not affect that person's right. It is simply a fact finding mission. Regarding the issue of an oath, it is my opinion that the *Insolvency Act* should provide for the admission of an oath sanctioned by religion or any other belief so as to

³⁰⁸ See for example sections 132-145.

accommodate both Christians and non Christians. This will ensure that there are no constitutional challenges to this provision. Legal representation of an insolvent is not provided for either. Legal representation is however provided for in case of sections 417 and 418 of the *Companies Act* which have the same provisions as section 152. It is submitted that no justification is found for this differentiation either in common or judicial precedent. Effective representation should therefore include both legal representation and the right to have any witness cross examined, even if it is only the insolvent himself that will be allowed to conduct the cross examination.

Furthermore, regarding the method of obtaining relevant information, I cannot think of any method of getting people to voluntarily submit to the interrogation proceedings, other than to compel them through the "draconian method". It is, however my opinion that where a person so summoned fails to comply with the requirements, such a person should be arrested and charged under the insolvency law, instead of having him detained continuously without trial. It is my opinion that if such a person is arrested and charged, there will be less constitutional attacks.

It is, consequently, important to investigate how section 152 is interpreted by the Constitutional Court. How it deals with sections 417 and 418 of the *Companies Act* (in so far as they correspond with section 152) will also be investigated. The constitutional attacks based on these sections or its subsections will be discussed as well. This will be done in the next chapter.

Chapter 5 Constitutional Court cases relating to section 152

5 Introduction

This chapter will concentrate on the judicature relating to section 152 of the *Insolvency Act*, not ignoring sections 417 and 418 of the *Companies Act* in so far as they relate to section 152.³⁰⁹ Before discussing a few Constitutional Court cases on this subject, the reader's attention will first be drawn to few earlier cases on this point.

5.1 *Podlas v Cohen*³¹⁰

In this case the court was faced with the task of deciding whether the Master's decision to issue summons under section 152 was reviewable. After analysing the applicants' argument, the court came to the conclusion³¹¹ that the notices under section 152 are simply subpoenas. A person who is subpoenaed to give evidence before any legally constituted tribunal empowered to subpoena witnesses is, generally speaking, obliged to obey it. This seems to be so because the said person is called upon to perform what may be described as **a public duty**. Personal freedom therefore becomes subordinate to the public interest. I agree. This view was later emphasised by judge Ackermann in the *Ferreira*³¹² case and it indicates that it is in the interest of justice to protect the rights of the public at large. These viewpoint concords with the *Constitution*, that the right to freedom is limited to that extent because it is reasonable and justifiable to do so.³¹³ The court further held³¹⁴ that there would be utter chaos if every official authorised to issue such a notice under section 152 were required to hear the person who is to be summoned before actually issuing

³⁰⁹ Section 152 of the *Insolvency Act* provides for private interrogation by the Master of any person that might provide information that the Master may deem necessary in the insolvent estate.

³¹⁰ *Podlas v Cohen and Bryden* 1994 (4) SA 662, 675 D-I (T).

³¹¹ At 675D-G/H.

³¹² See paragraph 5.4 below.

³¹³ Section 33 (1) of the *Interim Constitution*.

³¹⁴ At 675D-G/H.

the summons. It would be grossly unreasonable to demand this. On the basis of the above, the court held that no written reasons need to be furnished to any one to justify the decision to issue the notice or summons. The court further held³¹⁵ that the *Interim Constitution* did not oblige the Master to hear both sides before ordering an interrogation under section 152 because the order did not infringe the applicant's constitutional right to **administrative justice**.

5.2 Jeeva v Receiver of Revenue Port Elizabeth³¹⁶

In a twisting contrast to the above, the court in the case of *Jeeva* was faced with a task of deciding whether the applicants (who were officers of a company in liquidation) had a right of access to information held by the Master. The required information related to the reason behind the Master's decision to subpoena them to appear before the Master to provide information as required. The applicants relied specifically on sections 8 and 24 of the *Interim Constitution*.³¹⁷ The court as per judge Jones came to the conclusion³¹⁸ that the applicants were entitled to all the information sought by them which is not the subject of legal professional privilege, or covered by the secrecy provisions of the tax legislation. The court stated clearly³¹⁹ that a commission of inquiry authorised by the Master of the court and held under sections 417 and 418 is administrative in nature and has a material bearing upon the rights and interest of the applicants. Furthermore, the inquiry was said to be quasi-judicial in nature and consequent to that the applicants were entitled to administrative action which is lawful, justifiable and both substantially and procedurally fair. The inquiry was said to be quasi-judicial in that the applicants were compelled to submit to interrogation and therefore

³¹⁵ At 674F and 675D-G.

³¹⁶ *Jeeva and others v Receiver of Revenue, Port Elizabeth, and others* 1995 (2) SA 433 (SECLD).

³¹⁷ These sections respectively provided as follows: 8 (1) provided for equality before the law and to equal protection of the law. Section 24 provided for an administrative action that was lawful where any of his rights or interests were threatened, procedurally fair administrative action where any of his rights or legitimate expectations is affected or threatened and administrative action which is justifiable in relation to the reason given for it where any of his rights is affected or threatened.

³¹⁸ At 444E/F.

³¹⁹ At 443I-444B.

entitled to prepare for the interrogation. The applicants were further held to be entitled to equality before the law, which includes amongst other things equal access to the information held by the interrogator, especially in that the interrogator is directly or indirectly an organ of state.

5.3 *Lynn v Krueger*³²⁰

This case was heard before the Natal Provincial Division of the Supreme Court. The applicants in this case were the liquidators of a company unable to pay its debts. They urgently sought an order compelling the first respondent (an officer of the company) to answer questions put to him at an enquiry in terms of sections 417 and 418.³²¹ The second respondent in this case was the Master of the Supreme Court.

The first respondent brought a counter application for an interim interdict prohibiting his (respondent's) further interrogation under sections 417 and 418 and a referral to the *Constitutional Court*. The interdict was intended to stay or postpone the interrogation process until the Constitutional Court decided on the constitutionality of the said sections in the light of section 25(2)(c) of the *Interim Constitution*. Before the court could grant an interdict it had to weigh the prejudice that the respondent (applicant in the initial application) would suffer³²² in case the court granted the interdict and the *Constitutional Court* ultimately declining to strike down the provisions of sections 417 and 418.

The court proceeded to examine whether a case had been made out for interim relief of the type sought by first respondent. Judge Hurt was of the opinion that the chances of the Constitutional Court ruling on the

³²⁰ *Lynn NO and Another v Kreuger and Others* 1995 (2) SA 940 (N)

³²¹ These sections are the equivalent of section 152 of the *Insolvency Act*. They empower the Master or the court to summon and examine witnesses and officers of the company under liquidation regarding the affairs of the company. It calls for a **private interrogation** by the Master, any officer of the court (section 152(4) of the *Insolvency Act* provides that the trustee can also interrogate the witness) and any person who can provide security. Answers given at the interrogation proceedings could be used as evidence against the person giving it in subsequent proceedings.

³²² Against the prejudice that the applicant (the respondent in the initial application) would suffer in case the interdict is not granted.

unconstitutionality of sections 417 and 418 interrogation proceedings were remote. **The judge held that he could not think of any other procedure which would enable liquidators to effectively fulfil their tasks.**³²³ I agree with this viewpoint. I cannot think of any other way of obtaining information from officers or directors of a company that went insolvent other than to summon them before the Master or person representing him, for an interrogation. Dealing with a public institution implies that such a person shall be accountable to the public and the question of privacy is irrelevant. It is reasonably expected of an officer of a company in liquidation to provide information about the company's funds and dealings because the company as a juristic person is incapable of providing information about itself. Private finances is also involved, shareholders needs answers regarding the whereabouts of their investments.

Regarding the obligation to answer incriminatory questions which could subsequently be used in evidence against the person giving it, one has to first answer the question whether there is a general right to remain silent. In *casu*³²⁴ the court held that there is no section which gives a person a general and absolute right to remain silent. Regarding the use of incriminating evidence, the court held the view that the fact that answers given at the interrogation proceedings could be used in evidence against the person giving it, could give rise to constitutional attacks.³²⁵ The court stated that the respondent stood a reasonable chance of success. The court held that the right specifically violated by the admission of evidence at later proceedings was section 25(2)(c) of the *Interim Constitution*.³²⁶ It further held that in its view the provision relating to the admissibility of answers given at an interrogation under section 417 in subsequent criminal proceedings against the witness, can, for the purpose of avoiding irreparable prejudice to the

³²³ At 944 H/I-J.

³²⁴ See *Lynn NO and Another v Kreuger and Others* 1995 (2) SA (N) 940-944.

³²⁵ At 944J-945A/B

³²⁶ This section provides **protection** to the detained, arrested and accused persons. Subsection (2)(c) stated that the above mentioned persons are not be compelled to make a confession or admission which could be used in evidence against him or her in criminal proceedings. Although the person interrogated is not a detained, arrested and accused person, he might subsequently be that when criminal proceedings are brought against him. See the discussion hereunder.

witness, be severed from the remaining provisions in the section. This would certainly minimise unfairness in criminal proceedings that may be instituted against the interrogatee or insolvent. On the basis of this court's findings, **the first respondent's remedy lies in the severance of the presumed unconstitutional provision and not in the suspension of the applicability of sections 417 and 418.** In relation to incriminatory evidence against an examinee, the court highlighted the fact that proceedings under sections 417 and 418 were not primarily concerned with the prosecution of offenders but aimed at assisting officers of the court³²⁷ in the performance of their duty to creditors of the company in liquidation.³²⁸ This implies that justice had to be done **regardless of the fact that some rights might be infringed.** Incidental to this implication is a weighing of interests.

Thereafter the court had to consider whether the respondent fell within the category of persons referred to in section 25 of the *Interim Constitution*.³²⁹ The court came to the conclusion³³⁰ that even if the respondent might consequently become a person falling within the category defined in section 25 of the *Interim Constitution* it was unlikely that the Constitutional Court would interfere with any of the provisions of section 417(2) because that portion served a **necessary public purpose.** His remedy therefore was with the court that would subsequently preside over a criminal case against him. He may ask the court to exclude the incriminatory evidence obtained from the interrogation proceedings. It is true that the person under enquiry might consequently fall within the said category. But, in my opinion, it should not be because of his testimony used against him at subsequent proceedings. I therefore agree with the point that the interrogatee's remedy lies with the subsequent court.

³²⁷ In this instance the Master is not necessarily a judicial officer. An officer appointed by the court is a judicial officer. See Sharrock *Hockly's Insolvency Law* 8.

³²⁸ The interpretation of this court's findings implies that the Master has a duty to see to it that the creditors of a company are not prejudiced in the distribution of the insolvent company's assets. This implies that the Master has a fiduciary duty towards the creditors, and he must ensure that all the insolvent assets are brought back into the insolvent estate for execution.

³²⁹ Namely a person arrested, detained or accused for committing an offence.

³³⁰ At 944C-D/F/J and 945A/B.

In its deliberation the court had had an opportunity to strike a proper balance between the rights of the examinee respondent and those of the liquidators. To my mind the court did not succeed. In its findings it held that, although the first respondent might suffer irreparable prejudice if his answers were to be used against him in criminal proceedings, the court acknowledged that his application to set aside the proceedings was too premature. It held that his immunity³³¹ **lies with the court** to make a directive to the effect that such answers should not be disclosed to any person not immediately involved in that enquiry without the prior leave of the court.³³² It is true that the only people immediately involved are the liquidator(s) and creditors and they should hear the examinee's answers.³³³ If the examinee acted in good faith, there is no need for him to hide "behind his thumb". If he, however, acted in bad faith he should be accountable for his actions. In my mind a person not directly involved in the inquiry would be the prosecution in the criminal court. If that is the case, there would be no constitutional attack on the interrogation proceedings regarding incriminatory questions and answers given thereat. But the implication of this decision is that the insolvent or interrogatee should always first go to court to get a directive. Only at the stage when the examinee is criminally accused, would the information then be disqualified. This is a cumbersome process. It is my opinion that the courts should clarify this issue in simple terms. The incriminatory information may not be made available to the liquidator(s) or the creditor(s) for the purpose of **criminally accusing** the examinee. But the liquidator(s) and creditor(s) (such as banks, financial institutions and other companies with whom the examinee's company did business with) should know what happened to the funds and assets of the company.

Regarding the weighing of the examinee and the liquidators' rights, the court³³⁴ acknowledged that the damage would be much extensive if the applicants (liquidators) were to be denied the opportunity to interrogate the

³³¹ His right against self-incrimination.

³³² At 945C-D/E.

³³³ Only if "would be cheaters" in the business industry know that they will be held accountable where the company funds and assets are concerned, will business efficacy and good faith be promoted in South Africa.

³³⁴ At 945E-F.

examinee. The damage to the applicants was so obvious in that the liquidation proceedings would be hampered and that might not be just. As a consequence of the court's findings, the examinee's rights had to be sacrificed in the process. This, however, the court emphasised³³⁵ did not entail that the examinee was left without any remedy. He could for instance at later stage claim privilege to the incriminatory evidence on the basis of the fact that it was unconstitutional to use his answers as evidence in criminal proceedings. In my opinion this remedy is sufficient. As a result of the court's findings, the respondent was compelled to answer any questions put to him at the resumed enquiry on condition that the record of his testimony shall not be open to the inspection of any person other than the applicants, the first, second and the third respondents without the leave of the court. This, to my mind is not so good for the respondent. However, one should be consoled by the availability of the remedy to the examinee (the fact that the criminal court will exercise its discretion as to the admissibility of derivative evidence).

From the court's findings it is apparent that an examinee is at the mercy of the court as to whether the incriminatory evidence is used or not. It is my opinion that the right against self incrimination is at this stage irrelevant and the rights of the creditors are paramount. It is clear that the provisions of sections 417 and 418 are there to protect the interests of creditors and that alone. An examinee should find his remedy elsewhere, for example that his testimony not be used in criminal proceedings other than proceedings relating to perjury. It is my opinion that there should be a guideline within these sections, dealing specifically with incriminatory evidence, and no need to ask for a directive from the court.

5.4 *Ferreira v Levin*³³⁶

The applicants were the officers of a company under liquidation. They had sought a temporary interdict in the provincial division of the High Court to prevent the respondents from holding inquiries under sections 417 and 418 of

³³⁵ At 945C-D/E.

³³⁶ *Ferreira v Levin NO and others* 1996 (1) SA 948 (CC); 1996 (4) BCLR 441 (CC).

the *Companies Act*. The interdict specifically sought to enforce the examinees's right against self-incrimination accruing to every accused person. The applicants had alleged that they will be prejudiced if information derived from interrogation proceedings were to be admissible in subsequent criminal proceedings. The court *a quo* dismissed the application, but granted the applicants leave to appeal to the Supreme Court of Appeal. Certain constitutional issues were referred to the Constitutional Court in terms of section 102(1) of the *Interim Constitution*. The Constitutional Court had to decide on the validity of section 417(2)(b) as this was the basis for the application. The applicants alleged that section 417(2) of the *Companies Act* was unconstitutional to the extent that it required a person examined under the said section to answer questions which might tend to incriminate him. The section further provided that answers given at the interrogation proceedings may subsequently be used in evidence against the person giving evidence. On the basis of the above argument, they (applicants) contended that their rights under section 25(3) of the *Interim Constitution* were infringed.³³⁷

On the basis of the above contentions, the court had to decide whether an examinee in liquidation interrogations is an accused person in terms of section 25(3). The court came to the conclusion³³⁸ that an examinee is not such a person. I agree. It further held that whether an examinee (applicant) will ever become an accused person was a matter of pure speculation.³³⁹ Should it happen that they become accused persons that does not necessarily entail that their rights against self incrimination are automatically infringed. Their rights could only be infringed where self-incriminating evidence given by applicants under the section 417 enquiry is tendered and admitted as evidence against them at the subsequent trial.³⁴⁰ Consequently the court held that the only rights infringed by sections 417(2)(b) was the examinee's rights under section 11(1)³⁴¹ of the *Interim Constitution*. Section

³³⁷ Section 25(3) provides that every **accused** person shall have the **right to a fair trial**. See section 25(3)(a-i).

³³⁸ At 989F-G.

³³⁹ See also my remark at paragraph 5.3 with regard to *Lynn v Kreuger*.

³⁴⁰ See also my remark at paragraph 5.3 with regard to *Lynn v Kreuger*.

³⁴¹ The difference between section 11 and 25 is that the former provides for a residual right to a fair trial and the latter provide for the fair trial right. However, both aimed at the protection

11(1) of that *Interim Constitution* relates to the freedom right, the security of the person and the right not to incriminate oneself.³⁴² The court further held that the only acceptable and justifiable limitation of the examinees' section 11(1) rights could be allowed under section 33 of the *Interim Constitution*.³⁴³

Consequently, deliberating on the purpose of sections 417 and 418 of the *Companies Act*, the court stated³⁴⁴ that the main **purpose** of these provisions was undoubtedly to assist liquidators in discharging their duties. In the performance of their duties, liquidators have the duty with regard to the handling of an insolvent company estate, to determine the most advantageous course to adopt to the benefit of creditors who have a right to be paid. This, the court held, could only be achieved where liquidators could be able to ascertain the assets and liabilities of the company. Furthermore, the court stated that liquidators should be in a position to recover debts due to the insolvent estate and pay for liabilities according to law. These should be done in a way which will best serve the interest of the company and its creditors.

In delivering his judgement, judge Ackermann emphasised³⁴⁵ the importance of the section 417 and 418 proceedings in companies under liquidation. He stated that the proceedings were necessary, considering the fact that very often companies go bankrupt at the hands of corrupt directors and officers managing the company. He stated that such persons are the only eyes, ears and brains of the company. The company as a juristic person cannot be expected to function without these officers and they are therefore expected to have knowledge of the company's dealings prior to liquidation. Emphasising on their (directors and officers of the company) reluctance to assist liquidators in the discharge of their duties, he highlighted that unless they are compelled

of the freedom right and the rights of the detained or accused persons.

³⁴² Section 11(1) of the *Interim Constitution* has the same provisions as section 12(1) of the *Constitution* which provides that everyone has the right to freedom and security of the person. A detailed discussion of section 12 will be done in chapter 6 of this research.

³⁴³ Section 33 of the *Interim Constitution* related to the limitation of fundamental rights where it was reasonable and justifiable in an open and democratic society.

³⁴⁴ At 989H-J.

³⁴⁵ At 989H-J. See also 991D-F.

to come forward, they might not voluntarily provide the required information. He stated that even outsiders, for reasons of their own, might be reluctant to assist the liquidators voluntarily. The only solution to this problem, he emphasised, was to compel such officers to assist the liquidators in executing their duties. This, he held, was necessary in the interest of creditors and the public at large.

Comparing section 417(2)(b) of the *Companies Act* to section 65(2)(a) of the *Insolvency Act*, judge Ackermann questioned the differences between these provisions. He came to the conclusion³⁴⁶ that there might be legitimate reasons for distinguishing between those provisions, but he could not find any proper justification for providing direct immunity³⁴⁷ in respect of the latter but not for the former.³⁴⁸ In emphasising the need for consistency in these two provisions, he stated that in countries like Canada, the direct-use immunity had been effected and thus leading to less constitutional attacks. On the basis of his deliberation, he therefore held that the provisions of section 417(2) which infringe the examinees' section 11(1) right could not be justified under section 33(1) of the *Interim Constitution*. Consequently, the court declared³⁴⁹ invalid the section only to the extent that incriminating evidence obtained under section 417 proceedings **could be used against the person giving it, in subsequent criminal proceedings**. Finally, the court stated that an examinee could not escape answering questions lawfully put under section 417 of the *Companies Act*. This, it was held, should be so regardless of its incriminatory nature. Although the majority of the court agreed with judge Ackermann that section 417(2)(b) of the *Companies Act* was unconstitutional and agreed with the order proposed by him, they disagreed with his broad and generous interpretation of section 11(1) of the *Interim Constitution*. The basis of the disagreement was the fact that he (Ackermann) was of the view that the section should be divided into two parts. The first part would relate to the

³⁴⁶ At 990H.

³⁴⁷ Direct immunity in the sense that derivative evidence be excluded in subsequent criminal proceedings except in case of perjury against the examinee under 417 of the *Companies Act* as is the case under section 65 of the *Insolvency Act*.

³⁴⁸ See the argument of Smith in chapter four of this research at paragraph 4.3 regarding the possible reasons for distinguishing between these two types of insolvency proceedings.

³⁴⁹ At 991I/J.

protection of a right to freedom and the second would relate to a separate right to security of the person. The majority of the court was of the view that, the core purpose of section 11(1) of the *Interim Constitution* was for the protection of the physical integrity of the individual. The secondary purpose of the subsection was said to protect an individual's right to physical liberty and a right to physical security. I agree with the majority of the court. Judge Ackermann's broad and generous interpretation of section 11(1) of the *Interim Constitution* is over intricate. It is my opinion that the definition is over-elaborative. The section should be interpreted in a simple and clear manner and the main objective must be to protect an individual's physical deprivation of freedom arbitrarily. I further agree with the ruling of the court on this point. There could be no other way of obtaining information from an examinee, except compelling him to divulge even incriminating evidence. I further submit that the legislature should make applicable *mutatis mutandis* the provisions of direct-use immunity as under section 65(2a)(a) of the *Insolvency Act* above. There is however a difference. The difference could lie in the fact that under section 417 of the *Companies Act* creditors, shareholders, public and investor's funds are involved and this call for stricter provisions. In private insolvency only the insolvent's and his creditor's funds might be at stake. In the case of companies the officers and directors could hide under the corporate veil and get away with "murder". But, an examinee should in any case have a direct-use immunity as under section 65(2A).

5.5 Wessels v Van Tonder³⁵⁰

The applicant was summoned to appear before the Master in terms of section 152 of the *Insolvency Act*. At a later trial³⁵¹ he requested that information obtained at the enquiry be scratched. The basis of his argument was that the evidence given by him at the insolvency interrogation should be regarded as privileged. The court had to decide on the applicability and interpretation of the term **privilege** in relation to evidence given at the insolvency interrogation

³⁵⁰ *Wessels NO v Van Tonder en 'n Ander* 1997 (1) SA 616 (O).

³⁵¹ In subsequent civil proceedings against him.

under both sections 65 and 152 of the *Insolvency Act*. The court defines self-incrimination as

die verstrekking van inligting of die aflé van getuienis deur 'n persoon wat opsy skuld aan 'n misdaaddui.

In its deliberation the court held³⁵² that, although the legal principles relating to privilege against self-incrimination apply in insolvency interrogations (as they apply in a court of law), that does not prohibit a witness from answering questions which might be prejudicial in private law matter (thus a civil case). In this case the applicant failed to rely on the section 11(1)³⁵³ residual right not to be compelled to incriminate himself or section 25(3). Nevertheless, had he relied on those sections he would still be expected divulge incriminatory evidence. But the said evidence could not be used in criminal proceedings against him as it is privileged. The court went on and cited *R v Camane and Others*³⁵⁴ where it was said:

Now, it is established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial. The principle comes to us through the English law, and its roots go far back in history.

In this case the applicant failed to rely on the section 11(1)³⁵⁵ residual right not to be compelled to incriminate himself or section 25(3). Nevertheless, had he relied on that section he would still be expected to divulge incriminatory evidence, but the said evidence could not be used in criminal proceedings against him as it is privileged.

When put differently, this court's finding implies that the privilege against self-incrimination provides no basis for the exclusion of evidence given in sections 65 and 152 interrogations in subsequent **civil proceedings**. This interpretation of the privilege entails that where an examinee makes an admission under section 152, the trustee of the insolvent estate or any other

³⁵² At 620I-621A/B.

³⁵³ Of the *Interim Constitution*.

³⁵⁴ *R v Camane and Others* 1925 AD 570 at 575.

³⁵⁵ *Interim Constitution*. For a discussion on section 11(1) see my comments above in the case of *Ferreira v Levin*.

person may use such admissions in subsequent civil proceedings against the witness. The fact that the admissions were made in pain of prosecution does not prevent such admission from being used in civil proceedings.³⁵⁶

5.6 Roux v Die Meester³⁵⁷

The applicant's estate was sequestrated and he was subsequently subpoenaed in terms of section 152 of the *Insolvency Act*. During the interrogation proceedings the Master (first respondent) ordered that the applicant be precluded from the proceedings whilst a certain witness was testifying. In response to that, the applicant brought an application in terms of section 151 of the *Insolvency Act* to set aside the Master's ruling. The applicant subsequently expanded his application by including amongst other things, the right to attend the interrogation of all witnesses and to cross examine them. In addition to the above mentioned prayers he requested an order granting him the right to legal representation.

Due to procedural incorrectness of the extended application, the court treated the original application in terms of section 151 of the *Act* and the further prayers as if the application were one for a simple declaratory order.

The applicant had based his claim on the fact that his rights under both sections 23 and 24 of the *Interim Constitution* were violated.³⁵⁸ In terms of section 23, a person has a right of access to any information held by the state or any state organ, if such information was required to exercise or protect one's rights. Section 24 of the said act provided that every person has a right to procedurally fair administrative action where a person's right or legitimate expectation were affected or threatened. The applicant therefore alleged that both sections 23 and 24 were applicable to insolvency proceedings under section 152 of the *Act*.

³⁵⁶ See also 621A/B-B/C.

³⁵⁷ *Roux v Die Meester en 'n Aander* 1997 (1) SA 815 (T).

³⁵⁸ First of all the court commented that the applicant would not have been entitled to the order prayed for prior to the commencement of the *Interim Constitution*.

In its deliberation the court came to the conclusion that,³⁵⁹ in so far as section 23 is concerned, the applicant failed to show that his rights were violated. Although the court did not expressly clarify when a person's right will be violated, it is apparent that the rights of a person will be violated where he is prevented from obtaining information from the state or its organ where such information was required for the exercise or protection of his legitimate rights. Since section 23 has vertical application, it has no application to the Master as he is not an officer of the court. His findings cannot affect a person's rights. This is so because he cannot issue any orders or pass judgement.³⁶⁰ It was further held that section 24 was not applicable to the applicant either, **in so far as the enquiry in terms of section 152 of the *Insolvency Act* was purely investigative in nature.** This was so in that its findings affected no person's rights.

Having failed to succeed on the basis of both sections 23 and 24, the applicant subsequently relied on section 152(5) as amended by the *Insolvency Amendment Act*.³⁶¹ The provisions of the said *Act* made section 65(2) and (2A) applicable to section 152 interrogations. According to the applicant section 65(2A) obliged the presiding officer in certain circumstances to order that the inquiry be held in private. Accordingly, the presiding officer could or is empowered to actually order the proceedings to be public instead of them being held in private, unless where specifically directed to hold the *in camera* proceedings. Upon the interpretation of this statement, one is attempted to accept that the discretion of the presiding officer may be exercised in two ways, either to hold the proceedings *in camera* or in open doors. This is not correct. The presiding officer may not exercise his discretion where the act specifically directs him to call for *in camera* proceedings. He is obliged to comply with the provision of the *Insolvency Act* and his discretion is irrelevant.

³⁵⁹ At paragraph G-H page 818

³⁶⁰ See Sharrock *Hockly's Insolvency Law* 8.

³⁶¹ *Act* 89 of 1989.

In answering to the amendment of section 152 the court held that section 65(2) and (2A)³⁶² applied only to privilege and the giving of incriminating evidence during interrogation. The giving of incriminating evidence during interrogations **did not affect the format of the interrogations as such.**³⁶³ It also does not imply that interrogations in other circumstances to be held in public.³⁶⁴ In response to that, the applicant then relied on the *Ferreira v Levin*³⁶⁵ where it was held that the applicants were not obliged to answer questions in terms of sections 417 and 418 of the *Companies Act*, which would tend to criminally incriminate them or render them civil liable. The court held that the applicant's invocation of the *Ferreira* case was inappropriate in the circumstances. Responding to the applicant's submission, the court had an opportunity to deliberate on the difference between the *Companies Act* and the *Insolvency Act* on this point. It came to the conclusion that whereas section 417(2)(b) of the *Companies Act* provided that a person may be required to answer any question put to him during a section 417 examination regardless of the fact that the answer may tend to incriminate him, any answer may be used in evidence against him.³⁶⁶ The *Insolvency Act* contained no such provision. Instead it provided for direct-use immunity under section 65(2) and (2A). The court further observed that section 65(2A)(b) forbade the use of incriminating evidence in criminal proceedings except criminal proceedings relating to perjury, *etcetera*. The applicant's application was accordingly dismissed.

I agree with the provisions of section 65(2A), that is, obliging the presiding officer to hold *in camera* proceedings where it appears that the examinee might incriminate himself. This should also be the case where certain witnesses submit information in confidence and they would want such

³⁶² These sections requires the presiding officer in given circumstances to order that the proceedings be heard *in camera*.

³⁶³ In other words, regardless of the section 65(2) and (2A) the examinee has to give evidence as incriminating as it is and then he can claim that such evidence not be used in subsequent criminal proceedings against him. See paragraph B-C at page 819.

³⁶⁴ For the character of private interrogation, see the discussion of section 152 at paragraph 4.3 above.

³⁶⁵ *Ferreira v Levin* 1995 (2) SA 813 (W). This case went to the Constitutional Court where it was decided that examinee is obliged to answer all even incriminating questions. However, those could not be used against him at criminal proceedings, except for perjury *etc.*

³⁶⁶ At paragraph C-D page 819.

information to be held in confidence. Other circumstances requiring in *camera* proceedings should be where the examinee's private life is involved and where the examinee is in competition with other business and divulging information publicly might result in risking his trade secrets. One should, however, not lose sight of the fact that in other cases circumstances may exist requiring the need for a public proceeding. This would send a clear message to would be professional squanderers that their crooked ways will be brought to the public's attention and they are therefore expected to be accountable to the public for their actions (especially where public funds are concerned). Providing information at the meeting of creditors serves a public duty and the purpose of the interrogation is to obtain sufficient material information that will assist in the fair distribution of the assets of the insolvent estate. Nevertheless, he (the examinee) is expected to provide information required for a fair and equitable distribution of the insolvent estate to the benefit of the creditors.

As for access to information by the applicant my view is that, even if he is not allowed access to the information he requires, he will still be in a position to provide the information he has for the purpose of this private enquiry by the Master. He should always be honest and open with regard to his actions and dealings relating to the insolvent company's estate. I therefore, do not see how access to witness's information would assist him in anyway, unless he wants to evade some questions or be dishonest.

5.7 *Strauss v The Master*³⁶⁷

The applicants were heirs in the deceased insolvent estate. They were subpoenaed to appear before the Master in terms of section 152 of the *Insolvency Act* to provide information relating to the insolvent (deceased) estate. On their appearance, they requested access to the information relating to the reason behind the subpoena. Their request was turned down by the presiding officer (assistant Master). Subsequently they made an application

³⁶⁷ *Strauss and Others v The Master and Others* NNO 2001 (1) SA 649 (T).

seeking to review the presiding officer's decision in terms of section 151 of the *Insolvency Act*. The purpose of the action was to enforce their rights in terms of section 32 of the *Constitution*.³⁶⁸

Regarding section 151, the first question that falls to be decided is whether or not the applicant's contentions³⁶⁹ are correct. It is clear from the wording of section 152(2) of the *Insolvency Act*³⁷⁰ that the only jurisdictional fact that must exist before the Master can issue a notice in terms thereof is the following, He must be of the opinion that the person whom he intends to summon to appear for interrogation will be able to give information which he considers desirable to obtain **concerning the insolvent or his estate or the administration** thereof or concerning any claim or demand which has been made against the estate. The **subjective opinion** of the Master can therefore rightly be described as the **foundation** for the operation of the section.³⁷¹ The court³⁷² also pointed out that the powers of the court of law to review conduct which has as its foundation the **subjective opinion** of a functionary or official, are very limited. In supporting this argument the court cited the case of *South African Defence and AID Fund v Minister of Justice*.³⁷³ In this case judge Corbett stated that the powers of the court to review the conduct of an official who exercises discretionary powers in terms of statutory provisions may fall into one of two **broad categories**. It may consist of a fact or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a court of law. If, however, the court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the

³⁶⁸ Section 32 provides that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.

³⁶⁹ Seeking to review the presiding officer's decision not to give the required information in terms of section 151 of the *Insolvency Act*.

³⁷⁰ See paragraph 4.2 above.

³⁷¹ See also *Cools v The Master and Others* 1998 (4) SA 212 (C) 225C-D.

³⁷² At 656D/E-G.

³⁷³ *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) 34 par 35D.

power.³⁷⁴ On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power (the officer) the sole and exclusive function of determining whether in its opinion the pre-requisite fact or state of affairs existed prior to the existence of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact or state of affairs existed in an objective sense but whether, subjectively speaking the repository of the power (officer) had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a court of law. The court can only interfere and declare the exercise of the power invalid on the ground of non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter.³⁷⁵ The court concluded³⁷⁶ that, the applicants have not made out a case against the first respondent on the basis of the fact that he (respondent) acted *mala fide*. On the basis of this court's findings, the applicant's application could not succeed. The court held that there is another reason why the applicant's application could not succeed. The applicants contended that the first respondent has **made an order** when he approved of the application for an enquiry in terms of section 152 of the Act. The court found that the decision of the Master to summon the applicants to appear before him was not susceptible to review. This was due to the fact that such decision lacked three attributes, firstly, because **it was not final in effect and was susceptible to alterations by the court** (where *mala fide* was present) of first instance. Secondly, they were **not definitive of the rights of the parties**, for example, because they granted definite and distinct relief. Thirdly, **they had no effect of disposing at least a substantial portion of the relief claimed**. In this case there was also no definite resolution of a dispute by the first respondent when he concluded that an enquiry should be held in terms of

³⁷⁴ See *Kellermann v Minister of Interior* 1945 TPD 179.

³⁷⁵ See also *Radebe v Minister of Law and Order and Another* 1987 (1) SA 586 (W) where judge Goldstone made it clear that in those cases where the court is confronted with statutory provisions which confer the power on an official to decide himself whether or not a jurisdictional fact for the exercise of his discretionary powers exists the power of the court are limited to an enquiry whether or not the official had acted *bona fide* or *mala fide*.

³⁷⁶ At 656D/E-G.

section 152 of the *Act*. His decision cannot therefore be taken on review in terms of section 151. In terms of section 151 a decision, ruling or order of the Master can only be taken on review to a court by any **person aggrieved** thereby. The concept **person aggrieved** has been discussed in a number of cases in the past. In *De Hart v Klopper and Botha*³⁷⁷ the court held³⁷⁸ that, any **person aggrieved** by an **order** of the court is entitled to appeal. The word **aggrieved person**, was said not to mean a man who is disappointed of a benefit which he might have received if some other order had been made. The court held that a person aggrieved must be a man who has suffered a legal grievance; a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something.³⁷⁹ It was argued on behalf of the respondent that an aggrieved person is someone who has a legal grievance in the sense that his legal rights have been invaded or infringed. The court further pointed out³⁸⁰ that the Master's decision to hold an enquiry and to issue the notices to persons who might be called to testify did not prejudicially affect the witnesses' liberty or property or any other existing right that would require the Master to apply the *audi alteram partem* rule. These notices were said to be simply subpoenas. Regarding the subpoenas, the court held that a person who is subpoenaed to give evidence before any legally constituted tribunal empowered to subpoena witnesses is, generally speaking, obliged to obey it. This is so because a person is called upon to perform what may be described as a public duty.³⁸¹ Personal freedom, therefore, becomes subordinate to the public interest. In the words of the *Constitution*, the right to freedom is limited to that extent because it is reasonable and justifiable to do so.³⁸²

³⁷⁷ *De Hart NO v Klopper and Botha NNO and Others* 1969 (2) SA 91 (T).

³⁷⁸ At 659G/H-H, 660G and 661E-F.

³⁷⁹ See also *Friedman's Trustee v Katzeff* 1924 WLD 298 304-5 for the interpretation of the term aggrieved person.

³⁸⁰ At 661B/C-D/E/F.

³⁸¹ See *Van Aswegen v Lombard* 1965 (3) SA 613 (A) 623E.

³⁸² Section 33(1) of the *Interim Constitution* and 36 of the *Constitution*.

Regarding section 152 the court held³⁸³ that the enquiry in terms of section 152 of the *Insolvency Act* is purely investigative. The presiding officer makes no findings that can **detrimentally affect a person's rights. Nor does he determine any rights.** He simply records the evidence and regulated the proceedings. Prejudicial consequences such as imprisonment visit those who refuse to reply to relevant questions or commit perjury. The court cited the reasoning of judge Spoelstra in *Podlas v Cohen*³⁸⁴ where he found that no rights of the applicants have been infringed by the decision of the Master to summon them to appear at the enquiry and to be interrogated.³⁸⁵

The court proceeded³⁸⁶ to consider the further contentions of the applicants, that their right to fair procedure was infringed because they were denied access to the written application. The applicants had relied on the *dicta* of judge Harms, who delivered the judgement of the court in *Receiver of Revenue v Jeeva*³⁸⁷ and *Klerck v Jeeva*.³⁸⁸ In this case the court held that the applicants were entitled to all the information sought by them which was not the subject of legal professional privilege and that they had a right not to be subjected to oppressive or vexatious interrogation. Responding to the contentions of the applicants and relying on *Jeeva v Receiver of Revenue*, the court emphasised that the proceedings under both sections 417 and 418 of the *Companies Act* as well as an enquiry under section 152 of the *Insolvency Act* have to be conducted in a fair manner.³⁸⁹ However, fairness did not imply that the applicants were entitled to access to the written application³⁹⁰ that was put before the Master. The court stated that the applicants have sufficient remedies at their disposal in the event of the proceedings under section 152 being conducted in an oppressive or unfair manner or even if the provisions of section 152 have been utilised in such a manner. In *Bernstein v Bester*³⁹¹ the

383 At 661E.

384 *Podlas v Cohen and Bryden* 1994 (4) SA 662 (T) 675 D-I.

385 See also *Roux v Die Meester en 'n Ander* 1997 (1) SA 815 (T) at 824A-C.

386 At 661H-I, 662D-I, 663B.

387 *Receiver of Revenue, Port Elizabeth v Jeeva and Others* 1995 (2) SA 433 (SECD).

388 *Klerck and Others NNO v Jeeva and Others* 1996 (2) SA 573 (A) 579H-I.

389 See *Advance Mining Hydraulics (Pty) Ltd and Others v Botes NO and Others* 2000 (1) SA 815 (T) 824J-825A.

390 For the reason behind the Master's decision to summon them.

391 *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) 776A-B.

court stated that the High Courts of this country have over many years taken the view that they have the power to prevent the section 417-type enquiries which would result in oppression. The court has the power to intervene where enquiries are conducted in an oppressive or vexatious manner or result in hardship to the examinee. The same where unusual, special or exceptional circumstances are present. The court in *Bernstein*-case further held that if a person who has been summoned to appear at an enquiry under sections 417 and 418 of the *Companies Act* feels that, in the light of the facts of the matter, it was oppressive or vexatious or unfair to summon him or interrogate him, his remedy would be to approach the High Court for relief. These the court held, should also be applicable to section 152 enquiry. On the basis of this argument, the court in *Strauss v The Master* held that, the applicants failed to persuade the court that the first respondent had acted unfairly or oppressively or vexatious towards them by refusing them access to the written application.³⁹² The court acknowledged the fact that the second respondents objections to the documents (containing the reason behind the Master's decision to summon the applicants) being disclosed to the applicants was with merit. This was so because the enquiry was a private and confidential one and that the contents of the application (the Master's one) should also be regarded as confidential.

Regarding section 152 enquiry, the court emphasised the fact that this is an important and valuable mechanism for the Master and the trustee of an insolvent estate to obtain information which might enable them to secure assets belonging to the insolvent and to obtain clarity on claims or demands that have been made against the estate of an insolvent. It is therefore important to safeguard the interests of persons who furnish information to the trustee or the Master in a confidential manner. If the Master could readily make such information available to persons such as the applicants who have been summoned to be interrogated, a valuable source of information for the Master, and the trustee might be destroyed. It is therefore crucial for the

³⁹² The reason behind the Master's decision to summon them.

Master, as a matter of policy, to keep information confidential which has been furnished to him in a confidential manner.

The second basis upon which the applicants have relied for the contention that they are entitled to access to the written applications is that section 23 of the *Interim Constitution* is decisive of the matter. Section 32 of the *Constitution* provides that everyone has the right of access to any information held by the state or another person and that is required for the exercise or protection of any rights.³⁹³ Due to the fact that this application was launched on 16 July 1999 and at that time the national legislation envisaged by section 32 of the *Constitution* had not yet been enacted, the relevant provision to be applied was therefore item 23 of schedule 6 to the *Constitution*. On the basis of the applicant's contention, the court had to determine whether the respondent was an organ of the state. If the respondent was an organ of state that could entitle the applicants to have access to the information held by him, in order for them to exercise or protect any of their rights. The applicants had relied on *Jeeva v Receiver of Revenue*.³⁹⁴ There the court held that a commission of enquiry authorised by the Master of the Supreme Court and held under the machinery of the *Companies Act* is administrative action against the applicants, which in this case has a material bearing upon their rights and interests. The enquiry was said to be of a quasi-judicial nature and accordingly, applicants were entitled to administrative action which is lawful, justifiable and both substantially and procedurally fair. It was further argued on behalf of the applicants that, because they must submit to interrogation, they are entitled to prepare themselves to deal with the subject-matter of the enquiry. Furthermore, they were entitled to equality before the law, which included equal access to the information held by the interrogator, especially if the interrogator is directly or indirectly an organ of state. In response to these

³⁹³ The section also provides that national legislation must be enacted to give effect to this right. Item 23 of Schedule 6 to the *Constitution* provides that such national legislation must be enacted within three years of the date on which the *Constitution* took effect and until such time section 32(1) of the *Constitution* must be regarded to read as follows: 1 Every person has the right of access to all information held by the state or any of its **organ in any sphere** of the government insofar as that information is required for the exercise or protection of any of their rights.

³⁹⁴ *Jeeva v Receiver of Revenue, Port Elizabeth and Others* 1995 (2) SA 433 (SECD)

contentions the court cited the views in *Bernstein v Bester*.³⁹⁵ In that case judge Ackermann expressed his doubts about whether an enquiry under sections 417 and 418 of the *Companies Act* could be classified as administrative action in terms of the *Interim Constitution*. According to him such an enquiry is an integral part of the liquidation process pursuant to a court order and in particular that part of the process, which aims at ascertaining and realising assets of the company. The guidelines or norms according to which the courts should judge the conduct of an official,³⁹⁶ in order to determine whether or not the official performed an administrative act for the purposes of section 33 of the *Constitution*,³⁹⁷ have recently been laid down by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*.³⁹⁸ In that case the court decided that what matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. Therefore, the focus of the enquiry as to whether conduct is administrative action is not on the arm of government to which the relevant actor belongs, but on the nature of the power he is exercising. On the basis of judge Ackermann's views and the guidelines set out in *President of the Republic of South Africa v South African Rugby Union* above, the court came to the conclusion that it cannot be held that the decision to hold an enquiry under those sections amounts to administrative action. The court therefore disagreed³⁹⁹ with the judgement in *Jeeva v Receiver of Revenue* above, where it was held that proceedings under sections 417 and 418 are **administrative action**. The court further disagreed with the views that such enquiry affects the rights of persons who have been summoned to appear and to submit to interrogation. The court cited *Podlas v Cohen*⁴⁰⁰ where the court held that a person who has been summoned to appear before the Master in terms of section 152 of the *Insolvency Act* suffers no prejudice because his rights are not infringed.

³⁹⁵ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC).

³⁹⁶ See 665C/D-E/FG-H/I of the report.

³⁹⁷ Section 33 of the *Constitution* as is currently deemed to read and which provides, *inter alia*, that every person has the right to lawful administrative action where any of their rights or interests is affected or threatened.

³⁹⁸ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); (1999 (10) BCLR 1059).

³⁹⁹ At 665G.

⁴⁰⁰ See *Podlas v Cohen and Bryden* 1994 (4) SA 662 (T) 675 D-I.

Accordingly, it was decided that there is no difference between an enquiry held under section 152 of the *Insolvency Act* and the one held under sections 417 and 418 of the *Companies Act*. The decision of the court was that the applicants were not entitled to rely upon section 32 of the *Constitution*, read with item 23 of Schedule 6 to the *Constitution*, to demand access to the written application. This is so because they have no rights which need to be protected or which they can exercise. The application was accordingly dismissed.

With regard to the court's interpretation of section 32 of the *Constitution* and its applicability, it is clear in my mind that section 32 does not apply to section 152 interrogation proceedings. However, I do not see how such interrogation cannot affect the interrogatee's rights, unless the latter loses or does not have the rights in the circumstances. The right I am referring to are for example the right not to incriminate oneself. The latter mentioned right might be violated by section 152 in so far as information obtained at interrogation proceedings might be used as evidence against the interrogatee in subsequent proceedings. What is evident from the court's interpretation of these sections is the importance of the creditors's rights in insolvency proceedings and the position of the interrogatees is not entertained.

It is my view that the court's interpretation of both sections 151 and 152 is clear. The purpose of section 152 interrogation is the gathering of information. The information so gathered is essential to assist the trustees of the insolvent estate in the performance of their duties (in the process of fair distribution of the insolvent assets to creditors). However, it is my opinion that whatever information obtained from such enquiries, might affect the insolvent. This might be so where the information obtained might be used against the insolvent in any subsequent proceedings, civil as well as criminal (relating to perjury for example). Therefore caution should be taken. Safeguards should be taken when interrogating the insolvent to (especially where information might be used in criminal proceedings relating to perjury) ensure that the principle of justice is upheld. It is my conviction that the Master has, in the

light of what was said, **an enhanced obligation** to see to it that examinee is not subjected to vexatious and oppressive proceedings. It is thus apparent that the examinee has no rights to exercise in this respect. Due to the fact that the examinee is in a very sensitive situation, it is paramount that the Master ensures that the proceedings are conducted in such a manner that the principle of justice is upheld. This he can achieve by ensuring that fair procedures are adhered to and he act *bona fide* in all respects.

5.8 Conclusion

From the above discussion the following points are clear: According to the case of *Lynn v Kruger*⁴⁰¹ it is clear that section 417 and 418 of the *Companies Act* are within the confines of the *Constitution* and there is no other way of obtaining information about the insolvent company other than to interrogate its officials. Another pointer highlighted was the fact that an examinee's right will be violated if his evidence was used against him in subsequent criminal proceedings, but not in civil proceedings. On the basis of this court's findings, the first respondent's remedy lies in the severance of the presumed unconstitutional provision and not in the suspension of the applicability of sections 417 and 418. Furthermore the respondent may request the court to make a directive to the effect that answers given at the interrogation should not be disclosed to any person not immediately involved in that enquiry without the prior leave of the courts. The implication of this decision is that the insolvent or interrogate should always first go to the court to get a directive. In that court (criminal) proceeding he may request that his testimony not be used, except in criminal proceedings relating to perjury etc. It is my opinion that there should be guidelines within these sections, dealing specifically with incriminatory evidence, and no need to ask a directive from the court.

In the case of *Ferreira v Levin*⁴⁰² the court made it clear that the purpose of sections 417 and 418 was to assist liquidators in discharging their duties and

⁴⁰¹ *Lynn NO and another v Kreuger and Others* 1995 (2) SA 940 (N).

⁴⁰² *Ferreira v Levin NO and others* 1996 (1) SA 948 (CC); 1996 (4) BCLR 441 (CC).

nothing else. Another pointer highlighted by the court was the fact that an examinee was not an accused person and thus not entitled to the protection afforded by section 25(3) of the *Interim Constitution*. Consequently, the court declared invalid the section only to the extent that incriminating evidence obtained under section 417 proceedings could be used against the person giving it in subsequent criminal proceedings. Regarding judge Ackermann's interpretation of section 11(1) of the *Interim Constitution*, it is my opinion that his definition is over elaborative. The section should be interpreted in a simple and clear manner and the main objective must be to protect an individual's physical deprivation of freedom arbitrarily. Regarding the method of obtaining information for the purposes of sequestration, it is my view that there could be no other way of obtaining information from an examinee except compelling him to divulge even incriminating evidence. This provision should be strict considering the fact that creditors, shareholders and investor's funds are involved.

The term "privilege" was analysed by the court in the case of *Wessels v Van Tonder*.⁴⁰³ The court acknowledged the relevance of that term to insolvency proceedings, but it held that privilege does not entitle the examinee to refuse to answer incriminatory questions and consequently privilege was not an excuse to answer questions lawfully put.

In the case of *Podlas v Cohen*⁴⁰⁴ the court highlighted the fact that the Master's decision to summon a person to appear before him was not reviewable and the notices thereunder were simply subpoenas. Furthermore, the *Interim Constitution* did not oblige the Master to hear both sides before ordering an interrogation under section 152 because the order did not infringe the applicant's constitutional right to administrative justice. This seems to be so because the said person is called upon to perform what may be described as a public duty. Personal freedom therefore becomes subordinate to the public interest. In a twisting contrast to that, the court in *Jeeva v Receiver of Revenue* highlighted the point that the subpoenaed applicants were entitled

⁴⁰³ *Wessels NO v Van Tonder en 'n Ander* 1997 (1) SA 616 (O).

⁴⁰⁴ *Podlas v Cohen and Bryden* 1994 (4) SA 662 (T).

under section 24 of the *Interim Constitution* to obtain information not covered by professional legal privilege. The court clearly stated that a commission of enquiry authorised by the Master of the court and held under sections 417 and 418 is administrative in nature and has a material bearing upon the rights and interest of the applicants. The inquiry was said to be quasi-judicial in nature and consequent to that the applicants were entitled to administrative action which is lawful, justifiable and both substantially and procedurally fair. The applicants were further held to be entitled to equality before the law, which includes amongst other things equal access to the information held by the interrogator, especially in that the interrogator is directly or indirectly an organ of state.

From the case of *Roux v Die Meester*⁴⁰⁵ uncertainties as to whether or not the insolvency proceedings constituted an administrative action was laid to rest. The court pointed out that insolvency proceedings were not administrative actions and were purely investigative in nature. Although the court did not expressly clarify when a person's right will be violated, it is apparent that the rights of a person will be violated where he is prevented from obtaining information from the state or its organ. The information should be required for the exercise or protection of his legitimate rights. Another pointer highlighted was that the Master was not an organ of state (for the purposes of insolvency interrogations). Furthermore, the need for a private interrogation was emphasised. This is said to be so because the purpose of this process is the summary obtaining of confidential information for the purpose of facilitating the administration of the insolvent estate. Further, persons may be less reluctant to part with the truth if secured that that the information may not be available to the public.

In the case of *Strauss v The Master*⁴⁰⁶ the court pointed out that the Master was not required by law to give written reasons prior to summoning a person to appear before the interrogation proceedings.

⁴⁰⁵ *Roux v Die Meester en 'n Ander* 1997 (1) SA 815 (T).

⁴⁰⁶ *Strauss and Others v The Master and Others* NNO 2001 (1) SA 649 (T).

The next chapter will be the discussion of sections 12 and 35 of the *Constitution* and how it affects the discussed sections of the *Insolvency Act*. Only the sub-sections posing a constitutional problem will be discussed. A discussion on the draft *Insolvency Bill* and the Law Commission findings will be made.

Chapter 6 Sections 12 and 35 of the *Constitution* and the draft *Insolvency Bill*.

6 Introduction

It is of paramount importance to determine whether the freedom right and the right to a fair trial have any effect on the interrogation proceedings

6.1 Section 12 of the *Constitution*

Subsections 1(a) and 1(b) provide for the freedom and security of the person:

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.

In the light of these provisions, one has to determine whether a recalcitrant witness or the insolvent is deprived of his freedom and security of the person when he fails to comply with the provisions of the *Insolvency Act* and the presiding officer orders his detention.

According to De Waal⁴⁰⁷ the purpose of section 12(1) is made clear by the five aspects of the rights listed in section 12(1)(a) up to (e). These relate to physical liberty and security. The section aims at the protection of bodily integrity of the individual against unwarranted intrusion by the state. He emphasises the point that the protection of physical liberty is the principle purpose of section 12(1). It protects the individual, amongst other things, against invasion of physical integrity by way of arbitrary arrest. Section 12 guarantees both **substantive** and **procedural** protection. The substantive component deals with the **reasons** for which the state may deprive someone of freedom. There must be a "just cause" before the state can deprive someone of his freedom. The procedural component deals with the **manner** in

⁴⁰⁷ De Waal *The Bill of Rights Handbook* 248.

which a person's freedom is deprived.⁴⁰⁸ Accordingly, the state may not deprive its citizens of freedom for the purposes that are not acceptable. In instances where freedom is deprived, the manner of the deprivation should be procedurally fair.⁴⁰⁹

While arrest or imprisonment are the clearest cases of limitation of freedom, this is not always the case. Is freedom, for example, limited where an insolvent or witness is compelled to appear at the meeting of creditors, remain thereat and be obliged to answer incriminatory questions? In *Bernstein's* case⁴¹⁰ the court stated that the compulsion to show up at the interrogation and to remain in attendance thereat does not amount to the deprivation of freedom, even speaking and incriminating oneself was not considered as such. According to De Waal,⁴¹¹ if the decisions in *Ferreira v Levin*⁴¹² and *Bernstein v Bester*⁴¹³ are anything to go by, the Constitutional Court has opted for a **narrow interpretation of physical freedom**. Judge Ackermann's⁴¹⁴ two part analysis of the freedom right was not supported by the majority of the court. The majority of the court saw this analysis of the freedom right as unnecessarily detailed. Writing for the court, judge Chaskalson held that the core purpose of section 11(1) of the *Interim Constitution* (which corresponds with section 12 of the *Constitution*) was to ensure the protection of the physical integrity of the individual. The secondary purpose then was the protection of a right to physical liberty and a right to physical security. I agree with the majority of the court. I cannot see any difference between the two aspects and see no basis why the section had to be delineated in this manner. Although the majority of the court did not agree with judge

⁴⁰⁸ See *S v Coetzee* 1997 (3) SA 527 (CC).

⁴⁰⁹ See also *De Lange v Smuts NO* 1998 (3) 785 (CC) for the content of the freedom right at 786.

⁴¹⁰ *Bernstein v Bester NO* 1996 (2) SA 751 (CC).

⁴¹¹ De Waal *The Bill of Rights Handbook* 249.

⁴¹² *Ferreira v Levin NO* 1996 (1) SA (CC).

⁴¹³ *Bernstein v Bester NO* 1996 (2) SA 751 (CC).

⁴¹⁴ In *De Lange v Smuts NO* 1998 (3) SA 785 (CC) he tied the substantive component to section 12(1)(a) of the *Constitution* which provide that freedom may not be deprived arbitrarily or without just cause. He further broke the substantive enquiry into two parts: According to him, it must first be determined whether the deprivation of physical freedom is arbitrary and then whether the reason for the deprivation is a just one. The first part, the prohibition against arbitrariness, meant that there must be a rational connection between the deprivation of freedom and some objectively determinable purpose. The second part requires the purpose, reason or cause for the deprivation of freedom to be just.

Ackermann in that regard, they did however agree with his judgement. He confirmed the decision of the High Court that section 66(3) read with section 39(2) was constitutionally invalid to the extent that it authorised a presiding officer who was not a **magistrate** to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65. The judge did not consider the committal to prison as a problem. The only problem he had was where a **non judicial officer** would commit to prison a recalcitrant witness.⁴¹⁵ De Waal is also of the opinion that this test is over-elaborative and he submit that perhaps the issues raised by the substantive dimension of the freedom right are better addressed by asking as to whether the grounds upon which freedom has been curtailed, are acceptable.⁴¹⁶ I agree. Judge Ackermann's interpretation of the freedom right is exhausting.

It is my view that the answer to the question whether an examinee's freedom is curtailed by his detention is in the affirmative. However, there is a just cause for such deprivation and the substantive aspect of the freedom right has been met. The procedural aspect of the freedom right is met where an officer ordering the detention is a judicial officer. It is however, infringed where the detention is ordered by an officer in the executive organ of the state. Judge Ackermann emphasised the point that section 66(3) of the *Insolvency Act* is a form of process in aid to ensure that the legitimate goals of the insolvency laws are achieved and creditors are protected. He pointed out that there is no less severe means which would adequately guarantee that the examinee provides the required information. Furthermore, the measure is closely tailored to the purpose it is intended to serve and it goes no further than absolutely necessary to achieve the purpose.

Regarding the proportionality of the punishment for failure to comply with the insolvency law provisions, De Waal⁴¹⁷ has a specific view. He points out that, in practice, most objections to the substantive injustice of measures which

⁴¹⁵ The problem of constitutional attacks as a result of non-judicial officer's capacity to order the detention of a recalcitrant can be curtailed by the establishment of Insolvency courts, where only judicial officers will be empowered to order the detention.

⁴¹⁶ He relies on judge O' Regan's view in *Bernstein v Bester NO 1996 2 SA 751 (CC)*.

⁴¹⁷ De Waal *The Bill of Rights* 254.

infringe on freedom would be that they offend the principle of proportionality. These measures do more harm than good. However, De Waal does acknowledge that there is merit in a wide definition of the term "just cause." The principle of "just cause" does not restrict the substantive enquiry mandated by section 12(1)(a) simply to a consideration of proportionality. Accordingly the "just cause" required for the deprivation of liberty means that only measures consonant with the fundamental tenets and principles of the legal system may qualify. He points out that in respect of some deprivations of freedom such as detention and imprisonment, those measures must, **in addition**, pass the proportionality test. De Waal's view regarding proportionality implies that this insolvency law provision seems to be too severe in the sense that it offends the principle of proportionality. He however, acknowledges that the issue of proportionality is irrelevant or is not considered when issuing the punishment in insolvency proceedings. With regard to the wide definition of the term "just cause" De Waal is of the opinion that even though the punishment might be too severe, it must at least comply with the fundamental tenets and principles of the legal system.

The provisions of section 12(1)(b) requires a hearing conducted by a judicial officer in the court structure established by the 1996 *Constitution*. Regardless of that, the officers empowered by the *Insolvency Act* to commit recalcitrant examinees included officials from the Master's office, who lacks the required objective structural independence. According to judge Sachs, the authority to incarcerate for purposes of imposing penalties for the past or continuing misconduct belongs to the judiciary, and to the judiciary alone.⁴¹⁸ I agree. It does not comply with the procedural aspect of the freedom right. Consequent to the decision in *De Lange*⁴¹⁹ the provisions of section 66(3) of the *Insolvency Act* were declared unconstitutional and invalid only to the extent that it allows a presiding officer other than a magistrate to commit to prison a recalcitrant witness.⁴²⁰ The majority of the Constitutional Court concurred on the view that section 66(3) does not constitute a violation of the substantive

⁴¹⁸ See *De Lange v Smuts NO* 1998 (3) 785 (CC). I agree. It does not comply with the procedural aspect of the freedom right.

⁴¹⁹ *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

⁴²⁰ *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

aspect of section 12(1),⁴²¹ but does constitute a violation of the procedural aspect of section 12(1) of the *Constitution*.⁴²² In this regard judge Ackermann who wrote for four judges, held that “trial” prescribed by section 12(1)(b) requires a hearing presided over by a judicial officer in the court structure established by the 1996 *Constitution*. The *Insolvency Act* empowered officers in the Master’s office to commit to prison recalcitrant witness. These officers lacked the required objective structural independence and could not reasonably be perceived to possess it. This was the reason the court found the subsection invalid in the sense that it violated the procedural aspects of section 12(1). Judge Sachs agreed with the decision of the court in a separate judgement and this was therefore a majority judgement. In a minority view, judge O’ Regan pointed out that it was not sufficient that a judicial officer presided over the proceedings. According to her, coercive detention must be ordered by a court of law or an independent and impartial institution of a character similar to a court of law. The judge further pointed out that, committal for coercive purposes under insolvency law is not a judicial function but an administrative or quasi-judicial proceeding. According to her, even if a magistrate presided, the proceedings remained administrative in nature. For her, it was a requirement of procedural fairness that no person be imprisoned indefinitely by way of administrative proceedings. Only a court of law or a similar type of institution may perform this function. I, however disagree with judge O’ Regan’s view in this regard. The basis of my discontentment is the fact that the purpose of section 66 of the *Insolvency Act* is to bestow upon the presiding officer competence of judicial nature. The purpose is specifically to simplify matters and speed up the liquidation process. No court case is necessary at this stage unless the insolvent fails to comply. This court case may however, be accommodated under this section if an offence is created by this section. This view is in contrast to what was said in *Strauss v The Master*.⁴²³ There it was held that interrogation proceedings in terms of section 152 were not of administrative nature but purely investigative. Therefore an aggrieved person cannot find a remedy under administrative law. Although the

⁴²¹ This implies that it is reasonable and justifiable to commit to prison a recalcitrant witness in the sense that this serve a compelling public purpose.

⁴²² By permitting an officer other than a judicial officer to commit to prison a recalcitrant witness.

⁴²³ *Strauss and Others v The Master and Others* NNO 2001 (1) SA 649 (T).

Strauss case was concerned with section 152(2) of the *Insolvency Act* and not section 66(3) it is my view that both the provisions of these sections are aimed at ensuring a fair and equitable distribution of the insolvent estate's assets to the advantage of creditors. Therefore both should be either administrative or non administrative. Regardless of the fact that one is private and the other one public, they are both aimed at effectively collecting the insolvent assets for the purpose of a fair distribution to creditors.

The next question to be asked is whether a recalcitrant examinee's freedom is curtailed by his detention? Is section 12(1)(b) applicable in this instance? Is he (the recalcitrant witness) in other words detained without trial? According to De Waal⁴²⁴ section 12(1)(b) is superfluous. It merely emphasise that physical freedom may not be deprived without due process of law. Detention without trial is detention without due process of law. I agree. Accordingly it is an abuse of the state's power to detain an individual without allowing them recourse to the safeguards of the criminal justice process. De Waal therefore feels that the inclusion of a specific prohibition of detention without trial is therefore symbolic. It symbolises a constitutional commitment that the abuses of the past are not repeated.⁴²⁵

According to De Waal, the phrase "detention without trial" has a quite specific historical and political resonance in South Africa. It is commonly understood to mean preventative detention for a substantial period of time and for political purposes, on the orders of an administrative official, without recourse by the detainee to the judicial process or any other institution independent of the executive. He points out that the words "detention without trial" in section 12(1)(b) should be read with this particular context in mind. In the light of De Waal's view of section 12(1)(b) with which I concur, it is apparent that this subsection is not applicable to an examinee under the insolvency proceedings. Accordingly, the guidelines was set out in the following cases: In *Bernstein v Bester*⁴²⁶ and *Ferreira v Levin*⁴²⁷ it was decided with reference to

⁴²⁴ De Waal *Bill of Rights Handbook* 257-258.

⁴²⁵ Insolvency courts would eliminate the possibilities of that occurring again.

⁴²⁶ *Bernstein v Bester* NO 1996 (2) SA 751 (CC).

section 12(1)(a) and (b) that the compulsion to show up for an examination, to remain in attendance there, to speak and to incriminate oneself, was not considered to be a deprivation of physical freedom. This was held to serve an indispensable public purpose. In *De Lange v Smuts*⁴²⁸ it was decided that section 12(1) has two components, namely the substantive and procedural aspects. The substantive component entails that there must be a “just cause” before the deprivation of freedom takes place. The “just cause” in cases of insolvency proceedings is that there must be a compelling reason for depriving a witness of his freedom. That compelling reason is obviously the protection of the creditors’ rights by the fair distribution of the insolvent estate assets among his creditors. The procedural component entails that only a judicial officer may order the detention of a recalcitrant witness. In the light of the above discussion it is apparent that freedom may not be deprived without just cause and that the detention of a witness does not amount to the deprivation of freedom and thus does not violate the substantive component of section 12(1).⁴²⁹

6.2 Section 35 of the Constitution

Subsection (1) provides protection to the arrested, detained or accused persons. Accordingly one has to determine whether the insolvent falls within the above categories and therefore requires protection of this section, namely, the fair trial guarantee provided by subsection (3)(j). Subsection (3) and subsection (3)(j) jointly provides as follows:

Every accused person has a right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence.

For the purposes of the fair trial right, De Waal⁴³⁰ made the following observations, based on the Constitutional Court’s findings in *S v Coetzee*,⁴³¹

⁴²⁷ *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

⁴²⁸ *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

⁴²⁹ Special insolvency courts may eliminate the stigma associated with detention without trial.

⁴³⁰ *De Waal Bill of Rights* 586.

⁴³¹ *S v Coetzee* 1997 (3) SA 527 (CC).

Ferreira v Levin,⁴³² *Bernstein v Bester*,⁴³³ *Nel v Le Roux*⁴³⁴ and *De Lange v Smuts*.⁴³⁵ The section 35(3) fair trial rights only apply to an “accused person”. Accordingly, they have no relevance outside the context of a criminal trial, such as in insolvency proceedings or civil proceedings. He, however, points out that even though section 35(3) apply to an “accused person” only, **the fairness of the trial may be jeopardised by the obtaining of evidence in an unconstitutional manner prior to the trial.**⁴³⁶ Accordingly, even though conduct or statute does not relate to the trial itself, it may impact on the fairness of a criminal trial. If it does, such conduct or statute may be attacked on the basis of the fair trial rights. He points out that this is confirmed by the decision of the Constitutional Court in *Ferreira v Levin*.⁴³⁷ Here, the court invalidated part of section 417(2)(b) of the *Companies Act* which allowed self-incriminating evidence that had been obtained in an administrative enquiry to be introduced in a subsequent criminal trial. It should therefore apply when he is subsequently charged in criminal proceedings. De Waal, however, emphasises that, if the fair trial rights does not apply, the statute or conduct cannot be challenged on the basis that it infringes the fairness of the trial.⁴³⁸ This implies that an examinee has to tolerate the interrogation proceedings and thus has no remedy in this regard. His remedy can only be found under a criminal trial. It is under these proceedings where he might claim that information obtained in an unconstitutional manner be inadmissible. In *De Lange*, the court held that the fair trial rights do not apply to a committal to prison, which is a form of process in aid to ensure the co-operation of an examinee in an enquiry.

Regarding detention under sections 417 and 418 of the *Companies Act*, De Waal points out that the creation of an offence carrying a punishment of

⁴³² *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

⁴³³ *Bernstein v Bester NO* 1996 (2) SA 751 (CC).

⁴³⁴ *Nel v Le Roux NO* 1996 (3) SA 562 (CC).

⁴³⁵ *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

⁴³⁶ He relies on *Ferreira v Levin NO* 1996 (1) SA 984 (CC) where the court invalidated part of section 417(2)(b) of the *Companies Act*, which allowed self-incriminating evidence that had been obtained in an administrative enquiry to be introduced in a subsequent criminal trial.

⁴³⁷ *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

⁴³⁸ See *Nel v Le Roux NO* 1996 (3) SA 562 (CC) and *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC).

imprisonment, such as the one provided for in the *Companies Act*,⁴³⁹ will ensure that there is no violation of the procedural component of the freedom right, since imprisonment can only follow after a fair trial envisaged by section 35 of the *Constitution*. Accordingly, an examinee could **not be imprisoned** and deprived of his physical freedom before he had been afforded a trial at which he could challenge the provisions of the *Companies Act* on the basis that they were inconsistent with his fair trial rights.⁴⁴⁰ This view differs from the decision of *De Lange v Smuts*.⁴⁴¹ I agree with De Waal's view. The creation of an offence carrying punishment will ensure that there are no *Constitutional* attacks based on the violation of the fair trial right.

Regarding section 35(3)(j) the Constitutional Court in *Ferreira v Levin*⁴⁴² held that the rule against self-incrimination is not simply a rule of evidence, but a constitutional right. However, it must be pointed out that the constitutional right against self-incrimination exists merely to protect the right to a fair criminal trial. If the right to a fair trial is not threatened, the rule against self-incrimination has no application. De Waal⁴⁴³ is of the view that the implication of the approach of the majority of the Constitutional Court in *Ferreira v Levin*⁴⁴⁴ is that section 35(3)(j) may only be used to guarantee the fairness of criminal proceedings. He points out that, as an accused is hardly ever compelled to incriminate himself at trial, it would seem as if reliance on the right against self-incrimination is severely narrowed down by the court's holding in *Ferreira*. De Waal, however, acknowledges that this is not the case. The basis of his view is that, on the interpretation of the Constitutional Court, the right against self-incrimination also precludes the admission of self-incriminating evidence **obtained before trial**. The reason for this, he submits is that while non-accused persons do not have the right against self-

⁴³⁹ Sections 417 and 418.

⁴⁴⁰ See *Nel v Le Roux NO* 1996 (3) SA 562 (CC), *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) and *De Lange v Smuts NO* 1998 (3) SA 785 (CC) where the statutory mechanism in question provides for imprisonment, without creating an offence and without making an accused of the examinees, thus depriving them of their physical freedom without the benefit of the fair trial rights. De Waal points out that in such circumstances the protection afforded by the procedural component of section 12(1) is crucial.

⁴⁴¹ *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

⁴⁴² *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

⁴⁴³ De Waal *Bill of Rights* 644.

⁴⁴⁴ *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

incrimination, they may avail themselves of the right to prevent the introduction of the evidence at a criminal trial at a later stage. The use of the evidence would accordingly violate the right against self-incrimination of an accused person. I agree, the immunity provided by section 65(2)(a) should be applicable to avoid *Constitutional* attacks based on the violation of the right to a fair trial.

De Waal points out that the constitutional right against self-incrimination in South Africa is therefore nothing but an use-immunity. This means that self-incriminating evidence may not be used against the accused in a criminal trial.⁴⁴⁵ De Waal⁴⁴⁶ further points out that, though the *Constitution* provides for the protection of an examinee against possible criminal consequence under section 35(3) and enables the examinee to better prepare for the examination, there may still be reasons why the examinee may not want to co-operate with the proceedings. He correctly submits that one of those reasons might be the possibilities of civil liability against the examinee. It is therefore necessary to put in place a mechanism that would secure the co-operation of the examinee. It is this mechanism that may infringe the right to freedom. De Waal correctly points out that it is the sanction (coercive detention) for a refusal to fulfil the statutory obligation that implicates the freedom right and not necessarily the statutory obligation itself (for example appearing before the presiding officer at the creditor's meeting).⁴⁴⁷ He appears to have no problem regarding the sanction of imprisonment under section 139 of the *Insolvency Act*. He correctly point out that if non co-operation is made a criminal offence, the deprivation of freedom will take place after the examinee had the benefit of section 35(3). The benefit under section 35(3) would rule

⁴⁴⁵ See *Ferreira v Levin NO 1996 (1) SA 984 (CC)* for a detailed discussion on the subject. The ruling in *Ferreira* only pertains to evidence directly obtained in the enquiry. In so far as the prosecution obtains "derivative evidence" as a result of the enquiry, judge Ackermann, expressed the view, with which the majority of the court appeared to agree, that the trial judge in the subsequent trial is best placed to decide on the admissibility of such evidence. Ultimately, the judge held that the trial judge must ensure a fair trial and must decide whether the admission of derivative evidence would undermine the *Constitution's* commitment to a fair trial on the facts of the case before him.

⁴⁴⁶ De Waal *Revitalising the Freedom Right* 228.

⁴⁴⁷ He relies on *Nel v Le Roux NO 1996 (3) SA 562 (CC)* and *De Lange v Smuts NO 1998 (3) SA 785 (CC)*.

out any possible challenge based on the procedural component of the freedom right. I agree.

In his analysis of the relationship between sections 12 and 35, De Waal highlights the differences between these almost similar provisions. According to him not only are the due process requirements generated by sections 35(3) and section 12 different, but they also apply in different circumstances. Section 12 requires appropriate procedural safeguards when physical liberty is deprived outside the context of a criminal trial. Section 35(3), which only applies to accused persons, ensures fairness of a criminal trial. It is my view that the sanction of imprisonment for non compliance with insolvency provisions followed by a trial should be the principle which reflects the legal position correctly. As severe a punishment as imprisonment may be, it is a process that we cannot do without. Considering the severity of the punishment that may visit a recalcitrant witness, it is of paramount importance that such punishment is meted out by a judicial officer in a court of law. This does not, however, imply that the principle will be without any blemish. This is so in that imprisonment itself might delay the liquidation process.

6.3 Draft Insolvency Bill⁴⁴⁸

It is necessary to discuss the *Draft Insolvency Bill* to see if the proposed provisions are in line with the *Constitution*. Clause 63 of the Bill repeats the provision of section 64(1) of the *Insolvency Act*. The liquidator is empowered to use his discretion in determining whether or not an insolvent should attend a particular meeting of creditors in his insolvent estate. Commentators recommend that the reason behind the liquidator's discretion lies in the fact that, unlike the Master, the liquidator is in a position to decide whether the insolvent's attendance of such a meeting is of importance. Other commentators⁴⁴⁹ recommends that the insolvent should be required to find out about the dates and venues of the meeting himself and whether his

⁴⁴⁸ SA Law Commission Project 63 *Review of the Law of Insolvency: Draft Insolvency Bill* vol 2 paper 86 (Pretoria 1996) 123 (hereinafter "*Draft Insolvency Bill*").

⁴⁴⁹ SA Law Commission Project 68 *Review of the Law of Insolvency: Explanatory Memorandum* vol 1 paper 86 (Pretoria 1996) 86 (hereinafter "*Explanatory memorandum*")

attendance is of importance or not. The reason behind these recommendations might be the fact that insolvents tend to leave their previous address after sequestration. Regardless of the above recommendations, commentators submit that written notice to the insolvent should be a requirement. I agree with the recommendation that the liquidator should be clothed with the discretion whether the insolvent should or should not attend a meeting. This is so because the liquidator has done his investigations into the affairs of the insolvent and therefore has an understanding of whether or not he has information that is relevant. I further agree with the view that the insolvent should be notified. It is further my opinion that the Master⁴⁵⁰ should be part of this process to ensure that the process is not open to abuse. He should be empowered to interfere where there is reasonable suspicion on his side that the liquidator is vexatious or biased. If the liquidator is of the opinion that the insolvent should attend, he may order so. This provision should be accompanied by the right of the affected person to object to the liquidator's discretion where he feels that his interest is affected.

The provisions of section 64(2) have been entrenched in clause 64(1).⁴⁵¹ In this clause the term "interrogation" has been replaced with the term "questioning". Any person summoned under section 64 is summoned for the purposes of questioning instead of being interrogated about the affairs of the insolvent. The reason behind the substitution of the term "interrogation" with the term "questioning" according to commentators is the fact that the words "interrogation and "interrogate" have a confrontational connotations and therefore had to be changed. It is my view that the substitution of the term "interrogation" does not make a difference. It cannot erase the stigma associated with the insolvency proceedings. As long as a person is compelled to appear before the meeting of the creditors to provide information relating to the affairs of the insolvent estate there, is bound to be resistance. Nevertheless, people should understand that these types of proceedings form part of a civilised democratic state where the interests of all persons are

⁴⁵⁰ Or an officer, preferably a judicial officer. If a presiding (judicial) officer is appointed by the Master to conduct the proceedings in a special insolvency court then there is no problem.

⁴⁵¹ *Draft Insolvency Bill 123.*

protected. The changing of the interrogation proceedings to "questioning" will not affect or change the format of the proceedings. Furthermore, commentators⁴⁵² complain about the fact that summons are served shortly before the date of a hearing. They also recommend that a witness should be advised about what documents are required and what issues will be addressed generally. I agree with this submission. Short notices to attend meetings should be avoided at all costs considering the penalties involved in case of failure to attend thereat. Although it is not advisable to tell the person to be questioned what questions will be asked, the view is that the witness should know that the questions relates to the affairs of the insolvent estate. I agree. It should be a rule that no short notices are issued to witnesses. This should be the case because the consequences of non compliance with the summons are way too severe. A witness should be entitled to a reasonable notice and not be taken by surprise. Furthermore, the witness should be notified with clarity as to which documents to bring for the purposes of questioning. This requirement would minimise chances of witnesses hiding behind piles of documents to frustrate the proceedings. I also agree with the view that it is not advisable to tell the person **what** questions will be asked, lest he plan his answers in such a manner that it is easier for him to evade answering certain questions. An insolvent should be ready to answer questions lawfully put to him, questions which will assist the liquidators in performing their duties, which is the fair distribution of insolvent estate assets among his creditors. Nevertheless, he should be able to prepare for the questioning and therefore should get notice timely.

Regarding the subject matter of the investigations that take place at the creditors' meeting, the fact is highlighted that affairs of the insolvent taken in the widest sense should be the core issue. This is in line with judge O' Regan's minority decision in the *Harksen v Lane*⁴⁵³ case where she pointed out that the insolvent's spouse is disadvantaged by the provisions of section 21 of the *Insolvency Act* **and that other persons associated with the insolvent should also be investigated provided the outcome relates to**

⁴⁵² *Explanatory Memorandum* 159.

⁴⁵³ *Harksen v Lane NO and Others* 1998 1 (SA) 300 (CC).

the affairs of the insolvent. Clause 64(1)(c) has omitted reference to the affairs of the spouse. Commentators⁴⁵⁴ suggest that affairs of associates or other persons or entities whose affairs are relevant should also be the subject of a questioning. To support their argument the commentators point out that it often happens where a group of companies is liquidated. It is then necessary to investigate the affairs of more than one group member. If the affairs of an insolvent, associate or other company in a group are relevant to the affairs of the insolvent estate, the affairs of the associate or other company can clearly be investigated at a meeting of creditors. I agree. The insolvent might have been more close to his associates than he was with his spouse during the process leading to his insolvency. It is thus imperative that the affairs of other individuals or entities be the subject matter of the investigations. His business associates might be in a position to shed more light on his affairs than his spouse could.

Clause 65(1)⁴⁵⁵ relates to section 65(1). In addition to the administering of an oath it provides for the affirmation by a witness prior to questioning to speak the truth.

In clause 65(3)⁴⁵⁶ the provisions of section 65(6) for legal representation has been confirmed. A witness may be represented at the questioning. Representation extends only as far as clarifying questions put to the witness by interrogators at a meeting of creditors. Several commentators⁴⁵⁷ favour the limitation of representation at the questioning to attorneys and advocates. This would be correct if special insolvency courts were established and the whole questioning process be conducted under these courts. This is, however, not the case yet. But one should not lose sight of the fact that there should at least be restrictions on the number and scope of persons that can represent a witness at the questioning. It is, however, a person's right to appoint anyone whom he trusts. If that person is not good enough, it was his choice, since the interrogation process is not conducted under the supervision

⁴⁵⁴ *Explanatory Memorandum* 161.

⁴⁵⁵ *Draft Insolvency Bill* 124.

⁴⁵⁶ *Draft Insolvency Bill* 125.

⁴⁵⁷ *Explanatory Memorandum* 162-163.

of the court. Commentators further argue that there is no reason why a witness should not be assisted by an employer or someone other than a lawyer. Their argument is based on the fact that it is not uncommon for incompetent or long-winded attorneys or advocates appearing at interrogations. The presiding officer should control the proceedings by the powers vested in him to exclude persons from the meeting or disallowing questions that prolong the proceedings unnecessary. This principle effectively limits any injustices or proceedings conducted in an oppressive and vexatious manner. Clause 65(3) emphasises that a legal representative of a witness may not interrogate other witnesses. The role of the legal representative is to clarify questions put to the “interrogatee” or persons questioned, but he may not ask any questions.⁴⁵⁸

Clause 65(4)⁴⁵⁹ emphasises the provisions of section 39(6). It provides that proceedings under this section shall be accessible to the public. However, where in the opinion of the presiding officer it appears necessary for the effective questioning of a person, or for the maintenance of good order or the protection of the public interest, such officer may order a private hearing. This implies that the proceedings or any part thereof shall take place behind closed doors or that any particular person or persons may not be present during any particular stage of the proceedings or that the proceedings or any part thereof may not be published. The presiding officer is expected to exercise his discretion in a fair manner to ensure that the principle of justice and fairness is complied with. This he can do by ensuring that the proceedings are not conducted in a manner that may oppress either of the interested parties. Commentators⁴⁶⁰ recommend the *in camera* proceedings to safeguard the interest of the person questioned. They argue that it is not always clear at first sight whether a reply to a question will incriminate a witness. Commentators point out that it can be argued that if an incriminating answer were to slip through during a meeting that was not held behind closed doors, such

⁴⁵⁸ It is my view that the legal advisor should not advise the witness to remain silent where the answer to a question may tend to incriminate the witness. This should be so in that if a witness is given the opportunity to remain silent, he might do so for the entire proceedings and that will definitely be counter productive .

⁴⁵⁹ *Draft Insolvency Bill* 125.

⁴⁶⁰ *Explanatory Memorandum* 163-164.

evidence would be admissible, because any one can have access to the said evidence. Consequently, it may be desirable to have *in camera* proceedings with a view to encouraging a witness to speak the truth or to protect a person from the publication of incriminating evidence. The presiding officer cannot be expected to predict whether incriminating information will be revealed. Therefore the onus rests on the witness to convince the presiding officer to order the *in camera* proceedings where he believes that his interests might be infringed. Commentators, however, point out that it is not desirable to link the obligation to answer incriminating questions to an interrogation behind closed doors. They further remark that the risk of incriminatory questions is not the only reason why it might be desirable to hold a questioning behind closed doors or to exclude certain individuals. They feel that it is for example undesirable that slanderous allegations be heard in an open meeting, state secrets may be involved or a witness may justifiably be hesitant to give evidence in an open meeting. The presiding officer should also have the right to order an unruly witness or a witness who still has to testify to leave the meeting. This is acceptable and in my view a good practice. The objections raised earlier about the possible leakage of confidential and personal information of the interrogatee will be negated if proceedings are conducted behind closed doors.

In terms of clause 65(5),⁴⁶¹ which relates to section 65(2) of the *Insolvency Act* the duty of the banker with which the insolvent or a witness had an account is also preserved. He is therefore expected to provide information relating to transactions made by the insolvent or witness within a period of a year prior to insolvency. Commentators⁴⁶² submit that the one-year period is too short. This is so because bank statements and other related banking records frequently provide the starting point for tracing assets, which have been concealed and impeachable transactions. It is suggested that instead of arbitrary period, it seems advisable to leave out the period. I agree. The process leading to insolvency may be longer or may exceed one year. Therefore the sequence of events leading to insolvency might be over a long

⁴⁶¹ *Draft Insolvency Bill 125-126.*

⁴⁶² *Explanatory Memorandum 164-165.*

period of time and all these sequences have to be investigated. This is correct, it will negate the objections raised earlier about the mandatory period allowed for the submission of bank statements.

Clause 65(6)⁴⁶³ confirms the provisions of section 65(2A) of the *Act*. Accordingly, no person questioned in terms of this section may refuse to answer a question because the answer may tend to incriminate him in any **criminal or disciplinary proceedings** which have been instituted against him. The above-mentioned person may not even apply for the postponement of the questioning until the criminal or disciplinary proceedings have been finalised. Thus the pending criminal or disciplinary proceedings against him may no longer serve as an excuse not to answer incriminating questions. The safeguards provided by the above mentioned section are also retained, namely that no answer given thereat may be used against the person giving it in criminal or disciplinary proceedings, except in proceedings relating to perjury or the giving of false evidence under oath or affirmation or a contravention of section 68(3) for refusal to answer lawful questions fully and satisfactorily. This provision obviously extends to sections 417 and 418 of the *Companies Act*.⁴⁶⁴ This extension is in line with the court's ruling in *Ferreira v Levin*⁴⁶⁵ where the Constitutional Court held unconstitutional the use of self-incriminatory answers given at the interrogation proceeding. Commentators⁴⁶⁶ point out that although the court in the *Ferreira v Levin*⁴⁶⁷ did not make an order regarding the use of derivative evidence from the compelled testimony,⁴⁶⁸ it did however, decide by a majority that the admission or exclusion of such "derivative evidence" was a matter to be decided by the officer presiding over the criminal trial in ensuring that the accused receives a fair trial. It is my opinion that the presiding officer should not have a discretion. He just have to consider the evidence inadmissible in terms of clause 65(6). To emphasise on their point, commentators quote *Key v Attorney-General*⁴⁶⁹

⁴⁶³ *Draft Insolvency Bill 126.*

⁴⁶⁴ The purpose of the *Bill* is to have one act for all insolvencies.

⁴⁶⁵ *Ferreira v Levin NO 1996 (1) SA 984 (CC).*

⁴⁶⁶ *Explanatory Memorandum 166.*

⁴⁶⁷ *Ferreira v Levin NO 1996 1 SA 984 (CC).*

⁴⁶⁸ As distinct from the compelled testimony itself.

⁴⁶⁹ *Key v Attorney-General, Cape Provincial Division 1996 (4) SA 187 (CC).*

where the court said with reference to “derivative” evidence that at times fairness might require that evidence unconstitutionally obtained be excluded.

Commentators further acknowledge that at times “derivative” evidence might nevertheless be admissible to serve the principle of fairness, regardless of the fact that such evidence was obtained unconstitutionally. The applicant’s remedy will lie in his objecting to the use of such evidence in criminal proceedings. It will then be for the judge to decide whether the circumstances allow its use or not. In *Bernstein v Bester*⁴⁷⁰ the Constitutional Court highlighted the point that the Supreme Court has the jurisdiction to order relief where the examination was conducted in an oppressive, vexatious or unfair manner. If it becomes clear that proceedings in insolvency are likely to prejudice the insolvent in his defence in the subsequent criminal trial, the court has discretion to stay all the proceedings until all the criminal proceedings have been completed.⁴⁷¹ Commentators point out that the adoption of clause 65(6) will lessen the possibility of a witness being prejudiced in criminal proceedings.⁴⁷²

According to clause 67(2)(c)⁴⁷³ the liquidator is empowered to obtain information from any person who had any dealings with the insolvent within a period of 36 months before the liquidation of the estate of the insolvent. Commentators⁴⁷⁴ submit that questions should not be limited to a period of 12 months. They point out that questions should be allowed if there is a natural connection. This connection will exist in cases where the insolvent had entered into a transaction with that specific person or such person was in

⁴⁷⁰ *Bernstein v Bester* NO 1996 (2) SA 751 (CC).

⁴⁷¹ *Kamfer v Millman and Stein* 1993 (1) SA 122 (C) 125.

⁴⁷² Clause 65(6) as it stands now read as follows: “Notwithstanding the provisions of any other law or the common law, but subject to the court’s power to avoid questioning being conducted in an oppressive, vexatious or unfair manner, no person questioned in terms of this section may refuse to answer a question because the answer may prejudice him or her in any criminal or disciplinary proceedings which have been or may be instituted against him or apply for a postponement of the questioning until the criminal or disciplinary proceedings have been finalised: Provided that evidence given by a person in terms of this section is not admissible against him in criminal or disciplinary proceedings, except in criminal proceedings where such person is charged in connection with evidence given during the questioning with perjury or the giving of false evidence under oath or affirmation or a contravention of section 68(3) for refusal or failure to answer lawful questions fully and satisfactorily.”

⁴⁷³ *Draft Bill* 131.

⁴⁷⁴ *Explanatory Memorandum* 170.

possession of the property, books, documents or other records of the insolvent. The affairs of a “spouse” or “associate” are not mentioned expressly.

In clause 68A(1)⁴⁷⁵ the authority granted to the presiding officer to issue a warrant for the apprehension of a recalcitrant witness has been confined to a magistrate who may hold a court under the *Magistrate' Court Act*⁴⁷⁶ 32 of 1944. Commentators⁴⁷⁷ submit that the provision empowering presiding officers to summarily order the detentions of recalcitrant witnesses is drastic. Presiding officers are justly uneasy to apply the provisions. Accordingly, clause 101(2)(a) and (b) makes failure to comply with the provisions of clauses 64, 66 and 68 an offence. Commentators remark that a criminal sanction alone will not suffice. They argue that a meeting of creditors or a questioning can evidently not wait for a possible conviction at a criminal trial and argue for a suspended sentence to encourage compliance. The Constitutional Court made a ruling in *De Lange v Smuts*⁴⁷⁸ that section 66(3) read with section 39(2) is constitutionally invalid. This invalidity extends only in so far as this section allows an officer other than a magistrate to order the detention of a recalcitrant witness. A majority of commentators supports the view that a magistrate or judge should be empowered to order the detention of witnesses who fails to answer questions fully and satisfactorily. The view is that such provisions are necessary to maintain the efficacy of questionings and to ensure that these questionings can be conducted in a speedy and meaningful manner. The majority of commentators favour the widest possible powers for presiding officers that will be constitutional. They submit that the widest possible power is incarceration by a judicial officer.⁴⁷⁹ The provisions of clause 68A agree substantially with section 66 of the *Insolvency Act*. The witness will have the opportunity to appear before the judicial officer. No provision is made for a hearing by a judge but clause 68A(5) provides for application to the High Court for a discharge from custody in the case of

⁴⁷⁵ *Draft Insolvency Bill* 135-136.

⁴⁷⁶ 32 of 1944.

⁴⁷⁷ *Explanatory Memorandum* 174.

⁴⁷⁸ *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

⁴⁷⁹ They rely on the court's ruling in the *De Lange v Smuts NO* 1998 (3) SA 785 (CC).

wrongful commission to prison or detention to prison. Accordingly, a proposal of a fine with the alternative of imprisonment if the fine is not paid falls away in the light of the option of imprisonment in clause 68A(1).

Section 418(2) of the Companies Act had always restricted the authority to order the apprehension of a recalcitrant witness to a magistrate who is a commissioner.

6.4 Conclusion

Considering what has already been discussed in this chapter, it is clear that although there is a general right for the freedom and security of the person as provided for by section 12 of the *Constitution*, there is however a limitation.⁴⁸⁰ In this respect a person summoned to appear at the meeting of creditors cannot be said to have been deprived of his freedom arbitrarily. This is due to the fact that a person so summoned has a public duty to come forward and provide the required information. This is even so to the extent of incriminating himself. The justification for the deprivation of freedom is "just cause." This implies that there must be a fair and just reason to deprive one's freedom.⁴⁸¹ The emphasis is on section 12(1)(b) of the *Constitution* which provides that where there is a possible deprivation of freedom, there must be a trial presided over by a judicial officer.⁴⁸² Therefore in the case of recalcitrant witness, the order for the detention of such a witness must be ordered by a judicial officer. It has always been my opinion that where a witness fails to comply with the proceedings he should be charged and arrested. Consequent to his arrest he should appear before a court of law and not be detained without a trial.

With regard to section 35 of the *Constitution*, it is apparent that the section is not applicable in insolvency proceedings. This is so in that such a person implicated thereat is not regarded as arrested, detained or accused person.

⁴⁸⁰ Section 36 of the *Constitution*.

⁴⁸¹ This is the substantive aspect of this section. See paragraph 6.1 above.

⁴⁸² This is the substantive part of section 12. See paragraph 6.1 above.

Considering the recommendations of the Law Commission, it is my view that the highlight of these findings is the investigation of the insolvent affairs in the widest sense, namely that insolvent's associates should be investigated as well to ensure maximum coverage of the sequence of events leading to his sequestration. This is so in that the insolvent might have been more close to his associates than he was with his spouse during the process leading to his insolvency. It is thus imperative that the affairs of other individuals or entities be the subject matter of the investigations. His business associates might be in a position to shed more light on his affairs than his spouse could.

In this chapter the provisions and applicability of sections 12 and 35 of the *Constitution* to insolvency proceedings has been discussed. The review of the Law of Insolvency done by the Law Commission, and the views of commentators has been highlighted. The next chapter will be dealing with the conclusion and recommendations

Chapter 7 Recommendations and Conclusion

7 Introduction

Having had researched the constitutionality of sections 64,65,66 and 152 of the *Insolvency Act* together with the corresponding sections of the *Companies Act*, a few recommendations regarding the appropriate principles that may be applied, are inevitable.

In chapter one a layout of the dissertation was made and the purpose of the *Insolvency Act* was explained. One can correctly summarise the purpose of the above mentioned act as being to ensure a due and just distribution of the insolvent's assets among his creditors in the order of preference. The importance of this act is to ensure that creditors are inconvenienced as little as possible, considering the fact that they are already disadvantaged by the fact that they may not receive full payments.

The problem statement and the research question were to investigate whether the strict interrogations measures provided by the *Insolvency Act* and the *Companies Act* to ensure fair liquidation process are constitutional. The applicability of sections 11, 35 and 36 of the *Constitution* on this *Insolvency Act* was also investigated.

7.1 Conclusion of the research

Section 64 which compels the insolvent and other witnesses to provide information at the meeting of creditors is said to be constitutional in the sense that it serves an indispensable public purpose. The freedom and privacy of the person concerned is irrelevant. A person so summoned may not absent himself without first obtaining the consent of the trustee. The said person will also be compelled to provide any material information that might be required thereat and produce the required documents. Material information is any information that may be relevant with regard to the claim of a creditor(s), the

assets of the insolvent estate and the liabilities of the estate. Although De la Rey⁴⁸³ submits that it is the duty of the insolvent to make enquiries about the venues of meetings, it is my opinion that the insolvent should be informed of such meetings. The provision regarding attendance of meetings is strict. It is my opinion that the said provision should be relaxed only where the insolvent has a solid reason for failure to appear for interrogation. In my view, a medical condition supported by a medical certificate indicating a serious health risk is or should be a good enough reason. Obviously any information relating to the dealings and trading of the insolvent is permissible. To my mind what may not be permissible is any defamatory information regarding the insolvent. For example information that may reveal the insolvent's promiscuous relationship which may not assist the trustee in any manner. Thus, any person who can supply material information may be summoned by the presiding officer. Section 414 of the *Companies Act* has the same provisions as section 64 except that this section provides for an extended duty to directors and officers of the company unable to pay its debts to keep themselves informed as to the dates of the meetings where they are expected to attend.

The provisions in section 65 regarding the interrogation of the summoned persons, the privilege on documents submitted, the production of a cheque by an insolvent's banker drawn within a year as provided by section 65 is constitutional. It is my opinion that the banker-client relationship is different from that of an attorney-client one. Therefore there should be no problem. Secondly, it is my view that the requisition of such information might be necessary for a justifiable purpose, for example setting aside disposition intended to defraud creditors. The one year period provision for the production of documents or cheques drawn by the insolvent prior to his sequestration is in my opinion too short. The process leading to insolvency might be more than a year. It is thus my view that in order to effectively collect the insolvent estate assets for distribution amongst his creditors, it is imperative that the trustee be given greater latitude instead of an arbitrary period. If not, a minimum period of two years should be considered. The provision regarding the administering

⁴⁸³ De la Rey *Law of Insolvency* 300.

of an oath upon persons interrogated was investigated and it is submitted that an affirmation to speak the truth should also be allowed in the case of non Christians. With regard to interrogation, it is my opinion that the interrogation should take place at any meeting, but the fact that an interrogation will take place must be mentioned in the notice. This, in my opinion will minimise chances of taking an examinee or the creditors by surprise. The principles of justice and fairness will be upheld if an examinee or the creditors are afforded an opportunity to prepare for the interrogation proceedings and there will be less *Constitutional* attacks. Taking into consideration the discussion above, I do not see how the insolvency interrogation violates the right to freedom and security of the person, privacy or human dignity. In the Draft Insolvency Bill, the recommendation is made in this regard and it is welcomed. The provision under section 65(2) that a witness is compelled to answer all questions even to the extent of incriminating himself was said to be constitutional. This is due to the fact that the same section has made provisions for the closed doors interrogation. This implies that any incriminatory information may not be published in any manner whatsoever without the permission of the presiding officer. The term publish, in my opinion refer to making known to the public the content of the interrogation proceedings through any media.

Furthermore, the provision regarding the admissibility of such evidence at the subsequent proceedings was challenged. To ensure that fairness and justice is upheld, it is my submission that the incriminatory evidence given at the insolvency interrogation must solely be used for the purpose of determining the insolvent estate and the collecting of the insolvent's assets, for a proper, fair and even distribution amongst his creditors. It is now an established principle that it is not unconstitutional to compel a witness to answer incriminatory evidence and admission of such evidence at a civil proceeding is at the discretion of the judicial officer presiding over the said proceedings. It is also an established principle that if the presiding officer at the meeting of creditors is of the opinion that a witness might be prejudiced by his testimony he should order that the proceedings be held *in camera*. It is, however, submitted that the *in camera* proceedings and a bar against publication of information could in circumstances still be very detrimental to the insolvent.

Section 415 of the *Companies Act* has the same provision as section 65. The difference that exists between these two sections relates to the admissibility of evidence in subsequent proceedings. Section 65 provides that evidence given under this section is admissible only against the person giving it and section 415 provides that any evidence given under this section shall be admissible against the person giving it or the body corporate of which he is or was an officer. Another difference is that, under section 65, derivative evidence is admissible only in civil proceedings. Section 415 provides that such evidence is admissible in both civil and criminal proceedings. Furthermore, the direct use of immunity as provided by section 65 is not applicable to section 415. Regarding the application of section 415 of the *Companies Act*, see paragraph 3.6 above with reference to case law.

The provision under section 66(1) empowering the presiding officer to issue a warrant for the detention of a recalcitrant witness was challenged. Through case law it is now an **established principle** that no presiding officer other than a judicial officer has authority to order the detention of a witness. It is further a principle that there is nothing unconstitutional in detaining a recalcitrant witness until he is prepared to provide the required information, this provision is said to achieve a public purpose that no other provision can. The corresponding section in *Companies Act* (sections 414-416) has the same provisions as this section and it is clearly indicated that the provisions of section 65 shall apply to these sections *mutatis mutandis*.

Section 152 of the *Insolvency Act* makes provision for the private interrogation by the Master of any person that he deems fit to interrogate. It has been confirmed that this section provides for private interrogation and that the information obtained thereat is confidential and it is not unconstitutional if the Master denies anyone access to such information. This is so in that this section provides for the gathering of information and nothing else, therefore no one can qualify in claiming that his constitutional rights are infringed by the Master in refusing to grant access to the said information. The corresponding sections (sections 417 and 418) in *Companies Act* have the same provisions

as this section. The difference lies in the fact that under section 417 and 418 any person that may be affected by the insolvency will have closure, unlike in the case of section 152 where the summons can be served at any time as long as the insolvent is not rehabilitated. Another difference that exists between these sections is that section 417 makes provision for legal representation to a person summoned to provide evidence and section 152 does not make such provision. Regardless of these differences, it is proclaimed that section 152, 417 and 418 provide for a private and confidential enquiry, unless the Master provides otherwise. For the application of both sections 152 of the *Insolvency Act* and section 417 and 418 of the *Companies Act* see chapter 5 of this research where several case law is discussed.

In chapter six of this research, the implications and applicability of sections 12 and 35 of the *Constitution* to insolvency proceedings were discussed. It is now clear that the deprivation of freedom (by means of detention) of a recalcitrant witness is not unconstitutional. The only time the detention can be unconstitutional under section 12 *Constitution*, is when such detention is ordered by a person other than a judicial officer. It is now an **established principle** that only a judicial officer may issue an order for the detention of a recalcitrant witness.

When considering the implications of section 35 on the provisions of sections 64, 65, 66 and 152 of the *Insolvency Act*, it is now an established fact that section 35 applies only to the accused and arrested persons, and not to persons summoned to appear at the meeting of creditors for the purposes of submitting to interrogation. The reason section 35 does not apply to insolvency proceedings is the fact that there is a remedy available to such a person. The summoned person who is compelled to provide incriminatory evidence may apply to the court to prevent the use of such evidence in subsequent proceedings other than criminal proceedings mentioned under section 65 of the *Insolvency Act*.

Summarising the submission to the Law Commission, several pointers came to light. The liquidator is now empowered to use his discretion to determine

whether or not a specific person should attend a particular meeting of creditors in his insolvent estate. The term interrogation under section 64 has been replaced with the term questioning. Commentators submits that the short notice of summons should be done away with and such periods be extended to allow sufficient time for persons summoned to prepare for the questioning. Commentators further suggest that the scope of the affairs of the insolvent to be investigated should be greater, this is done in order to accommodate the affairs of the insolvent's business associates.

The issue of legal representation has been discussed as well and it is an established principle that a person may be represented at the interrogation by an attorney or advocate. The scope of representation only extends in so far as clarifying questions to the interrogatee and nothing else. The emphasis is also placed on the presiding officer' duty to exercise his discretion in a fair manner, this is done to ensure that the principle of justice and fairness is complied with. It is also emphasised that the *in camera* proceedings be opted for, this is done in order to safeguard the interests of the person interrogated and to encourage the said person to speak the truth. The *in camera* proceeding is also advocated for to ensure that slanderous allegations or state secrets not be heard in an open meeting. The privilege as applicable to a witness is preserved. This, however, does not mean that a person may refuse to answer incriminatory questions. The remedy available to such person is to make a request to the court that his testimony be excluded in subsequent proceedings, this may be criminal or disciplinary proceedings which have been instituted against him.

The period within which the liquidators may obtain information from the insolvent' associates has been extended from 12 months to 36 months, this is done in order to allow the liquidators greater latitude in ensuring a fair and just liquidation process. Other important pointers made by the Law Commission is that only a magistrate may issue a warrant for the detention of a recalcitrant witness and the creation of an offence for non compliance with the provisions of clause 64, 66 and 68 are most welcomed. This new provisions will also be applicable to *Companies Act* regarding companies in liquidation. Since the

Insolvency Bill is not accepted yet and the discussed provision of the *Insolvency Act* is still in operation, several **recommendations** should be made

In concluding, the research question and the problem statement has been answered and the purpose of this research has been achieved.

7.2 Recommendations

Concerning the application of section 64 to insolvency proceedings, it is recommended that the section remains intact. However, the strict provision regarding the reasons for failure to appear at the meeting of creditors should be relaxed where the insolvent or any witness subpoenaed has a valid reason for failure to attend. A medical condition supported by a medical certificate in my opinion is or should be a good enough reason. Regarding the compulsory attendance to creditors' meeting by an insolvent's spouse, it is recommended that such provision be retained. This provision should also be extended to the insolvent's business associates. The said persons may be in a position to provide more light about issues that the insolvent's spouse may be in the dark about. Furthermore, it is also recommended that the term **spouse** be extended to insolvents' living in homosexual arrangements as spouses.

Regarding the provisions under section 65 for the administering of an oath to the insolvent or other witnesses, it is recommended that the *Insolvency Act* should make a provision for the taking of a solemn and affirmation declaration from witnesses. This should apply to witnesses who due to their religious conviction are unable to take the oath.

The meeting at which the interrogation can take place should be clarified with certainty in the act. This should be so to ensure that a witness is not taken by surprise. Furthermore, it is recommended that the interrogation should take place at a meeting specifically convened for that purpose.

The one year period provided by section 65 for the production of a cheque and documents related thereto by a banker at which an insolvent or his spouse held an account is insufficient. It is therefore recommended that the trustee be given greater latitude instead of an arbitrary period. This should be so in order to ensure that the assets of the insolvent are effectively collected. Furthermore, it is a known fact that the process leading to insolvency may take more than a year.

It is recommended that the issue of privilege regarding information by an insolvent or any witness to his banker should not be an issue of concern. This should be so in that the banker-client relationship is different from that of an attorney-client one. First of all, it is not expected that the insolvent would have disclosed any financial irregularities to his banker, which may when disclosed at the meeting of creditors prejudice the insolvent. However, it is recommended that the claiming of privilege by an attorney of an insolvent be accepted, this will ensure that clients may be willing to disclose all information to their attorneys. If the trustee or creditors need information, they should get it from the insolvent himself and not from his attorney.

Regarding the issue of *in camera* proceedings, it is recommended that where the insolvent can prove that an answer to a question may be slanderous and therefore harm him in any way, he should be given a right to refuse to answer publicly. This should be so to allow proceedings to be public rather than behind closed doors, with the main purpose of ensuring that the message is sent across to would be professional debtors. The principle that people are likely to tell the truth behind closed doors should not always apply, especially when one considers the fact that our courts are open to the public and yet people end up being convicted from the testimony given in public.

With regard to incriminatory evidence obtained under the provisions of section 65, it is recommended that such evidence be used for insolvency purpose only. This should be so considering the consequences that may visit a person giving such evidence should it be used successfully against that person. The

derivative evidence should however, be use to set aside impeachable transactions.

It is recommended that legal representation of an insolvent at a meeting of creditors should include more than the rephrasing of questions by a legal representative to an insolvent or any witness. Effective representation should also entail interrogation by a witness's attorney of any person interrogating the witness. This will ensure that the principle of fair justice is upheld. It is further recommended that insolvency proceedings take a form of civil proceedings in a court of law rather than mercantile proceedings. This should be so in order to ensure amongst other things that the possibilities of fraud on the part of the insolvent or witness is established.

It is recommended that the issuing of a warrant for the detention of a recalcitrant witness be reserved for judicial officers. This should be so in order to minimise constitutional attacks based on the provision of section 65. Furthermore, if insolvency proceedings could take the form of civil proceedings, then the said warrant may be issued in a court of law and by a judicial officer. The detention will follow after the insolvent or witness is afforded the opportunity to defend himself. Should this recommendation be considered as far fetched, it is recommended that where the interrogation proceedings is conducted and it appears to the presiding officer that the insolvent does not wish to comply, such officer should refer the matter to the court. The court should thereafter deal with the matter in accordance with the principles of justice and convict the person if necessary. It is further recommended that the continuous detention should not be ordered. This can be curtailed by making a provision for an offence in case of repeated refusal by an insolvent to comply. The matter can then be handled by a court and a sentence be imposed instead of detaining a person without a trial, thus making the provisions of section 12(b) of the *Constitution* only symbolic, with no application at all.

The provisions of section 12 of the *Constitution* is satisfactory, especially the substantive part of it, which allows only a judicial officer to issue a warrant for

the detention of a recalcitrant witness. It is recommended that this section be applied in full to insolvency proceedings. It is further recommended that section 35(2) of the *Constitution* be applicable to an insolvent who is eventually detained.

In conclusion, it is clear to me that the provisions of sections 64, 65, 66 and 152 of the *Insolvency Act* together with the corresponding sections of the *Companies Act* serve an indispensable public purpose. That purpose is the protection of the rights of the entire citizen body, including those of an insolvent and his creditors. However, the establishment of special Insolvency Court would eliminate and curb constitutional attacks based on failure on the legislative side to apply the principles of justice in insolvency proceedings, specifically where the detention of recalcitrant witnesses is concerned.

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