

CASELAW UPDATE - ARREST TAMQUAM SUSPECTUS DE FUGA (written by Haydn Friis)

Sections 30(1) and 30(3) of the Magistrate's Court allow for a procedure known as arrest tamquam suspectus de fuga. This procedure allows for the arrest and detention of a debtor in circumstances where a creditor reasonably believes that a debtor is about to flee the country with the purpose of avoiding the repayment of a debt.

The constitutionality of these sections came under the microscope recently in the Constitutional Court in the matter of *Tatiana Malachi v Cape Dance Academy International (Pty) Ltd and five others*.

The judgment was handed down on the 24th August 2010.

Very briefly the facts were as follows: The applicant, a citizen of Moldova was recruited by the 1st and 2nd respondent as an exotic dancer. The 1st and 2nd respondents were essentially the applicant's employers. Upon her entry into the country they seized the applicant's passport and refused to allow her to leave unless she refunded them the funds they had expended on, inter alia, her visa, travel arrangements and rental. She was dissatisfied with her working conditions and after a couple of months, with the assistance of the Consul General of Russia, secured an air ticket to return to her home country.

Her employers found out about her plans and applied to the Cape Town Magistrate's Court for an order that she be arrested as it was expected that she was about to flee the country and thus avoid paying her debt to them.

The Magistrate's Court granted the order and she was imprisoned in Pollsmoor Correctional Centre from the 9th to 24th July 2009. She then applied to the High Court and subsequently the Constitutional Court on the basis that the procedure allowed for in section 30 of the Magistrate's Courts Act was unconstitutional. This was confirmed by the Constitutional Court who found, inter alia, that:

- I. "The words "arrest tamquam suspectus de fuga" as contained in section 30(1) of the Magistrates' Court Act 32 of 1944 are declared unconstitutional and invalid."
- II. "The whole of section 30 (3) of the Magistrates' Courts Act 32 of 1944 is declared to be inconsistent with the Constitution and invalid."

The effect of this judgment is that the procedure provided for in section 30 of the Magistrates' Court Act is no longer open to a creditor when the debtor is attempting to flee the country.

However a Creditor will, in appropriate circumstances, still be able to attach property in order to found or confirm jurisdiction, if the debtor has fled the country.

The High Court Act has provision for the same type of relief – this judgment was a pronouncement on the Magistrate's Court Act, but it is expected that the High Court provisions will be regarded as unconstitutional too.