

**FIRST NATIONAL BANK OF SA v COMMISSIONER, SARS 2002 (4) SA 768 (CC)
("THE FNB CASE")**

INTRODUCTION

The FNB case is the Constitutional Court's first engagement with the meaning of section 25 of the Constitution. It accordingly begins to define the terms used in the property clause and to deploy them in practice. In particular, it has something to say about –

1. The meaning of "property";
2. The meaning of "deprivation"; and
3. The meaning of "arbitrary"

for the purposes of section 25.

It also contains (in **paras 32** and **33**) a helpful discussion of Liens - which will come in useful during the real security section of the course.

THE FACTS

The applicant ("FNB") challenged the constitutional validity of section 114 of the Customs and Excise Act 91 of 1964 ("the Act"). Section 114 allowed the respondent ("the Commissioner") to seize and detain any goods in the possession or control of a customs debtor and to sell them in execution of the customs debt. Importantly, it did not matter whether the property in question belonged to the customs debtor. Accordingly, property owned by someone else (who did not owe the commissioner

any money) could be seized and sold to defray the customs debt of the person who just happened to be possess it at the time.

See paras 11 to 23 of the judgment

FNB had leased two cars to two different companies (“Lauray” and “Airpark”). It had also sold another car to Airpark by way of an instalment sale agreement. The agreement provided that FNB would remain the owner until the last instalment was paid.

Airpark and Lauray owed the Commissioner large amounts in outstanding customs duties and related debts. Acting in terms of his powers in terms of section 114 of the Act, the Commissioner seized the cars as security for the debts owed to him.

FNB was owed substantial amounts of money in terms of the instalment sale agreement and the leases. It was the owner of all three cars. The effect of the Commissioner’s action was to frustrate its rights in terms of those agreements and its right to ownership of the cars.

See paras 7 to 10 of the judgment

The question was, then, “whether it is constitutionally permissible to seize a third party’s property for another person’s customs debt” (**para 37**) where the effect of the seizure is that the detention of the goods continues indefinitely until they are sold by the Commissioner. The effect of the section was “to deprive FNB permanently of all its rights and benefits as owner of the vehicles”. (**para 38**). “The crucial issue is accordingly whether, in the absence of the relevant *nexus* [connection] between the

goods and the customs debtor, the sale by the Commissioner – under section 114 of the Act – of goods owned by someone else who is not a customs debtor amounts to an unjustifiable infringement of the owner’s section 25 property rights” (**para 38**).

THE MEANING OF SECTION 25

Negative protection

Section 25 of the Constitution “embodies a negative protection” or property. It “does not expressly guarantee the right to acquire, hold and dispose of property”. (**para 48**)

Even the negative “protection of property is not absolute, but subject social considerations”. (**para 50**).

The meaning of “property”

The Court held that it is “practically impossible” to embark upon a comprehensive definition of property – but ownership of a corporeal moveable must lie “at the very heart” of the constitutional definition of property (**para 51**).

It does not matter that FNB’s ownership of the vehicle was merely a contractual device to reserve ownership to FNB and secure payment on the instalment sale agreements and leases. (**para 53**). “Neither the subjective interest of the owner in the property, nor the economic value of the right of ownership . . . can determine the characterisation of the right”. (**para 56**).

The meaning of “deprivation”

The term “deprivation” is broader than “expropriation”. Any interference with the use, enjoyment or exploitation of private property involves some sort of deprivation. Dispossessing an owner of all rights, use and benefit to and of corporeal goods must, at least, be a deprivation (**paras 58 and 61**)

The meaning of “arbitrary”

Generally speaking, the word “arbitrary” may only impose a low level of judicial scrutiny – meaning nothing more than an absence of bias, bad faith or caprice. Arbitrary “has been held to mean ‘capricious or proceeding merely from the will and not based on reason or principle’”. (**para 62**).

But the context in which the word “arbitrary” is used is important. The word “arbitrary” in section 25 (1) must be interpreted “as part of a comprehensive and coherent bill of rights in a comprehensive and coherent Constitution” (**para 63**).

“Arbitrary” is not limited to non-rational deprivations. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into the connection between means and ends. At the same time it is narrower and less intrusive than the standard of proportionality. (**para 65**).

The exact nature of the test is fact specific. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent a deprivation from being arbitrary. (**para 66**).

Having reviewed a vast quantity of academic and foreign law authority, the judgment concludes, in paragraph 100, that a deprivation is arbitrary when there is not sufficient reason for it, or it is procedurally unfair. Sufficient reason is to be established by reference to the following factors:

“(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with “arbitrary” in relation to the deprivation of property under section 25.” (para 100)

APPLICATION TO SECTION 114

In this case, the end sought to be achieved is to exact payment of a customs debt.

This is a legitimate purpose. However, section 114 “casts the net far too wide”. It sanctions a total deprivation of a person’s property where:

1. They have no connection with the transaction giving rise to the customs debt;
2. Their property has no such connection either;
3. They have not transacted with the customs debtor in a manner that forces the commissioner to act to his detriment in relation to the customs debt. i.e: they have not hindered the Commissioner’s ability to collect the customs debt in any way.

Accordingly, there is insufficient reason for the deprivation authorised by section 114. It is accordingly unconstitutional, and the seizures pursuant to it are unlawful. (**paras 108, 109, 132 and 133**).

There is no justification for section 114 to be found in section 36 of the Constitution. (**para 111**).

COMMENTARY ON FNB

Read, in your own time, pages 53 to 57 of Van Der Walt, Constitutional Property Law, for a discussion of the FNB decision.

