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MASTER OF LAWS (LLM): SHIPPING LAW

TITLE:

Do the provisions of section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Admiralty Jurisdiction Regulation Act 105 of 1983 infringe the substantive requirements of section 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996?

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CHAPTER 1 INTRODUCTION

I Aim

In this dissertation, the issue that is considered is whether or not the provisions of section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Act') constitute an arbitrary deprivation of a minority shareholder's property because they permit the deprivation of minority shareholder's property interests purely on the basis of common control by the majority shareholder.¹

II Background

Section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act permits a creditor to enforce its maritime claim by arresting a ship other than the ship in respect of which the creditor has a maritime lien or a claim *in personam* even where the associated ship² is owned by a different juristic person. In effect, where the majority shareholder controls both the guilty (referred to

¹ See MJD Wallis *The Associated Ship & South African Admiralty Jurisdiction* (2012) (Wallis) at 266. He illustrates this concern by providing the following example: 'there is a situation where the ship concerned and the associated ship are owned by companies, both of which are controlled by the same individual, but where each company has minority shareholders and these are not common to both. In simple terms, the shares in company A, that owns the ship concerned, are owned by X and Y with X being the controlling shareholder. The shares in company B, that owns the associated ship, are owned by X and Z with X again being the controlling shareholder. The constitutional question is whether it is open to Z in that case to complain that permitting arrest of the associated ship in respect of the debts arising from the operation of the ship concerned, involves arbitrary deprivation of his or her property interest in company B?'

² Section 3(7)(a) of the Act defines an associated ship as 'a ship, other than the ship in respect of which the maritime claim arose:

(i) ...
owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or
owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

(b) For the purposes of paragraph (a):

(i) ships shall be deemed to be owned by the same persons if the majority in number of, or of voting rights in respect of, or the greater part, in value of, the shares in the ships are owned by the same persons;

(ii) a person shall be deemed to control a company if he has power, directly or indirectly, to control the company; a company includes any other juristic person and anybody of persons, irrespective of whether or not any interest therein consists of shares. ...'

as the 'concerned') ship-owning company and the associated ship-owning company at the relevant time, association is established and consequently the associated ship is liable to be arrested. It matters not that a minority shareholder in the associated ship company has no interest in the concerned ship company nor knowledge of the claim. This gives rise to a number of possible constitutional questions which relate *inter alia* to the right to property.

This dissertation aims to examine whether the provisions of the Act read together substantively³ infringe section 25(1) of the Constitution⁴ by reviewing the primary Constitutional Court decisions relating to section 25(1) of the Constitution, namely, *First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ('FNB')⁵ and *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* 2005 (1) SA 530 (CC) ('Mkontwana'). Although the facts of these cases are different from those that arise in an associated ship arrest, the underlying principles established by the Court are central to analysing whether section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act constitutes an arbitrary deprivation of property with respect to minority shareholders.

In the *FNB* case the Court stated the following (in relation to the deprivation enabled by section 114 of the Customs and Excise Act 91 of 1964):

'Here the end sought to be achieved by the deprivation is to exact payment for a customs debt. This is a legitimate and important legislative purpose, essential for the financial well-being of the country and in the interest of all

³ In the *FNB* case, the Court held that deprivation will be arbitrary if it is without 'sufficient reason' or procedurally unfair. This dissertation will consider only the substantive elements that may infringe section 25(1) of the Constitution of the Republic of South Africa, 1996.

⁴ Constitution of the Republic of South Africa, 1996.

⁵ AJ van der Walt *Constitutional Property Law* 3 ed (2011) (*Van der Walt*) at 8. He states: 'Arguably the most significant development in constitutional property law after 1994 was the Constitutional Court's *FNB* decision in 2002. That decision sketched out the way forward as far as the interpretation of section 25 is concerned, especially with regard to deprivation of property.'

its inhabitants. Section 114, however, casts the net far too wide...it sanctions total deprivation of a person's property under circumstances where (a) such a person has no connection with the transaction giving rise to the customs debt; and (b) where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to his detriment in relation to the incurring of the customs debt. In the absence of any such relevant nexus, no sufficient reason exists for s 114 to deprive persons other than the customs debtor of their goods. Such deprivation is accordingly arbitrary for the purpose of s 25(1) and consequently a limitation (infringement) of such person's rights.⁶ (Emphasis added)

On the basis of this reasoning, the dissertation aims to consider whether section 3(7)(a)(ii) read with section 3(7)(b)(i) infringes minority shareholders' property interests for the following reasons: the provisions are too expansive in that they too 'cast the net far too wide' by not limiting their application only to instances where all the shares are owned and controlled by the same person; they sanction total deprivation of a person's property in circumstances where (a) such a person may have no connection with the transaction giving rise to the maritime claim; (b) such person has not transacted with the claimant and therefore lacks the necessary nexus to the wrongdoing, and (c) there are less restrictive means to give effect to the objectives of the Act.

Based on the Court's reasoning in the *Mkontwana* case it will consider whether the contrary is not equally persuasive by arguing that the provisions do not infringe minority shareholders' property rights on the grounds that (a) the purpose of section 3(7)(a)(ii) read with section 3(7)(b)(i) is legitimate and compelling because it seeks to protect creditors from unscrupulous debtors in the context of a trade with particular international arrangements that place reliance on admiralty law being governed as a separate and distinct jurisdiction; (b) the law provides a 'sufficient reason' for the deprivation; (c) there exists a clear relationship between the associated ship and the debt occasioned by the

6 *Van der Walt* op cit (n 5) 247.

concerned ship and between the debt and the minority shareholder of the property because through its shareholding in the ship-owning company, the minority shareholder knowingly assumes the risks associated with minority shareholding in the company; and (d) there are measures that minority shareholders could and ought to put in place to guard them against loss occasioned through the arrest of the associated ship.

Given that it is possible that there are two opposing outcomes that could be reached in addressing the question posed in this dissertation, I will further consider whether, if it is found that the provision infringes section 25(1) of the Constitution, it could nevertheless be protected by section 36(1) of the limitations clause in the Constitution.

In concluding, I will contend that although there are arguments that can be made persuasively both in defence of and against the constitutionality of the relevant provisions in the Act, it is clear that any determination by a Court will require a careful balancing of competing interests not only in the context of property rights but also in the context of admiralty law.

III Structure

In order to arrive at this conclusion, the chapters have been structured in the sequence set out below. In chapter 2 the relevant associated ship provisions contained in the Act will be examined with a view to understanding the context of the provisions and the purpose behind the legislation. The chapter will also outline how the Constitutional Court approaches interpretation to legislation. Chapter 3 will consider all the relevant general elements of section 25(1) of the Constitution. In chapter 4, I shall apply the approach adopted by the Court in *FNB* and refined in *Mkontwana* to the relevant provisions of the Act to assess whether the provisions infringe section 25(1) of the Constitution. In chapter 5, the arguments for and against the constitutionality of the provisions will be examined. In chapter 6 I reflect on whether the potential limitation of the property right brought about by the Act is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in terms

of section 36(1) of the Constitution. In so doing, I consider whether there are 'less restrictive means' to achieve the objectives of the Act. To contextualise the outcome of the analysis, chapter 7 reflects on the current debates in international jurisdictions regarding provisions similar to the associated ship provisions contained in the Act. In chapter 8, I conclude by consolidating my primary findings on the question of constitutionality by drawing together my analysis of the Constitution, the Act, court decisions, published articles and textbooks relating to the subject matter of this dissertation. While there is no definitive answer to the enquiry conducted in this dissertation, it is submitted that it is likely that it will be found that the provisions in the Act in their current form do not pass Constitutional muster.

CHAPTER 2 THE ASSOCIATED SHIP PROVISIONS

I Aim

The aim of this chapter is to examine more closely the associated ship provisions contained in the Act, particularly section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act, to establish the context of the provisions and the purpose behind the legislation. The chapter also aims to consider the Constitutional Court's approach to interpreting legislation and the application of that approach to relevant provisions of the Act.

II The Provisions

(a) *The context of the associated ship provisions*

Hare⁷ states that one of the fundamental cornerstones of South Africa's admiralty jurisdiction is the statutory right to bring a 'suit *in rem*', otherwise known as an action *in rem*. It is a powerful remedy that enables a party to arrest another's property before judgment is obtained against the owner of the property and can be effected without notice to the owner. Section 3(4) of the Act provides that it may be enforced if the claimant has a maritime lien⁸ over the property or if the owner of the property to be arrested would be liable to the claimant in an action *in personam*. Hofmeyr⁹ states that although it was historically limited to the 'guilty' property only, its reach was extended as a result of maritime creditors being frustrated by entities that could deliberately circumvent its application by keeping away from ports where they were 'guilty' of transgressions.¹⁰

⁷ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa*, 2ed (2009) (Hare) 33.

⁸ The Act does not define maritime liens. South African law is based on English law as at November 1983, which encompassed the following as maritime liens – collision, salvage, seamen's wages, master's wages and disbursements and bottomry or respondentia bonds.

⁹ G Hofmeyr *Admiralty Jurisdiction: Law and Practice in South Africa* 2ed (2012) (Hofmeyr) 133.

¹⁰ See also William Tetley 'Arrest, Attachment and Related Maritime Law Procedures (1999) 73 *Tul. L. Rev* 1895, where he states: 'Pre-judgment security is of the highest importance to the maritime creditor, who always faces the threat of being unable to recover his debt from an impecunious or unscrupulous debtor, if the debtor's ship – the main asset on which so many maritime creditors depend in extending credit – should sail away without the debt having been paid.'

The Legislature addressed the concern by providing that the action *in rem* could be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose (the concerned ship). The provisions in the Act allow for arrests of ships connected not only by common ownership, but also by common control. In bringing an application to arrest an associated ship, the *onus* is on the claimant, who is required to prove on a balance of probabilities that the ship they seek to arrest or attach is an associated ship of the concerned ship. South African courts largely draw inferences on the basis of the information provided by the parties as to whether the association exists. The courts will look to whether there was common ownership and common control of the concerned ship and the associated ship at the time that the claim arose and at the time that the claimant seeks to enforce its claims.

(b) Section 3(7)(a)(ii) read with Section 3(7)(b)(i) of the Act

Section 3(7)(a)(ii) of the Act refers to an associated ship as one owned at the time at which the action commences by the person who controlled the company which owned the concerned ship when the maritime claim arose. Section 3(7)(b)(i) of the Act provides that ownership shall be deemed if the majority in number of shares or voting rights, or value in shares in the ship, are owned by the same persons. In shipping law,¹¹ a legal fiction exists that a ship is divided into 64 shares, which would mean that the majority own at least 33 shares.

Wallis indicates that the key issue to be determined in applying the provision relates to the 'person in whom the power of control vests'.¹² If the same person controls both companies at the relevant time, association is established, which he argues effectively ignores the presence of the minority shareholders. He states:

'As the section is now solely concerned with control of the company, it disregards the position of persons holding minority interests in the company, whether one is dealing with the ship concerned or an associated ship. Accordingly, if A controls two ship-owning companies at times

¹¹ Ship Registration Act 58 of 1998.

¹² *Wallis op cit* (n1) 203.

relevant for consideration of the question of association it will not matter that a minority shareholder in the company owning the associated ship has no interest in the company owning the ship concerned. Such a person can now clearly be deprived of his or her interest in the associated ship under the new provision notwithstanding that they have no connection with or responsibility for the default by the ship concerned. The effect of this change is to simplify the task of the arresting creditor and to extend the scope of the jurisdiction ... The effect of rendering the presence of minority shareholders irrelevant is probably to extend the scope for associated ship arrests.¹³

III The Purpose of the Associated Ship Provisions

Different views have been expressed by legal commentators on the reason for the inclusion of the associated ship provisions in the Act.¹⁴

Some commentators argue that it was essentially included as an extension of the 'sister-ship' provisions.¹⁵ The sister-ship provisions contained in the International Convention relating to the Arrest of Sea Going Ships (Brussels Convention) of 1952 (the 'Arrest Convention') arose out of a concern that because actions *in rem* could be instituted only against 'guilty' ships, maritime debtors could avoid their legal obligations by simply staying away from ports where they were guilty of transgressions.¹⁶ The sister-ship provisions allowed a claimant to arrest either the ship in respect of which it had a maritime claim (the ship concerned) or any other ship owned at the time of enforcement of the claim by the person who was the owner of the ship concerned at the time the maritime claim arose. It

¹³ *Wallis op cit* (n1) 146.

¹⁴ The origin of the arrests preceding the Act falls outside the scope of the dissertation. See H Staniland 'The arrest of the associated ship in South Africa: lifting the corporate veil too high' (1996–1997) 9 *USF Maritime Law Journal* 405; *Hofmeyr op cit* (n9) 133 and *Wallis op cit* (n1) chap 4.

¹⁵ *Bulkship Union SA v Qannas Shipping Co Ltd & Another* 2010 (1) SA 53 (SCA) at para 22; See further *Hofmeyr op cit* (n9) 134.

¹⁶ See *The Jade, The Eschersheim: Owners of the Ship Jade, Owners of Cargo lately laden on board the Motor Vessel Erkowit v Owners of the Ship Escherheim* [1976] 1 All ER 920 (HL) at 923 and *The Owners of the Motor Vessel Monte Unlia v Owners of the Ships Banco and Others (The Banco)* [1971] 1 All ER 524 (PDA and CA) at 151.

provided that ships are deemed to be in the same ownership when all the shares in the ship are owned by the same person.¹⁷ In practice, however, the provisions were ineffective because they were easily circumvented through the creation of 'single-ship' companies.¹⁸ In South Africa, the view that the associated ship provisions were in response to this perceived shortcoming in the sister-ship provisions was generally accepted by the legal fraternity.¹⁹ Hare states as follows:

'A maritime claim can be a debt collector's nightmare. The persona of the debtor is in all likelihood a shell company registered in an obscure jurisdiction with its sole asset a ship that tramps the jurisdictions of the maritime world ... Exacerbating the precariousness of the creditor's situation is the comparatively modern practice of the 'one ship' operation ... By the time of the drafting of the South African Admiralty Act, the "brass-plate" shipowning company was the norm, and it was rare for the sister ship provisions of the Arrest Convention to be of any use whatever to claimants. South Africa adopted an innovative approach to sister ship arrest ...'²⁰

Bradfield supports this view by stating:

'Mindful of this practice of establishing "one-ship" companies, generally as subsidiaries of a parent company that was effectively the owner of a fleet, as a means of circumventing the "sister" ship provisions, the South African legislature adopted the notion of an "associated ship" where the link between the ships could also be established through common control rather than being restricted to common ownership, as was the case with the sister ship provisions.'²¹

Staniland further comments that:

¹⁷ See article 3(2) of the Arrest Convention.

¹⁸ *Hofmeyr* op cit (n9) 133

¹⁹ See South African Law Commission Discussion Paper (*Project 32*) *Report on the Review of the Law of Admiralty*, 13 September 1982 at 14.

²⁰ *Hare* op cit (n7) 103.

²¹ G Bradfield 'Guilt by association in South African admiralty law' [2005] *LMCLQ* 234 at 238.

'At the time of their introduction, there was a discernible tendency by the law reformers to support the introduction of provisions on the ground that they merely constituted extensions of existing rights and remedies.'²²

However, not all commentators are in agreement that this is the justification for the associated ship provisions. The notion is rejected by Wallis, who states:

'Where it is sought to justify the associated ship arrest merely on grounds that its purpose is to align South African maritime jurisprudence with the provisions of the Arrest Convention, whilst addressing by way of extension a problem occasioned by attempts on the part of ship owners to avoid the sister ship arrest provided for in the Convention, it can be demonstrated that this is fallacious. The single ship company was no novelty when the Arrest Convention was concluded and, even more importantly, there is almost nothing to suggest that it has burgeoned in the way that it has, as a means to avoid the sister ship arrest.'²³

Wallis argues that an extension of the Arrest Convention provision would have been to widen the arrest provisions against any of the maritime debtor's property. What the associated ship provisions in the Act did was to introduce a completely new and different basis for liability by permitting the arrest of a different entity. In the Act, liability attaches not on the basis of ownership of the concerned ship or because of the arrest of property belonging to the debtor but on the basis of common control of ships or companies (or other corporate entities) which own the ships. As Wallis notes, there are fairly logical reasons why a company would want to structure its ownership in such a fashion.²⁴ It could, and should, not therefore have been a legitimate underlying intention of the Legislature to 'outlaw' such ownership structures. Furthermore, the

²² *Staniland op cit* (n14) 417.

²³ *Wallis op cit* (n1) 276.

²⁴ The commercial incentives for ship-owners to operate fleets of ships by structuring them as individual one-ship companies are highlighted by Wallis. He states that it may be a requirement of the banks that are financing the fleet who may insist on it to secure their own lending by way of cross-guarantees or personal guarantees. It may also be necessary so that they limit the number of creditors that can claim against the company particularly those that may rank higher than a mortgage in instances of insolvency. See *Wallis op cit* (n1) 277.

pronouncements by the Minister of Justice that the associated ship provisions were intended to allow for lifting the corporate veil in instances of fraud²⁵ appear to be misguided because it is not a requirement that fraud or dishonesty or improper conduct be alleged to invoke the provisions.

Wallis raises two other possibilities to justify the existence of the associated ship provisions. The first relates to the theory that the associated ship provisions were incorporated into the Act with the aim of increasing South Africa's attractiveness as a maritime jurisdiction. It is a contextual factor that might add texture to this analysis as there is evidence that this was a major consideration of the drafters and legal fraternity when drafting the provisions. He argues that when the Act was being debated, it was clear that fewer sister ships existed (probably as a means of circumventing the legislation) and that sister-ship arrest provisions as provided for in the Arrest Convention would prove to be ineffectual. The inclusion of the sister-ship provisions would not provide an opportunity to develop South Africa as a 'desirable maritime jurisdiction'. At the time of drafting the Act, the protection that the country offered to maritime creditors was no different from that offered elsewhere in the world. It was becoming a political outcast in international politics and its location was not suitable to its becoming an international maritime trade litigation centre. In order for South Africa to become 'an attractive maritime jurisdiction', it needed a wider basis for creditors to pursue and secure their claims, and the most apparent way to achieve this was to find a means of attacking 'the practice of operating a single fleet ... by means of a number of vessels owned by one-ship company[ies]'.²⁶

²⁵ *Staniland* op cit (n14) 410. Staniland further comments that the Minister of Justice's statements in the House of Assembly Debate, Hansard, 11 August 1983, Col 1172, which were as follows: 'Although the principles of sanctity of separate corporate personality of a company distinct from its members was enshrined in *Salomon v Salomon and Co*, our Courts should brush aside the veil of corporate separate personality time and again where fraudulent use is made of the fiction of legal personality' reflects the view that the introduction of the provision was simply an *extension of a South African company law principle*.' (Emphasis added.)

²⁶ *Wallis* op cit (n1) 66; See further *Hofmeyr* op cit (n9) 18 para VII.6.

Given Wallis's evidence as to why this was a key consideration underlying the more expansive associated ship jurisdiction (as opposed to the reasoning that it was simply an extension of the sister-ship provisions in the Arrest Convention) I am persuaded that it the aim of making South Africa an attractive maritime jurisdiction was a primary reason for the inclusion of the provisions. This is particularly concerning when one has regard to the extension of the ambit of jurisdiction by the amendment to the provisions in 1992 and the inclusion of section 5(3) in the Act.²⁷ I deal with these in turn below.

(a) *The 1992 Amendment*

When one considers the current section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act, it is clear that this was a significant shift from the previous provisions. In *Dole Fresh Fruit International Limited v MV Kapetan Leonidas*,²⁸ the court considered the previous wording of the associated ship provisions, which stated that the meaning of 'shares' in section 3(7)(a)(ii) referred to *all* the shares in the company on the basis that the:

'legislature could never have intended that a person owning shares in the company which owns the alleged associated ship, but who is a stranger to the company which owns the ship in respect of which the maritime claim arose, should be deprived of his interest by its arrest as an associated ship'.²⁹

This decision was made on the basis of the provisions before the amendment affected in 1992. One can also have regard to the views of Marais JA in the *Belfry Marine Limited v Palm Base Maritime SDN BHD* 1999 (3) SA 1083 (SCA) (the '*Heavy Metal*' case), where, in dealing with the relevant sections of the Act, he states that:

'The purpose of the provision does not create a fiction which could place innocent third parties in jeopardy of having their ships arrested to secure

²⁷ See the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992.

²⁸ 1995 (3) SA 112 (A).

²⁹ At 119 B–D.

payment of claims brought against persons or ships of whose existence they were quite oblivious. That would be tantamount to naked confiscation without compensation a purpose which one shies away from attributing to the Legislature unless that is unmistakably what it intended.³⁰

In my view, the comment reflects an interpretation of the Act that is in compliance with the Constitution. The provisions were specifically amended to extend their application to situations where all the shares were not owned by the same person.³¹ Similarly, when one considers section 5(3) of the Act, it raises questions about the true justification for the provisions in the Act. It provides that in addition to effecting an arrest to commence an action *in rem*, an associated ship can also be arrested for the purpose of providing security. Section 5(3) of the Act entitles the Court at the instance of any interested party to arrest property owned by a *peregrinus* as security for a maritime claim pending in South Africa or in a foreign jurisdiction, which claim may be based on a foreign cause of action and is subject to foreign law. The claimant is not required to convince the Court that he has commenced proceedings.³² All that is required is that he shows that proceedings are being contemplated.³³ As Hofmeyr states:

'This procedure, being a claim for security, is a separate and ancillary issue between the parties, collateral to and not directly affecting the main dispute. The section represents a far-reaching innovation. It extends to proceedings

³⁰ *The Heavy Metal* at 1112 I–J. In the case, this statement is made in relation to locating where the power of control really lies. The court stated that the dominance of ownership (where there is divided ownership); the dominance of control and the dominance in the value of shares was 'considered to be a justification for equating the situations' to full ownership in the concerned or associated ship; see at para 8 of Marais JA's judgment. The constitutionality of the provision in relation to minority shareholders was therefore not the subject matter of the case but in my view the same reasoning must be applied in relation to minority shareholders.

³¹ *Wallis* op cit (n1) 281. See further the Admiralty Jurisdiction Regulation Amendment Act 87 of 1992.

³² See *Hofmeyr* op cit (n9) 173.

³³ See *Hofmeyr* op cit (n9) 175.

outside the Republic and neither the parties nor the cause of action need have any connection with the court granting the order³⁴

Wallis states that the primary reason for the inclusion of the provisions was a considered policy choice by the Legislature 'that it was desirable that creditors should be paid and that provisions should be put in place in the legislation that would facilitate their ability to secure payment.'³⁵ He argues that the underlying motivation for the provisions is a legitimate concern by the State that creditors may use the corporate form as a means of avoiding their obligations. In the interests of international maritime trade, systems that support and facilitate the payment of debts are a desirable State objective.³⁶

In a recent Supreme Court of Appeal matter, Wallis, however, does not express any of the views above as the purpose behind the legislation. In *Owners of the MV Silver Star v Hilane Limited* [2014] ZASCA 194 (the *Hilane* case), he states that the background to the introduction of the associated ship arrest provisions 'was the international trend for ship owners to register all the vessels in a particular fleet in separate companies each owning a vessel'. He further states that although the Arrest Convention attempted to address this issue by providing that an action *in rem* was not only permissible against the concerned ship in relation to which a maritime claim arose, but could also be brought in respect of the arrest of another ship owned by the same owner as the concerned ship at the time that the maritime claim arose, it was ineffective when the vessels were owned by separate one-ship companies. Wallis concludes as follows:

'As the principal author of the Act put it to this court in the *Berg*,³⁷ in order to make liability for a maritime claim or the loss arising from such a claim to fall where it belonged by virtue of common ownership of ships or common

³⁴ See *Hofmeyr* op cit (n9) 173.

³⁵ *Wallis* op cit (n1) 277.

³⁶ *Wallis* op cit (n1) 89.

³⁷ *Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at 712A–B.

control of ship-owning companies, the associated ship provisions were devised and incorporated in the Act.³⁸

Despite Wallis's previous criticisms of this as the explanation for the purpose of the Act, its inclusion here lends support to the position articulated by other authors and provides authority for future judgments. The relevance of this enquiry relates *inter alia* to the analysis of arbitrariness in the context of section 25(1) of the Constitution, which is dealt with in more detail in the ensuing chapters. I now turn to a consideration of how the court will interpret the Act in the context of the constitutional challenge.

IV Interpretation

(a) *General approach to interpretation*

The Constitution is the supreme law of the land in South Africa.³⁹ All legislation, including the Act, must be tested and measured against it. The Bill of Rights applies to all law and binds the Legislature, the Executive and the Judiciary.⁴⁰ De Ville⁴¹ notes that Froneman J, sitting then as a High Court Judge in the matter of *Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others*,⁴² supported the idea that one should adopt the same interpretative approach when interpreting the Constitution and statute. Froneman J stated as follows:

'The interpretative notion of ascertaining "the intention of the legislature" does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the legislature. This means that both the purpose and method of statutory interpretation in our law should be different from what it was before the commencement of the Constitution on 27 April 1994. The purpose now is to test legislation and administrative action against the values and principles

³⁸ *Hilane* at para 13.

³⁹ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) at 240.

⁴⁰ Section 8 of the Constitution.

⁴¹ JR de Ville *Constitutional and Statutory Interpretation* (2000) (*De Ville*) 59.

⁴² 1994 (4) SA 592 (SE) at 597.

imposed by the Constitution. This purpose necessarily has an impact on the manner in which both the Constitution itself and a particular piece of legislation said to be in conflict with it should be interpreted. The interpretation of the Constitution will be directed at ascertaining the foundational values inherent to the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms to the fundamental values or principles of the Constitution. *Constitutional interpretation is thus primarily concerned with the recognition and application of constitutional values and not with a search for the literal meaning of statutes.*⁴³ (Emphasis added)

In the light of the above, I submit that the process of interpreting the provisions of the Act should entail a consideration of whether they are capable of an interpretation that is in line with the underlying constitutional values and principles.

(b) Interpreting the Bill of Rights

The Constitution provides that when interpreting the Bill of Rights, the court must interpret the right to property in a manner that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom.

Section 39 (2) of the Constitution states that:

'(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

The above requirement is not discretionary and must always be taken into account by the courts.⁴⁴ The Constitutional Court has established two

⁴³ *De Ville* op cit (n41) 59.

⁴⁴ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) at 240. The Court held that 'a court cannot enforce a law that is inconsistent with the Constitution'.

obligations that arise out of section 39(2) in various judgments.⁴⁵ The first obligation is that if a provision is capable of two interpretations and one interpretation would render it unconstitutional, the courts should opt for the interpretation that would render the provision compatible with the Constitution. In the *Hyundai* case,⁴⁶ the Court held that:

'The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistent with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as it is possible, in conformity with the Constitution ... judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such interpretation can be reasonably ascribed to the section.'

The second obligation is that if a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that 'better' promotes the spirit, purport and objects of the Bill of Rights. This is a requirement even though none of the interpretations results in the provision being considered unconstitutional. In *Fraser v Absa Bank*,⁴⁷ the Court held that:

'Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights.'

In my view, the wording of section 3(7)(a)(ii) read with section 3(7)(b)(i) is clear in its meaning and intent and is thus not open to two interpretations insofar as the provisions permit the arrest of a associated ship owned by another

⁴⁵ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Limited and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 21.

⁴⁶ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Limited* supra (n45) at paras 22–23.

⁴⁷ 2007 (3) SA 484 (CC) at para 47.

company, through common control. The constitutionality of this is dealt with below.

V Conclusion

In this chapter, I considered the associated ship provisions contained in the Act and contextualised section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act. I explored the purpose of the legislation and highlighted the constitutional approach to interpretation of the provision. On the face of it, the provisions serve a legitimate governmental purpose.⁴⁸ By creating not only ownership, but also control as the two necessary elements for association, the provisions are carefully crafted to overcome strategies that unscrupulous ship-owners might use to evade the arrests of associated ships by concealing their ownership or control of the ship. However, given the impact on innocent minority shareholders, as will be demonstrated in the ensuing chapters, it could be argued that the provisions are too intrusive.

⁴⁸ In addressing the policy question, Wallis states that it was determined that 'those who secure to themselves the benefits of scale and other benefits flowing from the operation of a fleet of vessels, should at the same time, by housing each vessel in a discrete company, be able to limit the range of assets to which ordinary creditors may have resort in order to secure payment of their claims'. He argues that throughout time, legal institutions have, where necessary, placed limitations on the ability of shareholders to enjoy separate legal personality and through the State helping to ensure that legal debts are paid, it fulfils a legitimate government purpose.

CHAPTER 3 APPROACH TO ANALYSIS OF WHETHER THE PARTICULAR STATUTORY PROVISIONS INFRINGE SECTION 25(1) OF THE CONSTITUTION

I Aim

In this chapter, I explore the elements of section 25(1) of the Constitution. I do so in order to determine what factors courts take into consideration when assessing whether there is an infringement of section 25(1) of the Constitution. The basis for the analysis is the approach used by the Constitutional Court in the *FNB* and *Mkontwana* decisions.

II The Property Clause

The right to property is contained within section 25(1) of the Constitution and reads as follows:

'No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property'

The tensions between individual rights and public policy that arise in interpreting the property clause in the context of the Bill of Rights are described by Van der Walt⁴⁹ as follows:

'The meaning of s 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterise the operation of the property clause. The tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.'

The section fulfils two primary functions: it provides that a person's property rights may be interfered with in the public interest but regulates the parameters for such interference. The interference cannot be arbitrary. In order to pass constitutional scrutiny, the statutory interference must meet three

⁴⁹ AJ van der Walt 'The Constitutional Property Clause' (1997) at 11.

requirements: first, it must be through a law of general application;⁵⁰ secondly, it must not be arbitrary and, thirdly, the deprivation must be in the public interest.⁵¹ If it cannot meet these requirements, the provision must be declared unconstitutional.

III General Approach to determining whether the Right is Infringed

De Vos⁵² outlines the process that must be applied by South African courts in assessing whether a fundamental right as set out in the Bill of Rights has been infringed, in three following stages: the application stage, the limitations stage and the remedies stage. In the application phase, the claimant will have to demonstrate that they are entitled to the protection provided by the Bill of Rights and that the respondent is bound by the duties imposed by the right and that the right has been infringed. In the limitations stage, the court will assess what the scope of the right is and whether the infringement is justifiable in terms of the law. If the deprivation infringes a right protected in the Bill of Rights and cannot be justified in terms of section 36, the provision will be considered unconstitutional.⁵³ The remedies stage arises where the court finds that the law unjustifiably infringes the fundamental right and in this instance the court will need to determine the order that must be made to address the wrong.

I now turn to deal with the structure of the enquiry as set out in the *FNB* and *Mkontwana* decisions. Before embarking on the analysis, I briefly set out below the key legal issues considered in those cases to provide context for the discussions that follow.

⁵⁰ This element is dealt with below.

⁵¹ See *FNB* supra at para 50. Ackermann J states that 'the purpose of s 25 has to be seen both as protecting existing private property rights and serving the public interest, mainly in the sphere of land reform but not limited there, and also striking a proportionate balance between these two functions'.

⁵² Pierre de Vos & Warren Freedman *South African Constitutional Law in Context* (2014) (*De Vos*) 320–321.

⁵³ *FNB* supra at para 59.

(a) *The FNB and Mkontwana cases*

The legal issue in the *FNB* case concerned the constitutionality of section 114 of the Customs and Excise Act⁵⁴ (the 'Customs and Excise Act'). The Commissioner of Inland Revenue had detained vehicles belonging to First National Bank ('FNB') for the purpose of obtaining security for a customs-related debt owed to it. FNB challenged the constitutionality of the provisions of the Customs and Excise Act which allowed the Commissioner to sell the goods without a prior judgment or authorisation by the Court (the procedural concern). FNB also challenged the Commissioner's right to sell the goods 'even where the goods do not belong to the customs debtor but to some third party' (the substantive concern).⁵⁵ In relation to the substantive concern, the issue before the Court was therefore whether it was constitutionally permissible to detain a third party's property for another person's debt.

The legal issue before the Court in the *Mkontwana* case was whether section 118(1) of the Municipal Systems Act⁵⁶ infringed section 25(1) of the Constitution on the basis that it gave rise to arbitrary deprivation of property. The relevant provision in the Municipal Systems Act precluded a registrar of deeds from transferring immovable property without a certificate issued by the municipality indicating that consumption charges (consumption of water and electricity) due two years prior to the date of issue of the certificate had been paid. Effectively, this meant that landowners were held responsible for payment even in instances where they were not responsible for incurring the debt because the land was illegally occupied or occupied by tenants who, although contractually responsible for the charges, had failed to pay them.

(b) *Property*

The question that needs to be answered in this context is whether a protected property interest is involved. In the *FNB* case, the Court held

⁵⁴ Act 91 of 1964.

⁵⁵ *FNB* supra at para 4.

⁵⁶ Act 32 of 2000.

that it was not necessary to provide an exhaustive list of what constituted property for the purpose of section 25(1) of the Constitution. This would be determined on the basis of the facts in the relevant case.

(c) *Deprivation*

The second issue to be determined relates to whether there is in fact a 'deprivation' of property. In the *FNB* case, Ackerman J held that deprivation did not have to mean the taking away of property in its entirety, but that 'interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned'.⁵⁷ Dispossession is catered for under the expropriation provisions in the property clause, section 25(2).⁵⁸

In the *Mkontwana* case the Court indicated that the question of whether there has been a deprivation:

'depends on the extent of the interference with or limitation of use, enjoyment or exploitation [and] at the very least, substantial interference or limitation that goes beyond normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation'.⁵⁹

In *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*,⁶⁰ the Court held that deprivation required a 'substantial interference' for it to be considered unconstitutional in terms of section 25(1). It is clear from the above cases that although the underlying concept of deprivation as set out in the *FNB* case is accepted, the courts apply a context-specific interpretation to the impugned provision.

⁵⁷ *FNB* supra at para 57.

⁵⁸ *Mkontwana* supra at para 32.

⁵⁹ *Ibid.*

⁶⁰ 2011 (1) SA 293 (CC) at para 39.

(d) *Law of general application*

The next issue to be determined is whether the relevant Act is a 'law of general application'. This refers to valid law that is authorised and properly promulgated. The requirement is found within the context of both section 25(1) and section 36(1) of the Constitution.⁶¹ Van der Walt indicates that in the context of section 25(1) this requires that the law authorising the deprivation must be:

'generally and equally applicable and ensure parity of treatment; non-arbitrary in the sense that the law is applied according to a discernible standard; precise enough so that people can arrange their conduct to meet its standards; and accessible in the sense that the law has been publicly promulgated and is available to the public at large.'⁶²

(e) *Arbitrariness*

The next issue to consider is whether the deprivation of property in terms of the law of general application is arbitrary. In the *FNB* case, the Court held that the deprivation will be considered arbitrary if 'the law of general application does not provide sufficient reason for such deprivation and/or the deprivation is procedurally unfair'. A useful starting point for this enquiry is Ackermann J's view that:

'Context is critical, both in the sense that the concept 'arbitrary' appears in a constitution and in the sense that it must be construed as part of a comprehensive and coherent Bill of Rights in a comprehensive and coherent constitution.'⁶³

⁶¹ H Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 702 indicates that the underlying policy of this requirement is that 'it is only a democratically elected legislature that has the power to limit rights in order to advance or defend social interests'.

⁶² *Van der Walt* op cit (n5) 232.

⁶³ *FNB* supra at para 63.

(i) *What constitutes 'sufficient reason'?*

The Court in the *FNB* case laid out the steps and requirements for establishing a 'sufficient reason' for deprivation as follows:

- (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 is less extensive ...
- (f) Generally speaking, when the deprivation in question embraces all 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 apply 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 relationship between means and ends; in others this might only be

established by proportionality evaluation closer to that required by s36(1) of the Constitution.

- (h) Whether there is sufficient reason to warrant deprivation is a matter to be decided on all 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 s25.⁶⁴ (Emphasis added)

As such, the Court in the *FNB* case created what Mostert⁶⁵ terms a 'flexible' test. He states that:

'The test applied in *FNB* was all encompassing, resembling the proportionality test more closely than the rationality test. But the Court did not fix the level of scrutiny for all subsequent cases. In the subsequent decision of *Mkontwana*, the standard of scrutiny differed in respect of the non-arbitrariness.'⁶⁶

In the *Mkontwana* case, Yacoob J stated that the deprivation of property is arbitrary within the context of section 25(1) of the Constitution 'if the law in issue either fails to provide 'sufficient reason' for the deprivation or is procedurally unfair'.⁶⁷ In the process of considering whether a sufficient reason existed, the Court indicated that it was necessary to 'evaluate the relationship between the purpose of the law and the deprivation effected by that law, the complexity of relationships ... including that between the purpose of the provision, on the one side, and the owner of the property as well as the property itself on the other'.⁶⁹ If no relationship could be established between the purpose of the law, the property and its owner, the provision would be considered arbitrary. Mostert argues that, according to the Constitutional Court's interpretation of the test in

⁶⁴ *FNB* supra at para 100.

⁶⁵ Mostert '*The Principles of Property Law in South Africa* 5 ed (2012) 120.

⁶⁶ Mostert op cit (n65) 124.

⁶⁷ *Mkontwana* supra at para 34.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

this case, where deprivations are minimal, a simple identification of the rational connection between the means and the ends would suffice. Where the extent of the deprivation is greater, however, the Court held that a 'legitimate and compelling purpose would be sufficient if it could be shown that it could reasonably be expected that the owner bear the risk at stake.'⁷⁰

(ii) The purpose of the law

The emphasis placed by the Court in this enquiry is of some significance to the outcome of the analysis. The Court held that although the Customs Act served a 'legitimate and important purpose essential for the financial well-being of the country and in the interest of all inhabitants', section 114 was far too invasive because the means that it used deprived a property owner of its property where there existed no element of nexus.⁷¹

In the *Mkontwana* case, however, the Court placed emphasis on the purpose of the legislation⁷² by considering the roles of the municipalities in the context of a constitutional dispensation. It acknowledged that the purpose of the legislation was to place the risk of non-payment of municipal debts on owners even in instances where there were illegal land occupiers on their property or tenants who occupied the property who had failed to fulfil their contractual obligations to effect payment for services, but 'nevertheless held that:

'The purpose is important, laudable and has the potential to encourage regular payments of consumption charges and thereby to contribute to the effective discharge by municipalities of their constitutionally mandated functions. It also has the potential to encourage owners of the property to discharge their civic responsibility by doing what they can to ensure that money payable to a government organ for the delivery of service is timeously paid.'⁷³

⁷⁰ Mostert op cit (n65) 124.

⁷¹ *FNB* supra at para108.

⁷² *FNB* supra at para 38.

⁷³ *Mkontwana* supra at para 38.

The relevance of the Court's difference in approach is dealt with in the ensuing chapter.

(f) *The nexus*

In *FNB*, the Court held that the sanctioning of the deprivation of the property occurred in a context where no nexus existed between the person and the event giving rise to the customs debt, the property and the customs debt. The Court further stated that the person had not placed their property within the customs debtor's control to induce the Commissioner to act to their detriment.⁷⁴ In this element, where one is unable to show the relevant nexus, the requirement for a 'sufficient reason' is not fulfilled and therefore deprivation in such circumstances will be considered arbitrary.

In considering the complexity of the relationships in *Mkontwana*, the Court examined the relationship between the consumption charges and the property. Unlike the Court's finding in *FNB* that there was no connection between the property and the customs debt, in the *Mkontwana* case, the Court found that there was a clear relationship between the property and the debt and that the property and the consumption charges were 'closely interrelated'.⁷⁵ The Court held that the electricity and water supply to a property were an integral part of the property that increased the value of the property. In relation to the relationship between the debt and the owner of the property, it held that the owner was connected to the property by virtue of the ownership of the property which carried associated rights and responsibilities.

(g) *The extent of the deprivation*

In *FNB* and *Mkontwana* the Court held that to the extent that there was a 'minimal deprivation'⁷⁶ a 'mere rational connection between means and ends could be sufficient reason.' However, where the deprivation was greater, 'the

⁷⁴ *FNB* supra at para 108.

⁷⁵ *Mkontwana* supra at para 40.

⁷⁶ *FNB* supra at para 66.

more compelling the purpose and the closer the relationship between means and ends must be'.⁷⁷

A further point worth noting is that in the *Mkontwana* case, Yacoob J held that the deprivation related to a single incident of ownership, namely the right to transfer. The owner could still continue to occupy the property or do anything else that ownership allowed and, as such, the deprivation was temporary.⁷⁸

⁷⁷ *Mkontwana* supra at para 90.

⁷⁸ *Mkontwana* supra at para 45.

(h) *Differences in the Court's approach*

Van der Walt⁷⁹ argues that there are two possible ways in which one could interpret the non-arbitrariness requirement in section 25(1) of the Constitution. He indicates that the first approach is to adopt what he refers to as a 'thin' level of scrutiny, which is to accept that all the section requires is that there be a legitimate government purpose in order to pass the test of whether there is non-arbitrariness. In this analysis, there would be no need to consider the 'proportionality between the means and the ends (in other words, the effect of the deprivation on the affected owner)'.⁸⁰ The second way in which one could interpret the non-arbitrariness requirement is through a 'thick' substantive interpretation.⁸¹ In this analysis, the impact of the deprivation on the affected owner needs to be taken into consideration. It is not sufficient that there is a legitimate government purpose authorising the deprivation: what is further required is that the law permitting the deprivation must achieve a 'proper balance between the ends it serves and the means it employs to reach them'.⁸² On the basis of this reasoning, even though the deprivation served a legitimate governmental objective, where an unduly harsh burden was being placed on the affected owner, the deprivation could be found to be arbitrary.

Van der Walt submits that the Court in the *FNB* decision clearly adopted a 'thick substantive interpretation' in its decision.⁸³ He argues persuasively that this test is not the same as that applied in *Mkontwana*, which, he asserts, reformulated the test to hold that a 'mere rational connection' suffices where there is a minimal deprivation but where there is greater deprivation a more compelling rational connection should be established. Secondly, he indicates that instead of weighing up the complexity of the relationships as was done in

⁷⁹ *Van der Walt* op cit (n5) 253

⁸⁰ *Van der Walt* op cit (n5) 237.

⁸¹ *Van der Walt* op cit (n5) 238.

⁸² *Ibid.*

⁸³ He states as follows (at 246): 'In the context of the *FNB* case, the test set out by the court in paragraph 100 was thicker than mere rationality because it was clear that a strong reason for the deprivation was required in the circumstances since the affected right was ownership; all the incidents of ownership were affected by the deprivation; and there was no nexus or relationship between either the affected owner or the affected property and the purpose of the deprivation.'

the *FNB* case, the Court in *Mkontwana* indicated that 'there would be sufficient reason for the deprivation if the government purpose was both legitimate and compelling and if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment'.⁸⁴ The test applied in *Mkontwana* was therefore reduced to two questions: first, whether the reason for the deprivation is 'legitimate and compelling'; and, secondly, whether it would be unreasonable in the circumstances to 'place the burden where the provision does'.⁸⁵ This, he argues, demonstrates that the *Mkontwana* test comes closer to the thin rationality test.⁸⁶

The significance of the refinement of the approach adopted by the Court forms the basis of the underlying arguments for and against the constitutionality of the provisions, and accordingly is dealt with further in the ensuing chapters.

IV Conclusion

In this chapter, I outlined the process of analysing whether section 25(1) of the Constitution has been infringed. I did so by reviewing the difference in approach applied by the Court in the *FNB* and *Mkontwana* case. I now turn to applying the principles articulated in this chapter to the relevant provisions of the Act.

⁸⁴ *Van der Walt* op cit (n5) 250.

⁸⁵ *Ibid.*

⁸⁶ *Van der Walt* op cit (n5) 256.

CHAPTER 4 DETERMINING WHETHER THE ASSOCIATED SHIP PROVISIONS INFRINGE THE PROPERTY CLAUSE

I Aim

In this chapter, by applying the Court's reasoning in the *FNB* and *Mkontwana* cases, I consider whether through the application of 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act minority shareholders are arbitrarily deprived of their property rights in contravention of section 25(1) of the Constitution. The structure of the analysis followed is largely as set out in the *FNB* case.

II The Analysis

(a) *The meaning of 'property' in Section 25 as applied to the provisions of the Act*

It is submitted that the property interest referred to in section 3(7)(a)(ii) read with section 3(7)(b)(i) relates to the shareholders' (including the minority shareholders') interest in the ship through the ship-owning company.⁸⁷ South African law recognises that shares in a company 'constitute a special category of contract-based rights and are generally regarded as constitutional property'.⁸⁸ The essence of a share is reflected in *Borland's Trustee v Steel Brother & Company Ltd*.⁸⁹

'A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up by various rights contained in the contract, including the right to a sum of money of a more or less amount.'

⁸⁷ Although the primary focus of this dissertation is the impact of the associated ship provisions on minority shareholders in a company, in my view the same constitutional concerns with regard to the arbitrary deprivation of property arise in relation to minority shareholders who hold shares in a ship. In terms of section 3(7)(b)(iii) of the Act, a company includes 'any other juristic person and any body of persons'. *Wallis* op cit (n1) 150 states that the associated ship provisions would therefore apply to any form of corporate ownership. The property interests of the minorities in any of those corporate structures also deserve constitutional protection.

⁸⁸ *Van der Walt* op cit (n5) 153.

⁸⁹ *Borland's Trustee v Steel Brother & Company Ltd* [1901] Chapter 279.

The Companies Act 71 of 2008 ('Companies Act') defines a share as 'one of the units into which the proprietary interest in a profit company is divided'.⁹⁰ In *Cooper v Boyes*,⁹¹ the Court held that:

'... a share represents an interest in a company, which interest consists of a complex set of personal rights which may, as a incorporeal movable entity, be negotiated or otherwise disposed of. It is certainly not a consumable even though a money value can be placed on it'.⁹²

On the basis of this, in my view, the constitutional property which minority shareholders are deprived of once their vessel is attached is the value of their proprietary interests in the ship-owning company.

(b) *The approach to 'deprivation' in the context of section 25*

The next issue to be determined relates to whether it could be argued that there is a 'deprivation' of their property rights. The successful application of section 3(7)(a)(ii) read with section 3(7)(b)(i) results in a ship being placed under arrest. This Act therefore interferes with the use, enjoyment and exploitation of the shareholder's property. To the extent that the parties are able to furnish security, the arrest may be short-lived. Where they are not able to do so, the Court may at any time while the ship is under arrest order that the ship may be sold in accordance with section 9(1) of Act read with Rule 21(4) of the Admiralty Proceedings Rules. Although this is a discretionary exercise of power by the Court that is unlikely to be applied where the defendant can demonstrate a defence to the applicant's claim, the threat of the loss of the ship 'imposes a substantial burden on the owner'.⁹³ Whether the arrest is short-lived through the

⁹⁰ Section 1 of the Companies Act 71 of 2008.

⁹¹ 1994 (4) SA 521 (C).

⁹² *Cooper v Boyes* supra (n91) at 535.

⁹³ It is conceded that the courts have demonstrated that they will not easily exercise the power to sell the vessel. See *Sheriff of Cape Town v MT Argun* ("The Argun") 2001 (3) SA 1230 (SCA), where Scott JA states at para 34: "The relief sought, as I have indicated, was an order for the sale of the vessel. Section 9 of the Act affords the Court a wide discretion to order 'at any time' that property arrested in terms of the Act be sold. Nonetheless, that discretion will be sparingly exercised *pendente lite* and, where a claim is contested, the Court will be reluctant to order the sale of the arrested property if there is a reasonable prospect that the owner will be able to show

provision of security or sold, it is clear that once the ship is attached, the property right is interfered with.⁹⁴ This view is further supported by considering the principle applied by O'Regan J in the *Mkontwana* decision, where she stated that:

'It could be argued that "deprivation" in section 25(1) relates only to the complete removal of ownership or other real rights in property and not to limitation on real rights. There can be no doubt that some deprivations of property rights, although not depriving an owner of the property in its entirety, or depriving the holder of that real right, *could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property. The value of the property in material and non-material terms to the owner may be significantly harmed by a limitation of the rights of use or enjoyment of the property.* If one of the purposes of section 25(1) is to recognise both the material and non-material value of property to owners, it would defeat that purpose were "deprivation" to be read narrowly.'⁹⁵ (Emphasis added)

Lastly, the point is illustrated by Didcott J in *Katagum Wholesale Commodities Company Limited v The MV Paz*,⁹⁶ although this case related to the application of the previous section 5(3):

'It is a serious business to attach a ship. To stop or delay its departure from our ports, to interrupt its voyage for longer than the period it was due to

that the ground for the arrest is not a good cause of action. Indeed, an order in such circumstances has rightly been described as "Draconian".

⁹⁴ The effect of the ship arrest in accordance with the provisions of Admiralty Rules (the Rules) is that the vessel is entrusted to the sheriff, who is entitled to remuneration. The owner of the vessel therefore has no right of use over the vessel which in turn means that it is not able to use its asset for commercial gain. In terms of section 9(1) of the Act, the ship may be sold. Section 9(2) of the Act provides that the proceeds of any property sold shall constitute a fund to be held in court or managed in accordance with the rules or any order of the court. See *Wallis* at 275, where he states that where there is delay, cargo owners could also bring claims against the owners of the associated ship as carrier of that cargo and, further, if the associated ship is under charter, the charterer could also have a claim based on the delay. Only by furnishing security can the owner of the vessel circumvent these consequences. However, as Wallis further points out, the provisioning of security comes at cost which generally can't be recovered. This issue is dealt with further in chapter 3 of this dissertation.

⁹⁵ *Mkontwana* supra at para 89.

⁹⁶ 1984 (3) SA 261 (N) at 263.

remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo'

(c) *Considering whether the Act is a 'law of general application'*

In a recent High Court decision, *Credit Europe Bank NV v MV Tarik*⁹⁷ ('*Tarik case*'), the court stated that 'the Admiralty Jurisdiction Regulation Act is law of general application'.⁹⁸ Although not part of the *ratio decidendi*, in my view, this observation is supported for the reasons set out below. The Act maintains admiralty as a discrete and defined jurisdiction and expands the court's jurisdiction over foreigners and foreign causes of action.⁹⁹ It singles out a particular group of debtors and affords them differential treatment. The difference in treatment for admiralty is rational for the reasons given by Hofmeyr, where he states that 'the very rationale for a separate admiralty jurisdiction is the practical need to accommodate foreign claims against the elusive ship'.¹⁰⁰ This does not, however, mean that it is not a law of general application. Currie¹⁰¹ states that the requirement for a law of general application is not that it needs to apply to everyone. What is required is that it applies equally to those who are affected by its application. The Act is precise and clear and applies equally to those who are covered by its application and clearly sets out their rights and obligations.

(d) *The meaning of arbitrary' in section 25 as applied to the provisions of the Act*

Wallis¹⁰² simplifies the factors set out by Ackermann in the *FNB* case in determining whether there is a 'sufficient reason' for the deprivation by

⁹⁷ Case No A 80/2014 delivered on 5 December 2014.

⁹⁸ *Tarik* supra at para 13.

⁹⁹ *Hofmeyr* op cit (n9) 18.

¹⁰⁰ *Hofmeyr* op cit (n9) 19. He goes on to say that part of the reasons why it is necessary to have a separate jurisdiction for admiralty is that there are 'international business expectations and arrangements and practises in place that rely on the fact that jurisdiction will be asserted over ships in special ways'.

¹⁰¹ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 169.

¹⁰² *Wallis* op cit (n1) 274.

suggesting that there are three primary issues that need to be considered in order to assess whether the deprivation of property in the context of the associated ship provisions is arbitrary. The first is an identification of the reasons why the Legislature created the situation where the particular deprivation occurs and whether that deprivation properly fits that purpose (referred to below as 'the purpose of the law'). The second relates to the extent of the deprivation – the greater it is, the more compelling the justification must be (referred to below as the 'extent of the deprivation'). The third relates to the nexus between the party and the indebtedness (referred to below as 'the nexus'). This summary, which encapsulates all the critical elements of the test laid out in *FNB*, provides a framework within which to conduct the analysis in relation to the provisions in the Act. I turn now to deal with the relevant factors below.

(i) The purpose of the law

Wallis indicates that the primary reason for the inclusion of the provisions was a considered policy choice by the Legislature 'that it was desirable that creditors should be paid and that provisions should be put in place in the legislation that would facilitate their ability to secure payment'.¹⁰³ On the basis of this justification for the inclusion of the provisions set out in chapter 2 of this dissertation, it is contended that the provisions serve a legitimate governmental purpose.¹⁰⁴ By creating not only ownership but also control as the two necessary elements of association, the provisions are carefully crafted to overcome strategies that unscrupulous ship owners might use to evade the arrest of associated ships by concealing their ownership or control of the ship.

¹⁰³ Wallis op cit (n1) 277.

¹⁰⁴ Wallis op cit (n1) 276. In addressing the policy question states that it was determination that 'those who secure to themselves the benefits of scale and other benefits flowing from the operation of a fleet of vessels, should at the same time, by housing each vessel in a discrete company, be able to limit the range of assets to which ordinary creditors may have resort in order to secure payment of their claims. He argues that, throughout time, legal institutions have, where necessary, placed limitations on the ability of shareholders to enjoy separate legal personality and through the State helping to ensure that legal debts are paid, it fulfils a legitimate government purpose.

(ii) The extent of the deprivation

Wallis argues that the extent of the deprivation pursuant to an associated ship arrest depends on the response to the arrest.¹⁰⁵ In his view, where security is furnished, the impact may not be excessive because the vessel might be temporarily delayed and any event would in all likelihood be discharging or loading cargo or engaged in similar activities in the scope of its operations. However, where there are delays borne by the vessel, cargo-owners may bring claims based on the delay and penalties relating to port usage and demurrage that may be incurred. Where disputes are raised regarding the security, the owners stand to suffer commercial harm. Where security is not furnished at all or not furnished timeously, the owner stands to lose the vessel. The loss of the vessel means that the likelihood of the owner recovering anything from the proceeds of the sale will be remote. According to Wallis, questions pertaining to the constitutionality of legislation cannot be determined on the most extreme or unusual of implications but rather on the 'ordinary range of potential consequences of the provisions'.¹⁰⁶

If one is to apply this test and consider 'the ordinary range of potential consequences' for the minority shareholder, it is clear from the consequences of the arrest of an associated ship that the impact of the deprivation on minority shareholders cannot be categorised as trivial.

An alternative argument to counter this position could be presented as follows. In the context of section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act deprivation in the context of a ship arrest affects the right to use the ship only, but that does not constitute a deprivation of the shares within the company because those shares are still retained even though their value is diminished in the instance where the ship constitutes the only asset of the company. On this basis, the minority shareholder can continue to retain the shares because the subject-matter of the sale is not the shares in the company. It is submitted that this position is incorrect because the value of the minority shareholder's property

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

interest is materially negatively affected by the arrest of the ship.¹⁰⁷ This argument is dealt with in further detail in the ensuing chapter.

(e) *The nexus*

The issue of whether there is sufficient nexus differs depending on whether one adopts the reasoning in the *FNB* or the *Mkontwana* case. Similar to the Court's finding in the *FNB* case, in the context of section 3(7)(a)(ii) read with section 3(7)(b)(i), it can be argued that the nexus between the minority shareholder and the wrongful conduct giving rise to the debt is remote for the following reasons. The minority shareholder has no connection with the transaction giving rise to the liability of the concerned ship. The associated ship is a separate legal entity and the minority shareholder (in the absence of the procedure in the Act) owes no liability to the claimant. On the basis of common majority ownership and control of the concerned and associated ship, the legislation imposes extends its reach to the minority shareholder's property through no fault or wrongdoing on their part.

However, based on the reasoning set out in *Mkontwana*, one could argue that there is a nexus between the debt of the concerned ship and the associated ship through the common majority and controlling shareholder. Similar to the Court's findings in *Mkontwana* that the owner could be held liable for the consumption charges incurred even though there were illegal occupiers on the land or where there were tenants that were contractually liable to pay for the charges but failed to do so, it could be argued that the nexus is established through the common majority shareholder in both entities. This could arguably suffice to create a 'mere rational connection' in instances where the deprivation of property is minimal.

(f) *Is there a 'sufficient reason' for the deprivation of the property?*

On the basis of the Court's reasoning in *FNB*, it does not suffice that there is a legitimate government purpose authorising the deprivation, because the Act does not achieve a proper balance between the ends it serves and the means it employs to reach them. The proposition would therefore be that even though the deprivation serves a legitimate governmental objective, an unduly harsh burden is being placed on the

affected owner and for this reason the deprivation of property must be found to be arbitrary.

On the basis of the Court's reasoning in *Mkontwana* one could argue that, given that the government's purpose is both legitimate and compelling, in the circumstances it is not unreasonable to allocate the risk of the loss in property to the minority shareholder because, in effect, the extent of the deprivation of property is not that substantial as the minority shareholder still retains the shares in the company. Considering the nexus between the owner and the property and the owner and the debt one would look at the relationship between the majority shareholder and the minority shareholder which, based on Wallis's comments, in the context of shipping law is usually a very close one. Given the level of scrutiny applied, all that is required to be established is a mere rational connection. The arguments in favour of and against the constitutionality of the relevant provisions positions are set out in the next chapter.

III Conclusion

In this chapter, I applied the factors that the Court laid out in the *FNB* and *Mkontwana* decisions to conduct an analysis of the constitutionality of section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act. In the analysis I contended that there was a protected property interest which minority shareholders were deprived of through the application of the provisions contained in the Act. I also argued that the Act was a law of general application. Depending on which level of scrutiny is applied to the issues of constitutionality, either *Mkontwana* or *FNB*, the answer to the question posed in the dissertation was more complex when considering the issue of nexus because the consequences of the outcome of this enquiry yields two different results. In the next chapter I consider arguments for and against the constitutionality of the provisions.

CHAPTER 5 ARGUMENTS AGAINST AND IN SUPPORT OF CONSTITUTIONALITY

I Aim

In the preceding chapter, I applied the factors that the Court laid out in the *FNB* and *Mkontwana* decisions to section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act. In this chapter, I consider the arguments against and in support of the constitutionality of the provisions. I do so by applying the level of scrutiny in applied in the *FNB* and the *Mkontwana* cases. In so doing, I shall consider the three key elements to assess whether the deprivation is arbitrary, namely: the purpose of the legislation (whether it is legitimate and compelling); the extent of the deprivation, and the complexity of relationship or nexus between the minority shareholder and the debt and the minority shareholder and the property. It is submitted that depending on which level of scrutiny is applied one could arrive at different conclusions.

II Arguments Against Constitutionality

Wallis argues that the constitutional challenge in relation to minority shareholders should fail. He states as follows:

'As said at the outset of this discussion the position cannot be said to be absolutely clear-cut, but it is submitted on balance that such a constitutional complaint should fail. There are four reasons for saying this. Firstly, the existence or otherwise of minority shareholders does not affect the legitimacy of purpose of the arrest and in general the proposition that it is an appropriate, effective and proportionate means to adopt to achieve the purpose of ensuring that legitimate claims are met. Secondly, there is a clear and indisputable nexus between the debt arising in respect of the ship concerned and the common majority and controlling shareholder in both companies. Thirdly, it is reasonable to anticipate that in almost every instance ... there is a close connection between minority and majority shareholders and likelihood that the former may have an interest in the operation of the group of ship-owning companies as a whole and in the financial health of that group. Lastly, one of the accepted hazards of being a minority shareholder in a private company is that the risks attendant upon

the operation of the company will be created by decisions and actions of the majority shareholder.¹⁰⁹

On the basis of the Court's ruling in *FNB*, I respectfully disagree with Wallis's assessment. The reasons for this are provided below.

(a) *The purpose of the law*

It is conceded that the provisions serve a legitimate governmental purpose.¹¹⁰ By creating not only ownership but also control as the two necessary elements for association, the provisions are intentionally designed to circumvent strategies that ship owners might use to avoid arrests of associated ships by concealing their ownership or control of the ships. However, given the impact on innocent minority shareholders, in my view the provisions are too invasive and the net is cast too wide. Even if one accepts that their inclusion serves legitimate government policy objectives, in my view, on the basis of the Court's reasoning in the *FNB* case, this would not be sufficient to warrant the infringement of a constitutional right in the manner that section 3(7)(a)(ii) read with section 3(7)(b)(i) allows. As Ackermann J states:

'even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards.'¹¹¹ (Emphasis added.)

The statutory provisions deprive the minority shareholder of their property for some other entity's debt unjustifiably. As Staniland states:

¹⁰⁹ *Wallis* op cit (n1) 285.

¹¹⁰ *Wallis* op cit (n1) 276. In addressing the policy question states that it was determination that 'those who secure to themselves the benefits of scale and other benefits flowing from the operation of a fleet of vessels, should at the same time, by housing each vessel in a discrete company, be able to limit the range of assets to which ordinary creditors may have resort in order to secure payment of their claims.' He argues that throughout time, legal institutions have, where necessary, placed limitations on the ability of shareholders to enjoy separate legal personality and through the State helping to ensure that legal debts are paid, it fulfils a legitimate government purpose

¹¹¹ *FNB* supra at para 31.

'While it is true that the ships represent elusive targets to plaintiffs, this is not *per se* sufficient reason to disregard the separate legal personality of separate companies to lift the corporate veil in the absence of special circumstances.'¹¹²

In light of the above, I submit that the remedy chosen by the legislature to give effect to the objective of ensuring that debts are paid is too far-reaching. When considering the consequences of the provisions for minority shareholders, the means employed simply do not justify the end sought to be achieved. For this reason I believe that Wallis's first contention as to why the provision must pass constitutional review is incorrect. The existence of the minority shareholder does affect the legitimacy of the provisions because the extension of the application of the provision to them is unwarranted.

(b) *The extent of the deprivation*

The preceding chapter dealt with the potential consequences of an arrest for a minority shareholder. I argued that the deprivation cannot be categorised as trivial. As Hofmeyr indicates:

'The fact that the owner of the associated ship can obtain the immediate release of its ship by providing security does not, it is submitted, detract from the fact that the initial arrest constitutes an arbitrary deprivation of property.'¹¹³

Even where the arrest is avoided, the furnishing of security for the concerned ship could place a financial burden on the minority shareholder. Where the furnishing of security is delayed, commercial harm is suffered by the minority shareholder because the company is not able to utilise the ship for commercial gain and may in fact incur penalties for the delay. Where the arrest is for the purpose of instituting an action *in rem*, the owner of the associated ship will be liable for any judgment against the ship; where they provide security,

¹¹² *Staniland* op cit (n14) 426.

¹¹³ See further *Hofmeyr* op cit (n9) 144.

that will also render the owner liable for the judgment and in the case of a security arrest, liable for the judgment or award in relation to which security is sought.¹¹⁴ It is clear that any of these consequences has a commercial impact which is not only a 'potentially onerous burden' but rather a real burden on a minority shareholders' interests and therefore 'cogent and substantial justification will be required if the deprivation inherent in the situation is not to be condemned as arbitrary.'¹¹⁵

(c) *The nexus*

In the preceding chapter I suggested that on the basis of the Court's reasoning in the *FNB* case, one could argue that the link between the minority shareholder and the transaction giving rise to the liability of the concerned ship could be remote. Wallis does not point to a nexus between the minority shareholder and the concerned ship but merely refers to the nexus between the concerned ship and 'the common majority and controlling shareholder.' He suggests that because most one ship companies are private companies, there is some connection between the shareholders, either through familial connections, employee relationships or business associations.¹¹⁶ Wallis further contends that minority shareholders bind themselves to accept the inherent risk of actions taken by the majority when they become minority shareholders.

I submit that even if there may in certain instances be close relationships between the majority and minority shareholders, this is not a fact to be assumed in all cases and cannot therefore be a justification in the context. This is particularly so where minority shareholders may equally be equity investors seeking to gain a return on their investment in a ship-owning company. For this reason I respectfully submit that Wallis's reasoning must be rejected.

I further submit that even if it could be argued that minority shareholders generally accept the inherent risk in relation to their participation as a minority

¹¹⁴ *Wallis op cit* (n1) 276.

¹¹⁵ *Ibid.*

¹¹⁶ *Wallis op cit* (n1) 284.

shareholder in an entity, their risk is in relation to their particular company and not in relation to other separate juristic personalities. Their decisions are therefore based on the financial soundness and a risk assessment in relation to their investment. In my view, one could therefore not argue that an arbitrary deprivation of a minority shareholder's property is justifiable because they must have accepted that they would be bound by the majority's conduct through a separate company to which they bore no connection and would, in the absence of the procedure in the Act, owe no liability in respect of the claim.

III Arguments in Support of Constitutionality

(a) *The purpose of the law*

In applying the Court's reasoning as set out in the *Mkontwana* case, a key departure point for the enquiry into constitutionality pertains to whether the legislation is legitimate and compelling. On the basis of what is set out in the *Hilane* case, it could be argued that the provisions are key and commendable. They contribute to ensuring fairness in the commercial context where the very nature of the trade makes it difficult to hold debtors to account. As Ploos van Amstel J in the *Tarik* case states with regard to the Act:

'The provisions in the Admiralty Jurisdiction Regulation Act ... are aimed at assisting creditors to obtain payment of what is due to them without difficulties relating to jurisdiction and security for their claims.'¹¹⁷

It could be further contended that the provisions are crafted in a manner that protects both ship-owners and claimants because the process of establishing the association is not a simple and easy one, likely to be abused in its application. As Davies¹¹⁸ indicates, if the arrest of an associated ship is challenged, the applicant needs to prove the relevant connection between the two entities on a balance of probabilities. Access to such information may be difficult and discovery in South African law is not permitted as a fishing

¹¹⁷ *Tarik* supra at para 22.

¹¹⁸ M Davies 'International perspectives on admiralty procedures' MLAANZ Conference 2003 at 11.

expedition for unspecified documents.¹¹⁹ This means that the applicant will have to navigate through the often complex and mysterious company structures to establish the details behind ownership and control. This substantive aspect places a significant burden on any applicant seeking to arrest an associated vessel.

(i) The nature of the affected property and the extent of the deprivation

In the preceding chapter, I indicated that the Court in *Mkontwana* stated that where there was a 'minimal deprivation'¹²⁰ of property, a 'mere rational connection between means and ends could be sufficient reason.' However where the deprivation was greater, 'the more compelling the purpose and the closer the relationship between means and ends must be.'¹²¹ In the context of arguing in support of the constitutionality of the provisions, I submit that there are three potential arguments that could be considered.

Firstly, it could be argued that the extent of the deprivation is minimal on the basis that (a) the property that is being deprived is the ship and not the actual property of the minority shareholder, namely the shares in the company itself and (b) the impact of the deprivation on the value of the company is minimal because the shares are still retained.

If the court is not persuaded that the deprivation is a severe consequence, either on the basis of the argument that the minority shareholder still retains its shares or alternatively on the basis of Wallis's contention that one must consider only the 'ordinary range of potential consequences' of the provisions, it is possible that the court could apply a thin level of scrutiny. In this instance, the court would only seek to uncover, in light of the compelling purpose of the legislation a 'mere rational connection' between the means and the ends.

¹¹⁹ *Hofmeyr* op cit (n9) 235-236

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

(b) *The nexus*

The Court in *Mkontwana* held that the nexus could be established between the property owner and the debt even if there were illegal inhabitants on the property consuming the services or where there were tenants that were contractually bound to pay for the services but had failed to do so. Using the same analogy, one could argue that there is a nexus between the minority shareholder and the debt even though the minority shareholder had no knowledge of the debt nor was he liable for the debt attached to the concerned ship. In relation to the nexus between the minority shareholder and the concerned ship, it could be argued that there is a clear relationship between the minority shareholder and the majority shareholder who controls the company through their joint participation in the ship-owning company on the basis of how Wallis indicates that these relationships are generally structured in the industry. This is considered further below.

(i) *Minority shareholder responsibilities*

Wallis argues that minority shareholders take on an inherent risk when they agree to take up a minority shareholding in an entity. He contends that it is the minority shareholder's responsibility to ensure that they are familiar with the provisions of the legislation in relation to South Africa if it is likely that the business that they have invested in may be affected by South African legislation. They would therefore be forewarned about the unique position of associated ships and should therefore act prudently in ensuring that the controlling shareholder in no way acts to the potential detriment of the minority shareholder. I submit that they could do this by ensuring that they conduct a proper due diligence on the entities with which they will be contracting to ensure that such entities are reputable and able to meet their financial

obligations. Secondly, they could provide in their respective shareholders' agreements that there will be relevant consequences for the parties in the event of their company assets being negatively impacted as a result of the enforcement of the associated ship provisions. This may include that there is an option that would immediately allow the minority shareholder to sell its interest in the company at an appropriate value or to claim damages for breach of contract.

IV The More Persuasive Argument

In my view, *FNB* provides a better exposition for the issue of constitutionality. The argument based on the *Mkontwana* case presents various concerns. These are dealt with in turn below.

While the purpose of the law is compelling and legitimate, given the potential extent of the deprivation and the impact of the impairment on the minority shareholder's property rights, it is not sufficient to apply the thin test adopted in the *Mkontwana* case but rather the thick test espoused in the *FNB* case. As indicated in the *FNB* case, no matter how compelling the justification for the legislation might be, it must still be subjected to constitutional scrutiny.

The proposition that the shares are still retained by the minority shareholder and the extent of the deprivation is minimal is not persuasive because the arrest of the ship 'constitutes a significant impairment in the interest' that the minority shareholder holds in the company. While in certain instances it could be considered that the deprivation is temporary, I submit that the court will need to consider the full series of possibilities in relation to the arrest of the ship. As indicated above, even where the arrest is avoided, the furnishing of security for the concerned ship could place a financial burden on the minority shareholder. This factor should discount the triviality of the deprivation.

The primary concern however relates to the issue of nexus between the minority shareholder and the debt and the minority shareholder and the majority shareholder. As indicated above, in relation to the latter, the nexus is established by their joint shareholding, however in relation to the former, it is

conceivable that the minority shareholder may have no knowledge of the claim against the concerned ship or bear no responsibility or liability for the debt. Yet, through its shareholding in a separate juristic entity, it is deprived of its property. The difference between the *Mkontwana* facts and the application of the associated ship provisions is that while the property continues at all times to belong to the property owner in the instance of the facts presented in *Mkontwana*, in the case of the associated ship provisions, the minority shareholder's property is of an entity that has a different juristic personality. This therefore means that in *Mkontwana* the charges are consumed in relation to the owner's own property but in the case of the associated ship arrest, the liability is incurred in relation to a completely different corporate juristic entity.

IV Conclusion

In this chapter I have aimed to present arguments both in support of and against constitutionality. I have demonstrated that while the objectives of the Act are legitimate objectives, given their impact on minority shareholders, the relevant provisions of the Act undermine the 'perfectly legitimate use of the corporate form to limit risk in commercial undertakings generally and in shipping particularly.'¹²² The effect of the deprivation of the property rights of minority shareholders is disproportionate to the good achieved by the legislated infringement of such rights.

¹²² *Bradfield op cit* (n21) 240.

CHAPTER 6 THE LIMITATIONS CLAUSE

I Aim

Having considered that the application of the Court's reasoning in the *FNB* case could result in a successful challenge against the constitutionality of section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act, in this chapter I will assess whether it could be argued that the limitation is reasonable and justifiable in an open and democratic society, based on section 36(1) of the Constitution.

II General Approach to Section 36(1) of the Constitution

Section 36(1) of the Constitution provides that rights set out in the Bill of Rights can be limited in terms of a law of general application only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The court conducts a two-stage analysis.¹²³ In the first stage, the minority shareholder would have to convince the court that there was a property right protected by the Constitution,¹²⁴ and that, through a law of general application, such property right has been infringed.¹²⁵ In stage two of the analysis, the party relying on the validity of the provision in the Act would have to persuade the court that the infringement can be justified in terms of section 36 of the Constitution.¹²⁶

In assessing whether the limitation meets the relevant threshold, the factors that the court takes into account include the following: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose, and whether there are the less restrictive means to

¹²³ *De Vos* op cit (n52) 354.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *FNB* supra (n3) para 100.

achieve the objectives of the legislation.¹²⁷ In the context of the right to property, the process is somewhat complex because, as Van der Walt cautions, section 25(1) contains 'a special category of a limitation of property, namely, deprivation'.¹²⁸ This internal limitation (otherwise referred to as an 'internal modifier') therefore already limits the scope and content of the right.¹²⁹

Van der Walt argues that it is highly unlikely (except in the most limited of circumstances) that deprivation found to be arbitrary in terms of section 25(1) of the Constitution will be found to be reasonable in terms of section 36(1).¹³⁰ In the *FNB* case, while noting that once the deprivation is considered to be arbitrary, there may be no further need for an analysis in terms of section 36, Ackerman J concluded that the infringement of section 25(1) is still subject to the limitations clause.¹³¹ I will therefore briefly examine whether the infringement of the minority shareholder's property rights in terms of section 3(7)(a)(ii) read with section 3(7)(b)(i) constitutes a reasonable and justifiable limitation on the right to property in section 25(1). I will not deal at length here with the elements of section 36 that overlap with the limitations analysis conducted in relation to section 25(1), as that has already been dealt with in detail in chapter 3 of this dissertation.

In the *FNB* case, Ackerman J held that it was unnecessary to consider in detail the justification analysis incorporating the test of proportionality applied to the balancing of different interests, because FNB's ownership of the vehicles was in the end completely destroyed by the operation of the provisions of the Customs Act. Based on the Court's finding that there was no connection

¹²⁷ Section 36(1) of the Constitution.

¹²⁸ *Van der Walt* op cit (n5) 121.

¹²⁹ *De Vos* op cit (n52) 358.

¹³⁰ *Van der Walt* op cit (n5) 78.

¹³¹ *FNB* supra (n3) para 100. Ackerman J states that 'By its terms, s 36 of the Constitution draws no distinction between any rights in the Bill of Rights when it provides that "[t]he rights in the Bill of Rights may be limited". Neither the text nor the purpose of s 36 suggests that any right in the Bill of Rights is excluded from limitation under its provisions. In view of the conclusion ultimately reached on this part of the case, it is not necessary to decide this question finally here. It will be assumed, without deciding that an infringement of s 25(1) of the Constitution is subject to the provisions of s 36.'

between FNB or its vehicles and the customs debt, the Court found that the means adopted to pursue the objectives of the Act were 'grossly disproportional' to the infringement of FNB's property rights.¹³² In my view, the same conclusion is applicable in relation to a minority shareholder's property rights because, as stated above, there is no connection between the minority shareholder and the liability of the concerned ship. The means adopted to achieve the objectives of the Act are therefore grossly disproportional to the infringement of the minority shareholder's property rights and accordingly unreasonable and unjustifiable. The reason for this conclusion is set out below.

(a) *The application of the Section 36(1)*

The approach to be adopted in applying the proportionality test is set out in *S v Makwanyane and Another*,¹³³ and was modified for the 1996 Constitution in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*.¹³⁴ For the purposes of conducting the analysis, I shall use the steps set out by De Vos¹³⁵ (which clarify the approach adopted by the Constitutional Court).

(i) *The Legitimate Purpose*

The first question that needs to be answered in the limitations analysis is whether the limiting measure serves a legitimate purpose. In chapter 2, I dealt extensively with the various views on the underlying purpose of the Act. I will not repeat all those arguments here. The brief answer to the question for the purposes of this analysis is that the limiting measures do serve a legitimate purpose.

(ii) *The Rational Connection*

The second question that needs to be considered is whether there is a rational connection between the limiting measure and its stated purpose. In my view, it could be argued that there is a rational connection between the objectives of the Act and the deprivation of the majority shareholder's

¹³² *FNB supra* (n3) para 111.

¹³³ 1995 (3) SA 391 (CC).

¹³⁴ 2000 (2) SA 1 (CC).

¹³⁵ *De Vos op cit* (n52) 372.

property, but there is no rational connection between the stated objectives of the Act and the deprivation of the minority shareholder's property because, through the application of the relevant provisions of the Act, the minority shareholder is deprived of their property interests in instances where they have no connection with the claimant or the maritime debt of the concerned ship.

(a) *Less Restrictive Means*

In conducting this analysis, one is required to consider whether there are alternative measures that are less restrictive of the right to property and, secondly, whether the measure chosen by the Legislature is appropriate ('well-tailored') in the light of all the circumstances.¹³⁶

In my view, there are at least two alternative measures that could be considered that would be less restrictive of the right to property, taking into consideration the objectives of the Act. The first would be to revert to the position prior to the 1992 amendment, which was that ownership would be deemed only where all the shares in the company are owned by the same person. This would effectively amount to resorting to the 'sister-ship' provisions contained in the Arrest Convention. Although these provisions might not attract constitutional scrutiny, it is submitted that these provisions would be rendered ineffective. The second alternative option could be to provide for the application of the provision in certain limited circumstances. This suggestion is set against the background of the current discussions within the *Comite Maritime International* ('CMI')¹³⁷ regarding the adoption of provisions similar to the associated ship provisions. Recommendations proposed by various countries for the adoption of such provisions have been rejected by the majority of countries primarily on the basis that they create a special basis for 'piercing the corporate veil' in the maritime context.

In the following chapter, I seek to examine more closely the concerns expressed by other international systems. This review is conducted to consider

¹³⁶ Ibid.

¹³⁷ The *Comite Maritime International* is a non-governmental, non-profit organisation, comprising individuals and National Associations of Maritime Law whose primary objective is to further the unification of maritime law. See www.comitemaritime.org.

two critical issues: (a) to examine whether there is support for the contention that the associated ship provisions in the Act are too expansive by considering on what basis they have not been adopted by other leading maritime nations; (b) to examine whether or not there is an alternative option that could be crafted to address the constitutional concerns regarding the associated ship provisions. If the latter is possible, it is submitted that an argument could be made that there are less restrictive means that could be adopted to achieve the objectives of the Act and that fall within the constitutional parameters.

III Conclusion

In this chapter, I considered whether, if found to infringe section 25(1) of the Constitution, the relevant provisions of the Act could nevertheless be saved by the limitations clause as set out in the Constitution. In subjecting the provisions of the Act to the section 36(1) analysis, I suggested that there were less restrictive means that could be applied to achieve the objectives of the Act. In this regard, I proposed that a review of some comparative international jurisdictions could be conducted with the aim of obtaining a view on how they view the associated ship provisions. I now turn to conduct the review and examine whether there are 'less restrictive means' to achieve the objectives of the Act.

CHAPTER 7 COMPARATIVE LAW REVIEW ON THE ASSOCIATED SHIP PROVISION

I Aim

In the preceding chapter, I considered *inter alia* whether there were less restrictive means that could be used to meet the objectives of the Act. In this chapter, I conduct the review by considering the current debates in comparative international jurisdictions¹³⁸ regarding provisions similar to the associated ship provisions contained in the Act. The aim of this analysis is to achieve two objectives. The first is to see whether there is support for the contention that the provisions are too expansive as contended in this dissertation (and the possible basis for this view) by reviewing the position in other comparative maritime jurisdictions. The second objective is to assess whether an alternative option that constitutes 'less restrictive means' could be developed.

Rather than consider the country-specific associated ship arrest provisions,¹³⁹ I will examine the key arguments raised in relation to the proposed amendments in the *Comite Maritime International* (CMI) Position Paper, which developed as a result of the various proposed legislative changes relating to the 'sister ship' provisions. In order to contextualise the primary concerns with the associated ship provisions expressed by parties in international jurisdictions, namely that they amount to 'piercing the corporate veil',¹⁴⁰ a brief synopsis of the company law principles relating to the concept in the context of South African law will be provided.

¹³⁸ As the Arrest Convention has been adopted in the national legislation of a number of countries, I consider the Lisbon Convention as representative of national laws.

¹³⁹ See Berlingieri *Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions* 5 ed (2011) 265–282 for a review of the national laws and jurisprudence on the position of 'piercing the corporate veil' in the context of associated ships (Berlingieri).

¹⁴⁰ See Farouk Cassim et al *Contemporary Company Law* 2 ed (2012) (Cassim et al) at 41. The process effectively allows the court to disregard the separate legal personality of the company and to shift its focus to the natural persons behind the company, or in control of its activities 'as if there were no dichotomy between such person and the company'

II Piercing the Corporate Veil

In *Airport Cold Storage (Pty) Ltd v Ebrahim*,¹⁴¹ the Court held that: 'one of the most fundamental consequences of incorporation is that ... a company is a juristic entity separate from its members.'

The incorporation of a company¹⁴² results in limited liability for the shareholders of the company. In general, shareholders are not liable for the debts of the company. Limited liability, however, cannot be abused¹⁴³ and it is clear that South African courts will look at substance rather than just legal form and hold directors or shareholders personally liable in appropriate circumstances. When the court elects to do so, this is referred to as 'piercing the corporate veil'. The ability to pierce the corporate veil is an exceptional remedy to be used only in instances where it is established that there is fraud, dishonesty or improper conduct in 'the use of the corporate form' or that the corporation is the 'instrument' or 'alter ego' or 'puppet' of its shareholders.¹⁴⁴

In an Appellate Division decision, *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*,¹⁴⁵ the Court held that:

'It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where *fraud, dishonesty and other improper conduct* ... are found to be present, other considerations

¹⁴¹ 2008 (2) SA 303 (C) at 306.

¹⁴² Section 19(1)(b) of the Companies Act 71 of 2008 entrenches the separate legal personality of a company. It provides that from the date and time that the company is incorporated, it has all the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such power or having any such capacity except to the extent that the Memorandum of Incorporation provides otherwise.

¹⁴³ Dennis Davis et al *Companies and Other Business Structures in South Africa* 3 ed (2013) at 24.

¹⁴⁴ *Bradfield* op cit (n21) 240. Note that there are, however, other instances in which the court will look beyond the separate legal personality. This may arise in the context of quasi-partnerships; where it is clear that the intention of parties was to form a partnership; where the agency principle is used in relation to imposing liability on a shareholder or director, and where a subsidiary company is considered to be the agent of a holding company.

¹⁴⁵ 1995 (4) SA 790 (A).

come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil¹⁴⁶

Under South African common law, courts can ignore the veil of the corporation only where fraudulent use and abuse is made of the fiction of legal personality. The ability to pierce the corporate veil was recently legislated in the Companies Act 71 of 2008 ('The Companies Act'). It provides in section 20(9) that an application can be brought by any interested person or a court in any proceedings can determine whether the incorporation, use of a company or any act by or on behalf of a company constitutes *an unconscionable abuse of the juristic personality of the company as a separate entity*. The court may declare that the company is deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company, and make any order it considers fit to give effect to such declaration.

(a) *'Piercing the corporate veil' through the associated ship provisions*

The ability to arrest any of the ships within a fleet is in effect a statutory piercing of the corporate veil of the ship-owning companies.¹⁴⁷ This is so because what it entitles the court to do is to ignore the separate corporate identities of the companies in relation to its fleet of vessels by allowing any creditor of any entity within the group of companies to arrest the ship. The extent of the deprivation in an associated ship arrest is described by Staniland as follows:

'the associated ship provisions are not content to lift the veil and let it fall in special circumstances; instead they shred it in all cases. And, the shredding is done with vengeance, for once the association is established in respect of

¹⁴⁶ Ibid at 803.

¹⁴⁷ *Bradfield op cit* (n21) states as follows (at 236): 'The provisions "may be described as a statutory mode of piercing the corporate veil". Ship-owning companies are treated, as a matter of course, as mere facades concealing the identity of the "true" debtor. Once the identity of the "true" debtor is established, any ship other than the guilty ship owned or controlled by the true debtor may be arrested as an associated ship to enforce the maritime claim in question.'

one claim all the ships of the associated company may stand exposed to arrests for other claims.¹⁴⁸

The wide-reaching impact of the associated ship provisions in the Act is described by Wallis as follows:

'Where the Act permits the arrest of a true associated ship ... the maritime creditor is thereby enabled to go behind the corporate structure to identify the person or persons who control or own the corporate entity and then to pursue its claim either against a vessel owned by that person or persons or more frequently, a vessel owned by another company altogether ... the disregard of corporate personality can occur in both directions – upwards to the controlling interests of the corporate entity controlling the ship or downwards from those controlling interests to a ship owned by another corporate entity controlled by the same interests.'¹⁴⁹

III Comparative Review

(a) Background

In 1999 a new Convention on the Arrest of Ships, referred to as the Lisbon Draft Arrest Convention ('Lisbon Convention'), was adopted. The Convention will come into force once it has been ratified by ten states. Through the CMI, there are ongoing discussions regarding the Convention. In order to address the concerns regarding the 'sister ship provision' contained in Article 3 of the 1999 Convention, the International Sub-Committee sought to draft a rule providing for the lifting of the corporate veil between several companies owning ships where those companies are controlled and owned by the same person. The Lisbon Convention did not cover instances where ship-owners operated one-ship companies. Concerns were raised that, in practice, some ship-owning companies had used single-ship companies to avoid liability. This concern was particularly expressed by the United Kingdom government in relation to environmental claims. In order to deal with the concern, the CMI proposed that

¹⁴⁸ *Staniland* op cit (n14) 423.

¹⁴⁹ *Wallis* op cit (n1) 89.

the question of 'piercing the corporate veil' to deal with the issue of ownership could be left to national law. The United Kingdom proposed a more extensive provision suggesting that arrest be permissible in instances where the ships were under common control and suggested that article 3(2) ought to provide explicitly for the arrest of associated ships. Their proposal read as follows:

'(2) Arrest is also permissible of any ship or ships controlled by the person who is allegedly liable for the maritime claim; or controls the company that is allegedly liable for the maritime claim, and who was, when the claim arose:

(i) the person who controlled the ship in respect of which the maritime claim arose; or

(ii) the demise charterer, time charterer or voyage charterer of that ship [or any part of it]

(3) For the purposes of this article, a person controls a ship if that person owns the ship or controls the company that owns it. The national law of the State in which the arrest is applied for shall determine whether, for these purposes, a person owns a ship or controls a company that owns a ship.

(4) Paragraph (2) shall not apply to claims in respect of ownership or possession of a ship.'

It is clear that the above text is similar in some respects to the current provisions in the Act relating to associated ships. The United Kingdom further provided a list of factors that could demonstrate control, which included the following: common or similar names, common shareholding of the companies owning the ships, common management or financing arrangements and insurance on a fleet basis. The purpose of this was to provide guidance on how national laws could define the scope of control, which would assist in creating consistency and uniformity in international maritime law. In their explanatory note on the motivation for the provision, the United Kingdom delegation specifically states '*we do not intend to catch banks or other investors with minority share ownership but no element of effective control*' through the provisions. The proposal was supported by some countries, namely, Canada, Japan, Australia and the Netherlands, but was rejected by most other countries.

(b) Views on the United Kingdom proposal

Greece, a major maritime nation, rejected the proposal on the basis that they believed that it supported United Kingdom interests, banking institution interests

and shipping management interests.

Norway supported Greece in rejecting the proposal. They argued that they had recently completed a review of their company law legislation and had decided against incorporating provisions that would permit piercing the corporate veil. The International Chamber of Shipping also rejected the proposal. They argued that the growth in single ship-owning companies was an economic consideration, essentially to reduce ship-owners' operating costs. They cited as an example that, when trading with countries where insurance cover was not available, ship-owners wanted to limit their potential loss, hence the creation of single-ship companies. For the purposes of financing their operations, ship-owners wanted to attract equity capital. In other instances, it was to maximise tax incentives.¹⁵⁰ They criticised the guidelines on the basis that they created uncertainty and, furthermore, that some of the criteria proposed did not necessarily indicate common control – for example, it was not an uncommon practice for ship managers to arrange insurance for a fleet of vessels with wholly unrelated ship-owners. Finland further argued that the principle of 'piercing the corporate veil' was not a specific maritime problem but

¹⁵⁰ See *Wallis* op cit (n1) 277. He supports the view that there is a justification for single-ship companies. He states: 'There are far too many legitimate business reasons for using this corporate form and this general structure for the purpose of engaging in commercial shipping operations ... The reality is that ship-owners worldwide have increasingly found it convenient from a business perspective, with few commercial disadvantages, to operate fleets of ships on the basis that the ownership of the vessels will vest in one ship companies. In doing so it seems likely that they have been supported by the financial institutions that provide finance to acquire and operate vessels and which secure their own position by way of mortgages. By insisting that each vessel in respect of which they provide finance be owned and operated by a one-ship company these institutions effectively limit the range of creditors that may pursue claims against the vessels, especially those that may enjoy a ranking higher than a mortgage.'

rather a more general problem of corporate law and China reiterated the point by stating as follows:

'The UK proposals are not in line with internationally generally accepted legal persons system or the limited liability corporate system ... the corporate system is an important system prevailing in the modern market economy ... piercing the corporate veil is a problem of general nature and therefore should be handled, settled and treated as a specific issue of general nature. So it is neither proper nor suitable to embody it in a purely and simply international shipping convention dealing only with arrests of ships.¹⁵¹

The Confederation internationale des syndicats libres ('CISL') supported the United Kingdom position. They raised the concern that the position of international seafarers was particularly weak in relation to employers. Their argument was that often when lives are lost at sea, the dependants suffer the consequences as a result of the loss of a source of income. These dependants are often located in different jurisdictions from the persons who own or control the vessel. The culprits tend to be entities that own one-ship companies, which makes it extremely difficult for the dependant families to enforce any claims. They therefore argued that the associated vessel was the only asset against which such families could secure, at a minimum, security for their claims.

The United Kingdom was given an opportunity to amend their initial proposal to address some of the concerns raised by other country delegates. However, the amendments proposed were ultimately rejected on the grounds that they amounted to:

'a fundamental change in the legal approach that would be adopted towards the concept of corporate ownership in many jurisdictions. ... that would have implications perhaps profound for other areas of law including and not limited to commercial and corporate law'.¹⁵²

¹⁵¹ *Berlingieri* op cit (n139) 690.

¹⁵² *Berlingieri* op cit (n139) 688.

The objectors raised a further concern that the element of 'control' as proposed by the UK constituency was unclear and its application would give an unacceptable discretion to the courts. The *Heavy Metal* case is a clear example of the complexity of dealing with the concept of 'control',¹⁵³ but the judicial development of the concept is beyond the scope of this dissertation. Suffice it to say that it is likely that this issue will be revisited in later decisions.¹⁵⁴ In the absence of agreement at an international level, the issue of whether the corporate veil should be pierced or not will be determined by the *lex fori*.

(c) *Australia*

Bradfield¹⁵⁵ comments that although Australia and South Africa share a close history of admiralty jurisdiction, when Australia reviewed its admiralty legislation shortly after South Africa had done so, the Australian Law Reform Commission ('The Law Commission) opted not to follow the South African 'associated ship' provisions but rather adopted what it termed 'surrogate ship'¹⁵⁶ arrests. The difference between this and the 'sister-ship' provisions related to ownership at the time that the claim arose and at the time of enforcement. The reasons cited for this were that the Law Commission:

¹⁵³ The issue of what constitutes 'power directly or indirectly' to control a company was dealt with in the *Heavy Metal* case. Although the decision reached by the Supreme Court of Appeal is subject to criticism by various South African writers such as Hare and Wallis, it articulates the current position in South African law on what is meant by control. The court found that the nominee was the registered owner of the majority of the shares in both ships and had the power directly to control both companies. See *Hare* at 110, where he states: 'the court regarded "direct power" to be equivalent to *de jure* power – meaning that the majority shareholder, as registered in the share register, controls the shares of the company and therefore determines the fate of the company. ... (notwithstanding that he held the shares as a nominee for the beneficial owners).'

¹⁵⁴ The Maritime Law Association of South Africa, a body comprising maritime lawyers, has proposed amendments to section 3(7)(b)(ii) to counter the effect of the decision in the *Heavy Metal* case.

¹⁵⁵ *Bradfield* op cit (n21) 239.

¹⁵⁶ The surrogate ship arrest is essentially based on the sister ship arrest as set out in the Arrest Convention. Section 19 of the *Admiralty Act 1988*(Cth) provides that: 'A proceeding on a general maritime claim concerning a ship may be commenced as an action *in rem* against some other ship if: (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first mentioned ship; and (b) that person is, when the proceeding commenced, the owner of the second-mentioned ship.'

'preferred in the interests of consistency, to leave the issue of whether the corporate veil of the ship-owning company should be disregarded to be dealt with as an exceptional remedy granted according to the principles applicable in its local corporation and insolvency law'.¹⁵⁷

Secondly, they argued that lifting the corporate veil would lead to complications in the context of insolvency, for example where the arrested assets were also assets in a corporate insolvency under general Australian law.¹⁵⁸ They also expressed concern that, other than South Africa, no other jurisdiction permitted piercing of the corporate veil in these circumstances but conceded that the emphasis placed on this concern should be limited because if the law were to change, there would have to be a first (or second).

The Law Commission considered that the provision would assist both Australian shippers and ship suppliers to recover monies owed by foreign ship-owners but the concept of establishing formal ownership and control would be challenging and time consuming. The onus would be placed on the plaintiff to show the relevant nexus and to discharge the burden of proof should the owners challenge the application. Given the difficulty in accessing the relevant information, there would be practical problems related to the application of the provision and they expressed concern that the provision 'had the potential to discriminate in its effect against ship owners based in countries where information about shareholdings and corporate structures are public'.¹⁵⁹

Although it is clear that at the time of the Law Commission report, Australia showed no willingness to adopt the associated provisions contained in the

¹⁵⁷ See further ALCR, where it is stated that 'the fundamental consideration, in the Commission's view, is the undesirability of making special provision with respect to the corporate veil in legislation dealing with admiralty jurisdiction. If questions of the liability or indebtedness of corporate groups are to be addressed this is properly done through company or insolvency law rather than in a specific legislative context such as admiralty jurisdiction at para 141.'

¹⁵⁸ The Australian Law Reform Commission Report 33 'Civil Admiralty Jurisdiction' para 139.

¹⁵⁹ *Ibid* para 140.

Act,¹⁶⁰ Glover¹⁶¹ comments that 'this position has been to the disadvantage of claimants when looking at the position in comparative jurisdictions, including South Africa'. Glover therefore argues that 'consideration should be given to the need to strike a new balance which will provide suitable local remedies to potential plaintiffs frustrated by the judicial and legislative development of the 1952 Arrest Convention, but at the same time do not unduly make Australia an unattractive destination for foreign shipping'.¹⁶² This view is echoed by Davis¹⁶³, who states that:

'Although the Commission had some harsh words for the 1952 Arrest Convention, its view of what was internationally acceptable seems to have been shaped in large part by the positions taken in that Convention. In retrospect, that seems unfortunate. The proliferation of one-ship companies occurred in direct response to the notion of "sister ship" arrest in the 1952 Convention, and it has proved almost completely effective: any ship operator can avoid surrogate ship arrest if it wishes to organize its affairs to do so. That was already true in 1988, when Australia signed on to a 1952-style regime. The failure of the 1999 Arrest Convention to solve the problem internationally by adopting a South African-style "associated ship" procedure was disappointing, to say the least, and it seems likely to doom the Convention to those dusty shelves at UNCTAD and IMO where unwanted conventions live out a sad but unwanted existence. However, the very fact that UNCTAD and IMO gave serious consideration to internationalizing the South Africa model in the 1999 Convention shows that world opinion has moved on since 1952 and 1986 ... so there are some Australian reformers ready for change.'

¹⁶⁰ See *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 at 567. Rogers AJA in the New South Wales Court of Appeal observed that 'there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil', and that 'there is no principled approach to be derived from the authorities'.

¹⁶¹ Glover P 'Sister Ship Arrest and the Application of the doctrine of attachment in Australia: A jurisdictional comparative analysis in the wake of the 1952 Arrest Convention' (2008) 22 *Australia and New Zealand Maritime Law Journal at*.

¹⁶² *Ibid.*

¹⁶³ Davis *op cit* (n119) 11

IV Conclusion

The review undertaken in this chapter indicates that there is reluctance in international jurisdictions to adopt provisions similar to the associated ship provisions contained in the Act.

Although it is not clear what is meant by 'unconscionable act' in the Companies Act, I submit that it is clear that the statutory allowance for the piercing of the veil is only ever intended to be available in instances of 'nefarious conduct' and not as a matter of course, as is the case with the associated ship provisions outlined in the Act. I submit that the above test could be used to determine whether the corporate veil should be pierced even in the maritime context where the claimant seeks to allege the separate corporate personality is being used to evade the law or to frustrate its enforcement.¹⁶⁴

¹⁶⁴ See *Prest v Petrodel* [2013] UKSC 34 at para 28, where it was stated: '[T]here is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.'

CHAPTER 8 CONCLUSION

Wallis JA remarks in a recent decision, *Owners of the MV Silver Star v Hilane Limited ('Hilane')*,¹⁶⁵ in relation to an attack on the constitutionality of the associated ship provisions as follows:

'Elsewhere, and in a different capacity, I have expressed the view that such a challenge could be raised but should not succeed.¹⁶⁶ As we are not confronted in this case with a constitutional challenge to the institution of the associated ship it is unnecessary for me to address the correctness of those academic views, which, after proper argument on an appropriate occasion, I may have to recant or modify.'¹⁶⁷ (Emphasis added.)

It is clear that any determination of the constitutionality of section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Admiralty Jurisdiction Regulation Act 105 of 1983 will require the Court to balance competing interests. This balancing act will take place in the context of the property rights contained in section 25(1) of the Constitution.

In exploring whether or not section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act contravenes section 25(1) of the Constitution, I analysed two leading Constitutional Court decisions, namely the *FNB* and *Mkontwana* decisions. The structure of the Court's analysis of the issue was used as a framework for considering the relevant issues. In this dissertation I argued that depending on which reasoning one chooses to adopt – either that proposed in *FNB* or that in *Mkontwana* – one is able to develop arguments both in favour of and against the constitutionality of section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act. The elements of the tests that appear to create little controversy in the context of the associated ship provisions relate to whether there is 'property' that could be said to enjoy constitutional protection, whether there is in fact a deprivation of the property through the provisions of the Act and whether the Act is a law of

¹⁶⁵ [2014] ZASCA 194.

¹⁶⁶ See *Wallis* op cit (n1) 268–281.

¹⁶⁷ *Mediterranean Shipping Co SA v Cape Town Iron and Steel Works 2011 (2) SA 547 (KZD)* para 19.

general application. These issues were considered in chapters 1- 4 of the dissertation. I argued that shares in a company could be considered 'property' for the purposes of section 25(1) of the Constitution. In chapter 4 and 5 of the dissertation, on the basis of the Court's rulings in *FNB* and *Mkontwana*, I demonstrated why the application of the relevant provisions of the Act could be considered to result in a 'deprivation of property' as contemplated in the Constitution. I also affirmed that the Act could be considered to be a law of general application. The difference in the outcome of the enquiry into constitutionality in the context of this dissertation is based on how one responds to the question 'Is there a sufficient reason for the deprivation?' I submit that the answer to this depends predominantly on whether one can demonstrate a nexus.

In closing I submit that proprietary interests, like other property rights, are worthy of constitutional protection. The associated ship provisions in the Act are not immune to the Constitution and must pass constitutional muster. If one applied the Court's reasoning in *Mkontwana* to the enquiry, an argument could be made that the provisions of the Act do not infringe the provisions of section 25(1) of the Constitution. The basis for this argument is that the provisions of the Act are not only legitimate but also compelling. They confer a valuable right on creditors seeking to secure their claims, particularly in the context of maritime trade, where it is common that the defendants are outside the country and have no assets within South Africa apart from the vessels that may occasionally navigate our waters. These provisions have been specifically designed to deal with entities that seek to avoid liability by creating complex company structures where a single holding company owns numerous 'one-ship' companies. They are necessary to secure legitimate governmental objectives where there is a sufficiently strong link between the minority shareholder and the concerned company. The nature and extent of the deprivation is not intrusive because it relates to the proprietary interest of the value of the shares in the ship (whose value could in any event be subject to fluctuation). The deprivation is temporary because security could be furnished to release the ship from arrest. The nexus between the majority and minority shareholder is evident through their joint

shareholding in the ship. In any event, minority shareholders assume risk by virtue of being minority shareholders. A prudent minority shareholder would put in place the relevant mechanisms to protect themselves from this potential eventuality. Therefore by applying the 'thin test' for rationality it could be argued that it is justifiable that the minority shareholder be deprived of their property in such circumstances.

However, having considered all the relevant arguments, I am persuaded that section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act affects minority shareholders' property rights in a manner that is neither reasonable nor justifiable because it permits the deprivation of minority shareholders' property rights in circumstances where the minority shareholders have a remote connection with the transaction giving rise to the concerned ship's liability. The basis of the nexus that is established in the *Mkontwana* case cannot be applied to the associated ship provisions because in this instance, the associated ship is a separate juristic entity. It is possible that the ship, which is an asset in a ship-owning company, could have no connection to the concerned ship's debt (save to the extent of the connection between the common controlling majority shareholders). The current provisions in the Act, which predate the constitutional dispensation, render the presence of the minority shareholder irrelevant in their reach and attack.

While the objectives of Act are legitimate, given their impact on minority shareholders the relevant provisions of the Act undermine the 'perfectly legitimate use of the corporate form to limit risk in commercial undertakings generally and in shipping particularly'.¹⁶⁸ The effect of the deprivation of the property rights of minority shareholders is disproportionate to the good achieved by the legislated infringement of such rights. Through my analysis of the position in international jurisdictions, it is apparent that although the current provisions of the Arrest Convention have proved to be ineffective, other jurisdictions have not extended their admiralty jurisdiction as far as South Africa has through the introduction of these provisions. Even the United Kingdom, which has been an

¹⁶⁸ *Bradfield op cit* (n21) 240.

supporter of adopting provisions similar to those contained in the Act indicated that they did '*not intend to catch... other investors with minority share ownership but no element of effective control*' through the provisions.

Whether section 3(7)(a)(ii) read with section 3(7)(b)(i) of the Act will survive constitutional scrutiny is a matter that will no doubt be determined by our courts in the near future. It will be dependent on a number of factors, which may be influenced by *inter alia* the following considerations: whether the Court chooses to adopt a 'thin' or 'thick' level of scrutiny in applying the substantive elements of section 25(1) of the Constitution; the complexity of relationships between (a) the concerned ship-owning company and the associated ship-owning company, (b) the relationship between the debt and the minority shareholder, and (c) the relationship between the minority and the majority shareholders.

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