

**FIRST NATIONAL BANK OF SA LTD t/a WESBANK v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE AND ANOTHER;
FIRST NATIONAL BANK OF SA LTD t/a WESBANK v MINISTER OF FINANCE 2002 (4) SA 768 (CC)**

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Citation	2002 (4) SA 768 (CC)
Case No	CCT 19/01
Court	Constitutional Court
Judge	Chaskalson CJ, Langa DCJ, Kriegler J, Ackermann J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ
Heard	August 28, 2001
Judgment	May 16, 2002
Counsel	A M Breitenbach (with N Bawa) for the appellant in the appeal from case No 825/99. S C Kirk-Cohen for the appellant in the appeal from case No 9101/94. G J Marcus SC (with J P Vorster SC and C S Kahanovitz) for the respondents.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Constitutional law - Human rights - Right to property - Section 114 of Customs and Excise Act 91 of 1964 facilitating enforcement of customs regulations and recovery of outstanding customs duties by allowing detention of any goods on any premises in possession or under control of customs debtor, whether goods belonging to customs debtor or not - Provisions of s 114 so expansive that they can embrace goods of third parties under factual circumstances where no other relationship at all existing between third party in question and Commissioner or customs debtor - Section not turning third party into customs debtor - Infringement issue in relation to s 25(1) of Constitution limited to determining whether deprivation of property enacted by s 114 of Act 'arbitrary' within meaning of that term as employed in Constitution - Deprivation of property 'arbitrary' as meant by s 25 of Constitution when 'law' referred to in s 25(1) of Constitution not providing sufficient reason for particular deprivation in question or procedurally unfair - Section 114 performing legitimate and important legislative purpose but casting net far too wide - In absence of relevant *nexus*, insufficient reason existing for s 114 to deprive persons other than customs debtor of their goods - Such deprivation arbitrary for purpose of s 25(1) of Constitution and a limitation of third party's rights - Infringement by s 114 of Act of s 25(1) of Constitution not reasonable and justifiable in open and democratic society based on human dignity, equality and freedom - Section 114 not constitutionally valid - Constitution of the Republic of South Africa Act 108 of 1996, s 25.

Constitutional law - Human rights - Right to property - Whether deprivation of property arbitrary - 'Arbitrary' as used in s 25 not limited to non-rational deprivations in sense of there being no rational connection between means and ends - 'Arbitrary' referring to wider concept and broader controlling principle that is more demanding than enquiry into mere rationality - At same time, concept narrower and less intrusive than that of the proportionality evaluation required by limitation provisions of s 36 of Constitution - Standard set in s 25(1) 'arbitrary' and not 'reasonable and justifiable' - Important in every case in which s 25(1) in issue to have regard to legislative context to which prohibition against 'arbitrary' deprivation to be applied and to nature and extent of deprivation - Deprivation of property 'arbitrary' as meant by s 25 when 'law'

deprivation in question or procedurally unfair - Sufficient reason to be established by considering various aspects of deprivation, purpose to be served and relationships affected thereby - Whether sufficient reason existing to warrant deprivation a matter to be decided on all relevant facts of each particular case, always bearing in mind that enquiry concerned with 'arbitrary' in relation to deprivation of property under s 25 of Constitution - Constitution of the Republic of South Africa Act 108 of 1996, s 25.

Revenue - Fiscal statutes - Constitutionality of - Fiscal statutory provisions, no matter how indispensable to economic well-being of country, not immune to discipline of Constitution of the Republic of South Africa Act 108 of 1996 and having to conform to its normative standards.

Constitutional law - Human rights - Right to property - Characterisation of right - Property rights of natural persons fully and properly realised only if such rights afforded to companies as well as to natural persons - Section embodying negative protection of property but protection for holding of property implicit in section - Plain that, for purposes of section, property not limited to land - Whether owner of corporeal movable making use of that movable or not irrelevant to categorisation of object as constitutional property - Neither subjective interest of owner in thing owned nor economic value of right of ownership, having regard to terms of an agreement, able to determine characterisation of right - Owner's right to property leased or sold in terms of instalment sale agreement reserving ownership constituting property for purposes of s 25 of Constitution of the Republic of South Africa Act 108 of 1996.

Constitutional practice - Courts - Constitutional Court - Declaration of invalidity of statutory provision - Section 114 of Customs and Excise Act 91 of 1964 providing for detention of goods of unconnected third parties as security for payment of duties and penalties declared invalid - Whether such declaration of invalidity to be limited or suspended under s 172(1)(b) of Constitution of the Republic of South Africa Act 108 of 1996 - Impossible textually to sever good from bad in s 114 without embarking on extensive redrafting of section - Such action would trespass on terrain of Legislature and inappropriate in circumstances - Appropriate remedy is order declaring provisions of s 114 invalid to extent that they provide that goods of persons other than relevant customs debtor subject to lien, detention and sale - Not just and equitable to prejudice person who purchased goods in good faith pursuant to selling provisions of s 114 of Act and has been placed in possession of such goods pursuant to such sales - Also disruptive, burdensome and difficult to reverse consequences of such sales if sales invalidated - Therefore just and equitable to limit retrospective operation of order of invalidity to exclude such sales and cases finalised under s 114 - No good reason for suspending order of constitutional invalidity in consequence of property challenge in terms of s 25 of Constitution - Invalidity relating only to goods owned by persons not customs debtors as envisaged by s 114 of Act - Individual owner of goods, not being a customs debtor as envisaged by s 114, not to be required to forego his or her constitutional rights and suffer loss of ownership of such goods, even for limited period of time.

Headnote : Kopnota

The appellant had leased two vehicles and sold another under an instalment sale agreement to two companies. In all cases the appellant had remained the owner of the vehicles. The Commissioner of the South African Revenue Services detained and thereby established a lien over one of the leased vehicles to obtain security for a customs-related debt owed to it by the first company. The Commissioner also detained and established a lien

over the other leased vehicle as well as the one sold under the instalment sale agreement to obtain security for customs debts and penalties owed by the second company. The appellant challenged the constitutionality of s 114 of the Customs and Excise Act 91 of 1964 (the Act), which allowed the Commissioner, in order to collect a debt owed, to sell goods without the need for a prior judgment or other authorisation by a court. The section further allowed the Commissioner to sell goods not belonging to the customs debtor but to a third party. The appellant contended that the section, by empowering the Commissioner to act as he had, constituted an unjustified infringement of its constitutional right to the protection of its property and that the detention and sale of the motor vehicles under the provisions of s 114 in circumstances where the appellant was not a customs debtor amounted to an expropriation of the motor vehicles in question for the purposes of s 25 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). It contended that, to the extent that s 114 did not provide for any compensation for such expropriation and authorised such expropriation, it was inconsistent with s 25(1) of the Constitution and invalid. The respondents contended, *inter alia*, that the appellant's ownership in the vehicles amounted to nothing more than a contractual device which reserved ownership to the appellant which, together with a range of other clauses, was designed to protect the appellant and that the Constitution did not seek to protect the reservation of ownership rights in leased goods by financial institutions. Accordingly, the appellant, as a juristic person, was not entitled to the property rights protected by s 25 of the Constitution.

A High Court had found that the detention mechanism of s 114 was similar to the common law lien and the landlord's hypothec, both of which may operate to defeat the rights of the owner of goods falling under the lien. The High Court had further held that s 114 created subsidiary categories of co-principal tax debtors and that taxation could not amount to deprivation or expropriation. It found that the lien upon and the sale of a credit grantor's goods under s 114 did not amount to expropriation and concluded that the decision on where the burden of taxation should fall was a policy one. In an appeal to the Constitutional Court.

Held, that the Act was premised on a system of self-accounting and self-assessment. There existed no viable method by which the Commissioner could keep track of all the goods imported that might result in customs duty being payable under the Act and whereby such duties could automatically be collected. The Commissioner accordingly had to verify compliance through routine examinations and inspections and through action precipitated by suspected evasion. (Paragraph [15] at 781C - D.)

Held, further, that the Act sought to spread the enforcement and recovery wings of the Commissioner as widely as possible. Section 114 facilitated this by allowing detention of goods on any premises in the possession or under the control of the customs debtor. The customs debtor needed only to be in possession or control of the premises, and not of the goods themselves, for those goods to be liable to detention. (Paragraph [23] at 783G and 784B/C - C/D.)

Held, further, that although one of the vehicles had been detained by the Commissioner at a time when the Constitution of the Republic of South

Africa Act 200 of 1993 (the interim Constitution) was still in force, it did not follow that that Constitution was necessarily applicable. The High Court proceedings in relation to that

vehicle had been instituted when the final Constitution was already in force and at a time when the appellant's ownership of the vehicle was threatened. Section 38 of the Constitution permitted a person to invoke the Bill of Rights both in relation to a threatened as well as an actual infringement of a right. The constitutional property attack under s 25 of the Constitution should therefore be considered in respect of all the vehicles involved. (Paragraph [24] at 784D - G/H.)

Held, further, that even fiscal statutory provisions, no matter how indispensable they were for the economic well-being of the country, were not immune to the discipline of the Constitution and had to conform with its normative standards. Furthermore, s 39(2) of the Constitution provided that when interpreting any legislation and developing the common law, every court had to promote the spirit, purport and objects of the Bill of Rights. The obligation of the courts to develop the common law in the context of the s 39(2) objectives was not purely discretionary. Courts were under a general obligation to develop the common law appropriately where it was deficient, as it stood, in promoting s 39(2) objectives and there was a like obligation on the courts when interpreting legislation, including fiscal legislation, to promote the same objectives. (Paragraph [31] at 787C - F.)

Held, further, that the keystone of the High Court's analysis of s 114 was the conclusion that the section turned third parties into co-principal debtors, who were liable, with the customs debtor, for payment of the customs duty in question. There was, however, no authority for the proposition that a person having a lien over the property of a third party thereby acquired an independent cause of action against the third party owner. The lien, to the extent that it related to the property of third parties who were not customs debtors, did no more than provide a further execution object for recovery of the debt from the relevant customs debtor. There was nothing in the working or purpose of the section to suggest a radical departure from the fundamental legal principles relating to liens, least of all that a new and highly unusual form of co-principal customs duty liability was being created. (Paragraphs [32] and [34] at 787F - 788A and 788F - G.)

Held, further, that as far as s 114 of the Act created a lien over the property of third parties and enabled the Commissioner to sell such property in execution of the customs debtor's obligation under the section, such liens could not be equated with common-law liens or the landlord's hypothec, as had been found by the High Court. Unlike common-law liens, s 114 of the Act did not establish any significant *nexus* between the creditor and the non-debtor third party over whose property the lien was created. The provisions of s 114 were so expansive that they could embrace goods of third parties under factual circumstances where there was no other relationship at all between the third party in question and the Commissioner or the customs debtor. (Paragraphs [35] and [36] at 788G/H - 789B.)

Held, further, that s 114 of the Act did not make the third party a customs debtor but made the goods of that party liable to be seized in execution of someone else's customs debt. The third party did not become a co-debtor and had no liability to the Commissioner to pay any tax at all. The question was therefore not one of equity in tax, but whether it was constitutionally permissible to seize a third party's property for another person's customs debt. (Paragraph [37] at 789D - E/F.)

Held, further, that the issue had to be framed broadly, without making any distinction between the position of the appellant and that of any other affected owner. This was so because s 114(1)(a)(ii) of the Act was couched

in expansive general terms identifying the targeted goods solely on the basis of some or other form of possessory relationship between the customs debtor and such goods. In relation to the targeted goods, the section drew no distinction between any categories of non-customs debtor owners of such goods. (Paragraph [39] at 789H/I - J.)

Held, further, that the appellant was a public company, which was a legal entity altogether separate and distinct from its members. Its continued existence was independent of the continued existence of its members and its assets were its exclusive property. However, no matter how complex the holding structure of a company might be, ultimately, in the vast majority of cases, the holders of shares were natural persons. The property rights of natural persons could only fully and properly be realised if such rights were afforded to companies as well as natural persons. It therefore had to be concluded that the appellant was entitled to the property rights under s 25 of the Constitution. (Paragraphs [43] and [45] at 791C - E and 791H.)

Held, further, that s 25 of the Constitution embodied a negative protection of property and did not expressly guarantee the right to acquire, hold and dispose of property. Protection for the holding of property was, however, implicit in s 25 and it was also plain that, for the purposes of the section, property was not limited to land. (Paragraph [48] at 793A - C.)

Held, further, that whether the owner of a corporeal movable made use of that movable or not was irrelevant to the categorisation of the object as constitutional property. At the time the appellant had concluded the relevant contracts with the customs debtors, it had been the owner of the vehicles. The reservation of ownership was therefore not the focus of the inquiry as such reservation was no more than the description of the effect of a contractual term in the agreement. (Paragraphs [54] and [55] at 795E and 795F/G - 796A.)

Held, further, that, having regard to the other terms of the agreement, neither the subjective interest of the owner in the thing owned nor the economic value of the right of ownership could determine the characterisation of a right. The right of ownership which the appellant had in the vehicles in question constituted property for the purposes of s 25 of the Constitution. (Paragraph [56] at 796C - E.)

Held, further, that s 25(1) of the Constitution dealt with all property and all deprivations, including expropriations. If the deprivation infringed or limited s 25(1) and could not be justified under s 36 of the Constitution, the provision was unconstitutional. Were the deprivation, however, not to infringe s 25(1), the question arose as to whether it was an expropriation. If the deprivation was an expropriation, it had to pass scrutiny under s 25(2)(a) and make provision for compensation under s 25(2)(b). (Paragraphs [58] and [59] at 796H/I - 797B.)

Held, further, that the infringement issue in relation to s 25(1) of the Constitution was really limited to determining whether the deprivation of property enacted by s 114 of the Act was 'arbitrary' within the meaning of that concept as employed in s 25(1) of the Constitution, as s 114 of the Act clearly constituted a law of general application. In its context, 'arbitrary' as used in s 25 of the Constitution was not limited to non-rational deprivations in the sense of there being no rational connection between means and ends. It referred to a wider concept and a broader controlling principle that was more demanding than an enquiry into mere rationality. At the same time it was a narrower and less intrusive concept than that of the

proportionality evaluation required by the limitation provisions of s 36 of the Constitution. The standard set in s 25(1) was 'arbitrary' and not 'reasonable and justifiable'. It was important in every case in which s 25(1)

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was in issue to have regard to the legislative context to which the prohibition against 'arbitrary' deprivation had to be applied and also to the nature and extent of the deprivation. (Paragraphs [61], [65], [66] and [99] at 797E - F, 798G - I/J and 810F/G.)

Held, further, that comparative law could not, by simplistic transference, determine the proper approach to the s 25 property clause that had its own context, formulation and history. The comparative perspective did, however, demonstrate two important principles. First, there were appropriate circumstances where it was permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation. Secondly, for such deprivation to be valid, there had to be an appropriate relationship between means and ends, between the sacrifice the individual was asked to make and the public purpose intended to be served. (Paragraphs [97] and [98] at 810A/B - C/D.)

Held, further, that the deprivation of property was 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) did not provide sufficient reason for the particular deprivation in question or was procedurally unfair. Sufficient reason was to be established by considering various aspects of the deprivation, the purpose to be served and the relationships affected thereby. Whether there was sufficient reason to warrant the deprivation was a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry was concerned with 'arbitrary' in relation to the deprivation of property under s 25 of the Constitution. (Paragraph [100] at 810G/H - H and 811E - F.)

Held, further, that the end sought to be achieved in the instant matter by the deprivation was to exact payment of a customs debt. This was a legitimate and important legislative purpose. Section 114 of the Act, however, cast the net far too wide. The means it used sanctioned the total deprivation of a person's property under circumstances where (a) such person had no connection with the transaction giving rise to the customs debt; (b) such property had no connection with the customs debt; and (c) such person had not transacted with or placed the customs debtor in possession of the property under circumstances that could have induced the Commissioner to act to his detriment in relation to the incurring of the customs debt. In the absence of any relevant *nexus*, no sufficient reason existed for s 114 to deprive persons other than the customs debtor of their goods. Such deprivation was accordingly arbitrary for the purpose of s 25(1) of the Constitution and consequently a limitation of such person's rights. (Paragraphs [108] and [109] at 814H - 815C.)

Held, further, that for the purposes of the judgment it had to be assumed, without deciding, that an infringement of s 25(1) of the Constitution was subject to the provisions of s 36. In the circumstances the conclusion was unavoidable that the infringement by s 114 of the Act of s 25(1) of the Constitution was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Section 114 of the Act was accordingly constitutionally invalid. (Paragraphs [110] and [113] at 815E and 816E - F.)

Held, further, that it was impossible textually to sever the good from the bad in s 114 of the Act without embarking on an extensive redrafting of the section, an action which would trespass on the terrain of the Legislature and would be inappropriate in the circumstances.

The appropriate remedy would accordingly be an order declaring the provisions of s 114 of the Act invalid to the extent that they provided that the goods of persons other than the customs debtor referred to in the section be subject to a lien, detention and sale. This was not to be taken to imply that there might not be circumstances when the *nexus* between the third party and the customs

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debtor, or between the goods of the third party and the customs debtor, or between the goods of the third party and the customs debt was such that the detention and sale of such goods would pass constitutional muster. (Paragraph [114] at 816F/G - 817A.)

Held, further, with regard to the question of whether the retrospective effect of the declaration of invalidity should be limited or suspended under s 172(1)(b) of the Constitution, that it would not be just and equitable to prejudice a person who had purchased goods in good faith pursuant to the selling provisions of s 114 of the Act and had been placed in possession of such goods pursuant to such sales. It would also be disruptive, burdensome and difficult to reverse the consequences of such sales if they were to be invalidated. It was therefore just and equitable to limit the retrospective operation of the order of invalidity to exclude such sales and also cases finalised under s 114. (Paragraph [122] at 819D/E - F.)

Held, further, that there was no good reason for suspending the order of constitutional invalidity in consequence of the property challenge. The invalidity related only to goods owned by persons who were not customs debtors as envisaged by s 114. Such goods represented no more than a minute proportion of the goods annually attached and the effect on the *fiscus* would be minimal. By contrast, it would be wholly disproportionate to require any individual owner of goods, not being a customs debtor as envisaged by s 114, to forego his or her constitutional rights and suffer the loss of ownership of such goods, even for a limited period of time. (Paragraph [123] at 819F - H.)

The decision in the Cape Provincial Division in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* 2001 (3) SA 310 reversed.

Cases Considered

Annotations

Reported cases

Airservices Australia v Canadian Airlines International Ltd (1999) 167 ALR 392: distinguished

Allgemeine Gold- und Silberscheideanstalt AG v The United Kingdom (1987) ECHR Series A vol 108: considered

Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223: considered

Bank of New South Wales v The Commonwealth (1948) 76 CLR 1: considered

Beckingham v Boksburg Licensing Board 1931 TPD 280: dictum at 282 applied

Bombay Properties (Pty) Ltd v Ferrox Construction 1996 (2) SA 853 (W): referred to

Burton v Honan (1952) 86 CLR 169: distinguished

Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander 1996 (4) SA 19 (A): dictum at 26J - 27A applied

37 BVerfGE 132 (1974)(*Mieterschutz* case): considered

53 BVerfGE 257 (1980)(*Versorgungsausgleich* case): considered

58 BVerfGE 137 (1981)(*Pflichtexemplar* case): considered

58 BVerfGE 300 (1981)(*Nassauskiesung* case): compared

83 BVerfGE 201 (1991)(*Bergrechtliches Vorkaufsrecht* case): considered

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) (2001 (10) BCLR 995): dictum in para [39] applied

Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC) (1996 (1) SACR 587; 1996 (5) BCLR 609): considered

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Chicago Burlington and Quincy Railroad v City of Chicago 166 US 226 (1897): referred to

Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC) (1999 (12) BCLR 1420): considered

Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others 1995 (4) SA 631 (CC) (1995 (10) BCLR 1382): considered

Commissioner for Customs and Excise v Standard General Insurance Co Ltd 2001 (1) SA 978 (SCA): referred to

Commissioner for Inland Revenue v NCR Corporation of South Africa (Pty) Ltd 1988 (2) SA 765 (A): referred to

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) (1998 (7) BCLR 779): considered

Dolan v City of Tigard 114 S Ct 2309 (1994): considered

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253): considered

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1): considered

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another 2001 (3) SA 310 (C) (2001 (7) BCLR 715): reversed on appeal

Fredin v Sweden [1991] ECHR Series A vol 192: considered

Gasus Dosier- und Födertechnik GmbH v Netherlands [1995] 20 EHRR 403: distinguished

Groenewald v Van der Merwe 1917 AD 233: dicta at 238 - 9 applied

Gudmunder Gudmundson v Iceland (1960) YB 3 394: considered

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (10) BCLR 1079): compared

James v United Kingdom [1986] 8 EHRR 123: considered

Johannesburg Liquor Licensing Board v Kuhn 1963 (4) SA 666 (A): referred to

McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida 496 US 18 (1990): referred to

Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another 2001 (1) SA 1109 (CC) (2001 (1) BCLR 1): considered

Minister of Finance and Others v Ramos 1998 (4) SA 1096 (C): referred to

Mistry v Interim National Medical and Dental Council of South Africa and Others 1998 (4) SA 1127 (CC) (1998 (7) BCLR 880): considered

Mutual Pools & Staff (Pty) Ltd v The Commonwealth of Australia (1994) 179 CLR 155: considered

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) (1998 (2) SACR 556; 1998 (12) BCLR 1517): referred to

Pennsylvania Coal Co v Mahon 260 US 393 (1922): considered

Phillips v Commissioner of Internal Revenue 283 US 589 (1930): referred to

R v Lord Saville of Newdigate and Others, Ex parte A and Others [1999] 4 All ER 860 (CA): considered

R v Ministry of Defence, Ex parte Smith and other appeals [1996] 1 All ER 257 (CA): considered

R v Secretary of State for the Home Department, Ex parte Daly [2001] 3 All ER 433 (HL): dictum at para [28] applied

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R v Secretary of State for the Home Department, Ex parte Hindley [2000] 1 QB 152 (CA): considered

Rand Bank Bpk v Regering van die Republiek van Suid-Afrika en Andere 1975 (3) SA 726 (A): referred to

Re Director of Public Prosecutions; Ex parte Lawler and Another (1994) 179 CLR 270: distinguished

Rudolph and Another v Commissioner for Inland Revenue and Others 1996 (4) SA 552 (CC)

(1996 (7) BCLR 889): referred to

S v Adams 1986 (4) SA 882 (A): dicta at 890H - J and 891A applied

S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC) (1995 (2) SACR 748; 1995 (12) BCLR 1579): considered

S v Brick 1973 (2) SA 571 (A): dictum at 579H applied

S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC) (1997 (2) SACR 540; 1997 (10) BCLR 1348): distinguished

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665): dictum in para [109] applied

S v Mtsele 1997 (2) SACR 740 (CC) (1997 (11) BCLR 1543; [1998] 1 B All SA 15): dicta in paras [12] - [14] applied

Secretary for Customs and Excise v Millman NO 1975 (3) SA 544 (A): dictum at 550A - B applied

Sporrong & Lönnroth v Sweden [1982] 5 EHRR 35: considered

X v Austria (1979) 13 DR 27: considered

X v Federal Republic of Germany (1959) YB 3 244: considered

X v The Netherlands (1971) YB 14 224: considered

X & Y v United Kingdom (1973) 44 CD 29: considered.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 200 of 1993: see *Juta's Statutes of South Africa 1995* vol 5 at 1-209 *et seq*

The Constitution of the Republic of South Africa Act 108 of 1996, ss 25, 36, 38, 39(2) and 172(1)(b): see *Juta's Statutes of South Africa 2000* vol 5 at 1-148, 1-149 - 1-150, 1-151 and 1-169

The Customs and Excise Act 91 of 1964, s 114: see *Juta's Statutes of South Africa 2000* vol 3 at 2-65.

Case Information

Appeal from a decision in the Cape Provincial Division (Conradie J), reported at 2001 (3) SA 310. The facts appear from the judgment of Ackermann J.

A M Breitenbach (with *N Bawa*) for the appellant in the appeal from case No 825/99.

S C Kirk-Cohen for the appellant in the appeal from case No 9101/94.

G J Marcus SC (with *J P Vorster SC* and *C S Kahanovitz*) for the respondents.

Cur adv vult.

Postea (May 16).

Judgment

Ackermann J:

Introduction

[1] This is a direct appeal, with leave of this Court, from the judgment

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ACKERMANN J

and order of the Cape of Good Hope High Court 1(1) (the High Court) dismissing a constitutional challenge by the appellant, First National Bank of SA Ltd (trading as Wesbank) (FNB), to the provisions 2(2) of s 114 of the Customs and Excise Act 91 of 1964 (the Act) in two High Court cases, Nos 825/99 (the *Lauray-Airpark* case) and 9101/94 (the *Republic Shoes* case) respectively. Although this Court has come to a different conclusion, the judgment of the High Court has been of much assistance in a complex matter.

[2] FNB is a financial institution that sells and leases movables. Three motor vehicles of which it is the owner have been detained under the provisions of s 114 of the Act. The first respondent is the Commissioner of the South African Revenue Service (the Commissioner), who is charged under s 2(1) of the Act with its administration. The second respondent is the Minister of Finance (the Minister) under whose aegis the Act falls.

[3] The two cases were consolidated for hearing in the High Court. In the *Republic Shoes* case it was common cause that FNB's cause of action had arisen before 27 April 1994, the date on which the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) came into force. The High Court accordingly correctly held, on the strength of the judgment of this Court in *Rudolph and Another v Commissioner for Inland Revenue and Others*, 3(3) that FNB could not validly base a challenge on either the interim Constitution or the 1996 Constitution 4(4) and that the substantive dispute in this case fell away. The only issue on appeal in the *Republic Shoes* case is the costs order made in the High Court. Unless the contrary is indicated, all references in this judgment will be to the *Lauray-Airpark* case.

[4] The Act provides for the 'levying of customs and excise duties and a surcharge; for a fuel levy and for an air passenger tax; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto'. 5(5) It is primarily a fiscal measure and has counterparts in countries throughout the world. Section 114 is concerned with the collection of debts (customs debts) due to the State by the debtor (customs debtor) under the Act. For the purposes of this case and at the risk of oversimplification it is helpful to emphasise two features of the provisions of s 114 at this stage. The first is that, in order to collect the debt owed, they allow the Commissioner to sell goods without the need for a prior judgment or other authorisation by a court. The second is that, in order to satisfy the debt owed, the Commissioner may sell goods even where the goods do not belong to the customs debtor but to some third party.

ACKERMANN J

[5] FNB contends, as it did in the High Court, that s 114 of the Act constitutes an unjustified infringement of its constitutional rights to have access to the courts in the settlement of disputes, 6(6) to the protection of its property 7(7) and to its freedom to choose a trade. 8(8) Save for the constitutional attack, the entitlement of the Commissioner in terms of s 114 of the Act to act as he has done in this case is not in dispute.

[6] The format of this judgment is as follows:

The factual background: paras [7] to [10].

Section 114 of the Act: paras [11] to [18].

Goods subject to detention and sale under s 114: paras [19] to [23].

The property challenge.

Introduction: paras [24] to [40].

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The meaning of s 25:

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The factual background

[7] FNB, acting in the normal course of its business, leased a Volkswagen Jetta to Lauray

Manufacturers CC (Lauray) in November 1994 and a Volkswagen Golf to Airpark Halaal Cold Storage CC (Airpark) in November 1995. In January 1996 FNB sold a Mercedes-Benz to Airpark under an instalment sale agreement with reservation of ownership until the last instalment was paid. Appellant thus remained the owner of all three vehicles.

[8] On 16 February 1996 the Commissioner detained, and thereby established a lien over, several vehicles on Lauray's premises in terms of

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s 114 of the Act. One these vehicles was the Volkswagen Jetta. This was done in order to obtain security for approximately R3,26m 9(9) comprising predominantly outstanding customs duty, penalties and payment in lieu of forfeiture arising out of an alleged fabric smuggling network. Lauray was placed in provisional liquidation on 17 November 1997. On 18 December 1997 the liquidator cancelled the lease. The Commissioner lodged a claim with the liquidator and received an amount of R198 074,96. Appellant did not lodge a claim for the arrears in lease payments since it would have been treated as a concurrent creditor in circumstances where there was no prospect of a dividend for concurrent creditors. The Commissioner has indicated, subject to the outcome of these legal proceedings, that he intends selling the vehicle in order to satisfy the outstanding customs debts of Lauray. Lauray was originally allowed to use the Jetta after detention, but it has been stored in a State warehouse since 27 March 1998.

[9] On 7 April 1997 the Commissioner detained and established a lien over the Volkswagen Golf and the Mercedes-Benz leased and sold respectively by FNB to Airpark. This was done in order to obtain security for customs debts and penalties of R640 571,32 owed by Airpark. Airpark had removed goods from a customs and excise cold storage warehouse without paying customs duty. The Commissioner has not sought to liquidate Airpark since there would be no benefit to creditors. The Commissioner has, however, stated his intention to sell the vehicles in an endeavour to recover at least part of Airpark's outstanding debt of R397 920,80. The two vehicles have been stored in the State warehouse since 26 March 1998.

[10] It should further be noted that FNB claims substantial sums to be outstanding with regard to the three vehicles, both in terms of payments which have fallen into arrears and in terms of total outstanding contract payments.

Section 114 of the Act

[11] The constitutional attack in this case is focused primarily on the power of the Commissioner to detain and sell various types of property under the provisions of s 114 of the Act, which, in its relevant part, reads as follows:

(1)(a)(i) The correct amount of duty for which any person is liable in respect of any goods imported into or exported from the Republic or any goods manufactured in the Republic shall from the date on which liability for such duty commences; and

(ii) any interest payable under this Act and any fine, penalty or forfeiture incurred under this Act shall, from the time when it should have been paid, constitute a debt to the State by the person concerned, and any goods in a

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customs and excise warehouse or in the custody of the Commissioner 10(10) (including goods in a rebate store-room) and belonging to that person, and any goods afterwards imported or exported by the person by whom the debt is due, and any imported goods in the possession or under the control of such person or on any premises in the possession or under the control of such person, and any goods in respect of which an excise duty or fuel levy is prescribed (whether or not such duty or levy has been paid) and any materials for the manufacture of such goods in the possession or under the control of such person or on any premises in the possession or under the control of such person and any vehicles, machinery, plant or equipment in the possession or under the control of such person in which fuel in respect of which any duty or levy is prescribed (whether or not such duty or levy has been paid), is used, transported or stored, may be detained in accordance with the provisions of ss (2) and shall be subject to a lien until such debt is paid.

...

(b) The claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in para (a) or (aA) and may be enforced by sale or other proceedings if the debt is not paid within three months after the date on which it became due.

....

[12] It is useful to paraphrase the mechanism for which s 114 provides in order to relate it to the wider scheme of the Act. The Act is singularly detailed and even a cursory overview of its provisions would burden this judgment unnecessarily. The limited explanation that follows under this heading is intended solely to provide a setting for the constitutional enquiry and will focus on customs duty. Issues of contention regarding the interpretation of s 114 will be dealt with later in the judgment.

[13] Two types of debt to the State are constituted by the provisions of s 114(1)(a) and may be secured and enforced by a lien and sale of goods. First, the 'correct amount of duty' for which a person is liable from the date of such liability in respect of imports, exports or manufacture in the Republic. 11(11) Secondly, any interest payable and fine, penalty and forfeiture incurred from the date on which liability for such duty commences. 12(12)

The correct amount of duty

[14] The main duties in question consist of customs duty on imported goods, excise duty on goods manufactured locally, and fuel levy on imported or locally produced goods. Liability for imported goods commences from the time when goods are deemed to be imported into the Republic. 13(13) Duty is payable at the time of entry for home consumption of such goods. 14(14) An importer of goods has to complete the requisite forms, produce a bill of entry as prescribed, and pay the customs duty

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within the time prescribed for making due entry. 15(15) The customs duty payable is determined by application of, amongst others, ss 45, 47(1) and 58(1) of the Act as circumstances may require, as well as the provisions of Schedules 1 and 2. The value for duty purposes is determined by the provisions of chap IX of the Act. 16(16) A wide range of persons is liable for the payment of duties under the Act. 17(17) With reference to customs duty this would include the master or pilot of the ship or aircraft concerned; 18(18) the container or the depot operator; 19(19) and importers, 20(20) the wide definition 21(21) of

which would include import clearing agents, for instance.

[15] It is important to note that the Act is premised on a system of self-accounting and self-assessment. 22(22) There exists no viable method by which the Commissioner can keep track of all goods imported that might result in customs duty being payable under the Act, and whereby such duties may be collected automatically. The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected evasion. 23(23)

[16] The correct amount of customs and excise duty can only be determined if goods are classified under the correct tariff heading, and the value, quantity or volume of the goods has been determined correctly. The Commissioner may make a written determination in order to set the applicable tariff heading or value in relation to specific goods. 24(24)

[17] Such determination will be subject to appeal to a High Court, but any amount due in terms of the determination shall be deemed to be correct and shall remain payable so long as the determination is in force. 25(25) An appeal may be brought within one year of such determination. 26(26) The appeals procedure envisaged by the above sections is based on the widely accepted principle relating to the recovery of fiscal claims of 'pay now, argue later'. 27(27) The provisions of s 39(1)(b) that payment of

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duty is to be made on delivery of the bill of entry is qualified by the following proviso:

'... Provided that the Commissioner may, on such conditions, including conditions relating to security, as may be determined by him, allow the deferment of payment of duties due in respect of such relevant bills of entry and for such periods as he may specify.' 28(28)

Interest, fines, penalties and forfeitures

[18] The second category of 'debt' in respect of which the provisions of s 114 are available to the Commissioner comprises interest, fines, penalties and forfeitures that have become payable. Interest is provided for in s 105 and does not run on penalties or fines. The Act provides for fines upon conviction for specific offences. 29(29) Section 87(1) provides that goods dealt with contrary to the provisions of the Act or in respect of which an offence 30(30) was committed, shall be liable to forfeiture. Section 93 provides for the remission of penalties in the discretion of the Commissioner. This would include forfeiture. The Commissioner may demand payment of the value of the goods liable to forfeiture in lieu of forfeiture. 31(31) The reference in s 114(1)(a)(ii) to forfeiture would include payment in lieu of forfeiture. Section 105(c) provides as follows:

'(T)he Commissioner may on such conditions as he may consider necessary -

- (i) remit any interest for which any person is liable by virtue of this section;
- (ii) permit payment of any amount referred to in para (a) by instalments of such amounts and at such times as he may determine.'

Goods subject to detention and sale under s 114

[19] The goods subject to detention and sale under s 114(1)(a)(ii) fall into the following five

categories:

- (i) any goods in a customs and excise warehouse or in the custody of the Commissioner (including goods in a rebate store room) and belonging to the customs debtor;
- (ii) any goods afterwards imported or exported by the customs debtor;
- (iii) any imported goods in the possession or under the control of the customs debtor or on any premises in the possession or under the control of the customs debtor;
- (iv) any goods in respect of which an excise duty or fuel levy is prescribed (whether or not such duty or levy has been paid) and any materials for the manufacture of such goods in the possession or under the control of the customs debtor or on any premises in the possession or under the control of the customs debtor;
- (v) any vehicles, machinery, plant or equipment in the possession or under the control of the customs debtor in which fuel in respect

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of which any duty or levy is prescribed (whether or not such duty or levy has been paid), is used, transported or stored.

By virtue of s 114(3) such goods would include the container of such goods.

[20] Section 114(1)(a)(ii) authorises the detention of the goods and stipulates that such goods shall be subject to a lien until the debt is paid. Section 114(1)(b) provides that the claims of the State shall have priority over the claims of all other persons upon anything subject to a lien and may be enforced by sale of the goods referred to above or by other proceedings if the debt is not paid within three months after the date on which it became due.

[21] Section 114 clearly authorises the detention and sale of the goods of third parties, that is persons who do not owe the s 114 debt to the State. 32(32) Only the first category of goods requires the goods to belong to the debtor.

[22] In relation to the second category, there need be no physical or other *nexus* between the goods belonging to a third party and the customs debtor; the only requirement is that the goods must have been imported or exported 'afterwards' (presumably after the customs debt with which s 114(1)(a)(ii) is dealing arose) by the customs debtor. In relation to the fifth category the only *nexus* required by the section between the goods of third parties and the customs debtor to render such goods subject to detention and sale by the Commissioner is 'possession or control' by the customs debtor; and as far as the third and fourth categories are concerned 'possession or control' by the customs debtor or the presence of such goods 'on any premises in the possession or under the control' of the customs debtor.

[23] In the context of s 114 the concept 'possession or control' is of wide signification. The Act seeks to spread the enforcement and recovery wings of the Commissioner as widely as possible. It is trite law that possession of a movable requires both physical control (*detentio*) and the necessary state of mind (*animus*). 33(33) When used in a statute the context will

determine what state of mind is required for possession in terms of such statute. 34(34) At common law a distinction is drawn between civil possession and natural possession. Under the former the state of mind required by the controller is that of keeping the article for herself as if she were the owner; under the latter it is sufficient if control of the article is

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for her own purpose. 35(35) In the case of other statutes 'possession' has been construed to mean physical control plus the intention to control, either for the possessor's own purpose, or on behalf of another; in the latter case little more than conscious physical detention, custody or control is required. 36(36) Where, as in the present case, the critical phrase conjoins 'possession and control', this would cover not only an intention to control for the possessor's own purpose but also mere conscious physical detention, custody or control. 37(37) In the case of the third and fourth categories above, the net is cast even wider, for all that is required is the presence of the goods in question 'on any premises in the possession or under the control' of the customs debtor. The customs debtor need only be in possession or control of the premises, not of the thing itself; in fact, she could be unaware of the presence of the thing on the premises in question.

The property challenge

Introduction

[24] Although one of the vehicles owned by FNB that is in issue in this case, namely the Volkswagen Jetta, was detained by the Commissioner on 16 February 1996 at a time when the interim Constitution was still in force, it does not follow that - in relation to the property right challenge - that Constitution is necessarily applicable. The High Court proceedings in relation to this vehicle were instituted on 27 January 1999, at a time when the 1996 Constitution was already in force. At this date, FNB's ownership in the vehicle had not yet been taken away from it (to use a clumsy but neutral expression), but was threatened. If the actual taking away would amount to an infringement of FNB's constitutional property rights, then a threat would be actionable under s 38 of the 1996 Constitution. 38(38) The threat was an ongoing one and still persisted as an ongoing cause of action after that Constitution came into force. Section 38 39(39) of the Constitution permits a person to invoke the Bill of Rights in relation to both a 'threatened' as well as an actual infringement of a right. I accordingly propose to consider the constitutional property attack under s 25 of this Constitution in respect of all the vehicles involved in the case.

[25] Section 25 40(40) of the Constitution in relevant part provides:

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'25. Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application -

- (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) . . .
- (4) For the purposes of this section -
- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
-'

[26] It was contended on behalf of FNB, both in the High Court and in this Court, that the detention and sale by the Commissioner under the provisions of s 114 of the motor vehicles owned by FNB, under circumstances where FNB was not a customs debtor, amounted to an expropriation of the motor vehicles in question for purposes of s 25 of the Constitution. Neither s 114, nor any other provision of the Act provided for the payment of compensation for such expropriation as mandated by s 25(2)(b) of the Constitution. Accordingly, it was submitted, the provisions of s 114 of the Act that authorised such expropriation were inconsistent with s 25(1) of the Constitution and invalid.

The High Court's judgment on the property attack

[27] With regard to the property attack, the High Court found that the detention mechanism of s 114 was similar to the common-law lien and the landlord's hypothec, both of which 'may operate to defeat the rights of the owner of goods falling under the lien'. 41(41) Mere detention without sale 'does not deprive the owner of his ownership', and any limitation of the property clause would therefore arise only upon sale of the goods so detained. 42(42) Regarding the power to sell the goods of third parties, the Judge referred to the wide definition of an importer as 'the person liable for customs duty'. 43(43) Under this definition, the 'master of a ship or pilot

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of an aircraft may be liable for duty'. 44(44) The Judge then reasoned that s 114 created 'subsidiary categories of co-principal tax debtors'. 45(45) Taxation could not amount to deprivation or expropriation. 46(46) The following passage is instructive of his reasoning: 47(47)

'To the extent that the goods of affected owners are in the possession or under the control of the customs debtor (the importer), such owners themselves become liable for customs duty. The tax is, to all intents and purposes, extended to them. If this seems inequitable, the answer is that there is no equity about a tax. It is not more inequitable that a credit grantor should suffer than that the master of a ship should in certain circumstances incur liability.'

[28] In relation to goods liable to detention under s 114(1)(a)(ii) the Judge drew a distinction 48(48) between a 'credit grantor', who finances the sale or long term lease of such goods to the customs debtor and into which category FNB is placed, and 'affected owners'. Affected owners are in turn divided into affected owners who, not being credit grantors, stand in some other contractual relationship with the customs debtor in relation to the goods in

question, and affected owners who do not and who have not given possession of such goods to the customs debtor, but such goods 'happen to be on premises in the custody or control of the customs debtor'. 49(49)

[29] The Judge assumed that the ownership of a credit grantor who was concerned mainly with security for his claim would qualify for constitutional protection, 50(50) but ruled that under s 114 no expropriation takes place 'as that word is commonly understood'. 51(51) Significantly though, this finding is limited to the property of credit grantors. 52(52) After finding that the lien upon and the sale of a credit grantor's goods under the section does not amount to expropriation, the Judge proceeds to consider whether the impact of s 114 in relation to the goods of affected owners could be justified in free and democratic countries. 53(53) In doing so the Judge also deals, in certain passages in the judgment, with justification in relation to credit grantors. 54(54)

[30] With regard to justification, the Court found that no less invasive methods than s 114 had been made out as viable alternatives 55(55) and that 'some democratic countries permit the attachment either of goods belonging to credit grantors or of goods (such as tools or equipment) used in the customs debtor's enterprise'. 56(56) Owners in a contractual

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relationship with the customs debtor would have a claim for the value of the goods seized, although owners without such a relationship might have only an enrichment claim. 57(57) The revenue derived from selling the goods of third parties was probably 'next to nothing', 58(58) but the 'coercive effect on a shipping agent of having its customers' goods attached as security for duty which it owes must be considerable'. 59(59) The Judge concluded that the 'decision on where the burden of taxation should fall is a policy one'. 60(60)

[31] Before considering the relevant constitutional property provisions it is convenient to deal with the High Court's analysis of the s 114 mechanism summarised in para [30] above. In doing so it is first necessary to emphasise that 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. Moreover, s 39(2) of the Constitution provides that:

'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' 61(61)

In the *Carmichele* case 62(62) this Court held that the obligation of courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary but that the courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the s 39(2) objectives. There is a like obligation on the courts, when interpreting any legislation - including fiscal legislation - to promote those objectives.

[32] The keystone of the High Court's analysis of s 114 is the conclusion that s 114 turns third parties (credit-grantors and affected owners) into co-principal debtors, who are liable, with the customs debtor, for payment of the customs duty debt in question. I am unaware of any authority, and none has been cited to us, for the proposition that a person having a lien

over the property of a third party thereby acquires

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an independent cause of action against the third party owner. In fact, authority is to the contrary. In *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander* 63(63) the Supreme Court of Appeal confirmed that a lien did not exist *in vacuo* but *to secure or rein-force* ('ter versekering of versterking') an underlying claim; accordingly neither a direct nor an indirect enrichment claim could be entertained if there had been no unjustified enrichment of the owner; it constitutes no more than a defence against the owner's *rei vindicatio*. Eiselen and Pienaar *Unjustified Enrichment* 64(64) express the principle aptly as follows:

'The lien or retention right is an ancillary right which supports the main claim, but is also dependent on it. In all cases where a party relies on a retention right the *onus* is on that party to prove the existence of the main claim without which it cannot survive.'

[33] A lien is a right conferred on the possessor of another's property, on which the possessor has expended money or labour, to retain possession of such property until properly compensated, either under contract or on the basis of unjustified enrichment. 65(65) The fact that at common law the *fiscus* enjoyed a legal hypothec over the property of its citizens in respect of taxes and dues owing by them to the State 66(66) takes the matter no further, for the hypothec was only on the goods of the tax debtor. This hypothec was abolished by s 86 of the Insolvency Act 32 of 1916. 67(67) When the equivalent statutory lien was introduced for the first time in s 142(1) of the Customs Act 35 of 1944 it related only to the goods of the customs debtor.

[34] It is against this background that the effect of the lien under s 114(1)(a)(ii) must be considered. In my view, such lien, to the extent that it relates to the property of third parties who are not customs debtors, does no more than provide a further execution object for the recovery of the debt from the relevant customs debtor. There is nothing in the wording or purpose of this section providing for the statutory 'lien' to suggest that a radical departure from the fundamental legal principles relating to liens, referred to above, is envisaged. Least of all that a new and highly unusual form of co-principal customs duty liability is being created.

[35] As far as s 114 creates a lien over the property of third parties and enables the Commissioner to sell such property in execution of a customs debtor's obligation under the section, such liens over the property of third parties cannot, in my view, be equated with that of the common-law lien or the landlord's hypothec, as found by the High Court.

[36] Unlike the case of common-law liens, s 114 does not establish any

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significant *nexus* between the creditor (the Commissioner) and the non-debtor third party over whose property a lien is created. The provisions of s 114(1)(a)(ii) are so expansive - as indicated earlier in this judgment - that they can embrace goods of third parties under factual circumstances where there is no other legal relationship, or indeed any other

relationship at all, between the third party in question and the Commissioner, or the third party and the customs debtor. Under such circumstances there would be no analogy at all between the lien under the section and any common-law lien.

[37] Dealing with the perceived inequity resulting from the conclusion reached by the Judge, in the passage quoted in para [27] above, to the effect that the tax liability of the customs debtor is extended to the third party, the Judge remarked that

'... there is no equity about a tax. It is not more inequitable that a credit grantor should suffer than that the master of a ship should in certain circumstances incur liability.'

The flaw in this reasoning is that s 114 does not make the third party a customs debtor; it makes the goods of that party liable to be seized in execution of someone else's customs debt. The third party does not become a co-debtor and has no liability to the Commissioner to pay any tax at all. If the property is realised and there is a balance due on the tax debt, that remains the responsibility of the customs debtor. The question here is not about equity in tax, but whether it is constitutionally permissible to seize a third party's property for another person's customs debt.

[38] The detention of the goods could continue indefinitely, until such time as sold by the Commissioner or in execution by a creditor with an unsatisfied judgment against the owner. In this latter event the Commissioner would, by virtue of the s 114 lien, enjoy preference on the proceeds of the sale. In any of these events the Commissioner has the power to deprive FNB permanently of all its rights and benefits as owner of the vehicles. In practice, however, it is most improbable that the Commissioner would not sell the detained goods and such detention therefore constitutes a continuing and real threat of sale. The crucial issue to be determined on this part of the case is accordingly whether, in the absence of a relevant *nexus* between the goods and the customs debtor, the sale by the Commissioner - under s 114 of the Act - of goods owned by someone who is not a customs debtor amounts to an unjustifiable infringement of the owner's s 25 property rights.

[39] The issue must be so broadly framed, without making any distinction between the position of FNB as credit grantor and the position of any other affected owner. This is so because s 114(1)(a)(ii) is itself couched in expansive general terms identifying the targeted goods solely on the basis of some or other form of possessory relationship between the customs debtor and such goods. In relation to the targeted goods, the section draws no distinction between any categories of non-customs debtor owners of such goods. The different possible categories of such owners are legion.

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[40] It may have been possible for the Legislature to have devised a narrower category of non-debtor owners for purposes of the section, which may or may not have passed constitutional muster. It is unnecessary to decide this. The Legislature has not chosen to do so. It is not this Court's function to attempt to select such categories from a maze of them, nor to speculate - for that is what it would amount to - about what the Legislature might have done had it formulated the section with the idea of constitutional compatibility in mind. Under these circumstances it is impermissible for this Court to attempt to formulate a narrower set of categories of third parties falling within the purview of s 114(1)(a)(ii) and only to consider the section's constitutionality in respect of such categories; this would in effect

be a legislative act. 68(68) Section 114 is certainly not the sort of provision that is reasonably capable of a narrower construction in conformity with the Constitution. 69(69)

The property challenge issues

[41] A preliminary question is whether FNB, as a juristic person, is entitled to the property rights protected by s 25 of the Constitution. In this regard s 8(4) of the Constitution provides as follows:

'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

[42] In the *First Certification* case 70(70) an objection was raised that, inconsistently with Constitutional Principle II, the extension of the rights guaranteed by the Bill of Rights to juristic persons would diminish the rights of natural persons. This Court rejected the objection in the following terms:

'... [M]any "universally accepted fundamental rights" will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of NT 8(4) specifically recognises this. The text also recognises that the nature of a juristic

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person may be taken into account by a court in determining whether a particular right is available to such person or not.' 71(71)

In the *Hyundai* case 72(72) this Court held that although juristic persons are not the bearers of dignity they are entitled to the right to privacy, although their privacy rights 'can never be as intense as those of human beings'. 73(73) Exclusion of juristic persons from the right to privacy

'... would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons.' 74(74)

[43] We are here dealing with a public company. It is trite that a company is a legal entity altogether separate and distinct from its members, that its continued existence is independent of the continued existence of its members, and that its assets are its exclusive property. 75(75) Nevertheless, a shareholder in a company has a financial interest in the dividends paid by the company and in its success or failure because she '... is entitled to an *aliquot* share in the distribution of the surplus assets when the company is wound up'. 76(76) No matter how complex the holding structure of a company or groups of companies may be, ultimately - in the vast majority of cases - the holders of shares are natural persons.

[44] More important, for present purposes, is the universal phenomenon that natural persons are increasingly forming companies and purchasing shares in companies for a wide variety of legitimate purposes, including earning a livelihood, making investments and for structuring a pension scheme. The use of companies has come to be regarded as indispensable for the conduct of business, whether large or small. It is in today's world difficult to conceive of meaningful business activity without the institution and utilisation of