THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO: 825/99

In the matter between:

FIRST NATIONAL BANK OF S A LIMITED
t/a WESBANK — Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — First Respondent

THE MINISTER OF FINANCE — Second Respondent

JUDGMENT DELIVERED ON FRIDAY 2nd MARCH 2001

CONRADIE, J:

Consolidation

Two cases were consolidated for this hearing. The first, *First National Bank of SA Limited v The Minister of Finance* I shall call 'the Republic Shoes case'. It concerned a detention by the first respondent ('the Commissioner') of property of the applicant in the possession of Republic Shoes (1984) (Pty) Ltd. The second case is one between the same parties about a detention of the applicant's

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property in the possession of Lauray Manufacturers CC ('Lauray') and Airpark Halaal Cold Storage CC ('Airpark'). I shall call it 'the Lauray – Airpark case'.)

In each case the detention arose from customs duties owed to the Commissioner. The issue is the constitutionality of s114 of the Customs and Excise Act 91 of 1964 ('the Customs Act'), the mechanism by which the Commissioner enforces payment of customs duties.

The applicant conceded that it was not entitled to argue the constitutionality of a detention of one of its vehicles in the possession of Republic Shoes 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. *Rudolph and Another v Commissioner of Inland Revenue and Other N.O.* 1996 (4) SA 552 (CC) decided that conduct which occurred before the new constitutional order was established, might not be challenged under either the Interim Constitution or the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution'). The substantive dispute in the Republic Shoes matter accordingly fell away. The order consolidating the two cases provided that, save for the wasted costs of the hearing of the Republic Shoes matter on 25 August 1999, which the applicant was ordered to pay, the costs of that matter were to stand over for determination in the consolidated proceedings.

The Factual Background

By 10 June 1996 Lauray was indebted to the Commissioner for customs duties and penalties amounting to R3,26m. Lauray agreed to pay off the debt in instalments of R80 000,00 per month. In order to obtain security for the debt, the Commissioner, acting in terms of s114 of the Customs Act, on 16 February 1996 detained four vehicles on Lauray's premises. One of them was a Volkswagen Jetta belonging to the applicant. On 17 November 1997 Lauray was provisionally wound up. The Commissioner's claim in the estate yielded only a small dividend

of some two hundred thousand Rand. He wants to sell the Jetta to recover at least some of the rest.

Airpark had removed goods from a customs and excise cold storage warehouse without paying customs duty on the goods. As security for its debt of R640 571,32 a Mercedes-Benz and a Volkswagen Golf belonging to the applicant were on 7 April 1997 detained by the Commissioner in terms of s114. Airpark was permitted to use the vehicles until it defaulted in the payment of agreed instalments in reduction of the debt. The vehicles were then removed to the state warehouse.

The Court's Powers

The Volkswagen Jetta on Lauray's premises was detained while the Interim Constitution was in force. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Metropolitan Council 1999 (1) SA 374 (CC)* the constitutional court held that is was in the interests of justice for the supreme court of appeal to exercise the jurisdiction conferred by the Constitution in respect of a constitutional issue arising under the Interim Constitution, whether or not it was pending when the Constitution came into force. The consequence of this ruling is that notwithstanding the exclusion under the Interim Constitution of the supreme court of appeal's jurisdiction to strike down legislation, the procedural provisions of the Constitution apply, and the supreme court of appeal may declare an Act of parliament invalid subject to confirmation by the constitutional court in terms of section 167(5) of the Constitution. What is sauce for the supreme court of appeal is sauce for the high court. The latter may accordingly

strike down legislation as inconsistent with the Interim Constitution subject to confirmation of an order of invalidity by the constitutional court. Whether or not a constitutional infringement occurred while the Interim Constitution was in force, is governed by that Constitution. It will accordingly be necessary to examine the relevant provisions of both constitutions.

The Notice of Motion

The Commissioner had stated that he intended selling the vehicles to satisfy unpaid customs duty, value added tax, penalties and (in the case of Lauray only) to recover payments in lieu of forfeiture. For this reason the applicant at first claimed an interim order interdicting the Commissioner from alienating the vehicles. Upon receiving an assurance from him that he would not dispose of the vehicles, the claim for this relief was abandoned. The second part of the notice of motion, in its amended form, claims an order -

"2. Declaring:

2.1 section 114 of the Customs and Excise Act 91 0f 1964:

2.1.1 to be unconstitutional and invalid;

2.1.2 alternatively, to be unconstitutional and invalid to the extent that it permits First Respondent or an officer under his control to detain, establish a lien over and sell or otherwise alienate goods belonging to someone other than the person liable to the State for the debts described in Section 114(1)(a)".

There is also a prayer that the 'seizure' of the vehicles be declared invalid and that those respondents who oppose the application pay the costs.

Prior to the amendment of the notice of motion the thrust of the applicant's case was that it was constitutionally impermissible for property in which a financial institution (or someone else) held reserved title to be detained or sold in order to recover debts owed by a customs debtor to the Commissioner. This, it was said, amounted to expropriation without compensation. The main relief which is now being sought is that s114 in its entirety should be declared unconstitutional. The respondents were sufficiently taken by surprise by the new approach to request a postponement in order to deal with it. After some procedural skirmishing, a postponement was agreed upon. Supplementary papers were then filed. Ultimately, the amendment was granted by consent. I deal later with the wasted costs of the postponement.

There are, accordingly, now, on the papers, two main prongs to the applicant's attack. The first is the procedural challenge. It falls into two parts. The first part concerns the question whether the administrative collection of customs duty is permitted by s34 of the Constitution or was permitted by s22 of the Interim Constitution. By the administrative collection of customs duty is meant a procedure whereby the duty becomes exigible before a court has (finally) pronounced on liability therefor. The second part is whether, if s34 (or s22) does not permit such a procedure, s114 of the Customs Act is saved by considerations relating to the reasonableness in an open and democratic society of administrative tax recovery measures which limit the function of the courts in the recovery process.

The second challenge is mounted on the footing of a suggested infringement of the applicant's constitutional rights to economic activity and property under s28 of the Interim Constitution and s25(2) of the Constitution. It raises the question, firstly, whether there is indeed an infringement and secondly, if there is, whether

it is justifiable in an open an democratic society for the state to rely on legislation which, by creating a right of retention in favour of the state, benefits the *fiscus* over other creditors.

There is a third, lightly armoured, attack. It is suggested that the favour shown to the *fiscus*, violated the applicant's right to choose a trade or engage in economic activity.

Another point, not foreshadowed in the notice of motion, was debated in argument. It was contended that s114 was overbroad, and that even if it were permissible to establish a lien over the property of instalment sale creditors and long-term lessors, ('credit grantors') the section permitted a detention (and subsequent sale) of goods belonging to third parties which went beyond any legitimate fiscal requirement. I shall refer to creditors in this category as 'affected owners'.

Section 114 of the Customs Act

It is necessary to quote s114 of the Customs Act in full. I use the present version. Amendments made after the launching of the applications are unimportant for a decision in this case.

"114 Duty constitutes a debt to the State

(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 customs and excise warehouse or in the custody of the Commissioner (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 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 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 subsection (2) and shall be subject to a lien until such debt is paid.

(aA) Any plant and stills for the manufacture of any goods in respect of which an excise duty or fuel levy is prescribed which are in the possession or under the control of such person or on any premises in the possession or under the control of such person shall be subject to a lien from the time when the liability for the duty or levy payable as contemplated in paragraph (a) in respect of any goods so manufactured commences until the debt in question is paid, as if such plant and stills are detained in accordance with the provisions of subsection (2): Provided that the Commissioner may allow any such plant or still to be used under such conditions as he may impose in each case.

(aB) Any capital goods in respect of which any surcharge has been withdrawn in terms of any permit issued by the Director-General: Trade and Industry shall be subject to a lien as security for the surcharge so withdrawn until the conditions specified in such permit have been complied with to the satisfaction of the said Director-General, as if such goods are detained in accordance with the provisions of subsection (2) unless other security is furnished to the satisfaction of the Commissioner.

(b) The claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in paragraph (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: Provided that, notwithstanding anything to the contrary in any other law contained, the Commissioner may, on good cause shown, direct at any time on such conditions as the Commissioner may in each case impose, that such thing, of which the person by whom the debt is due is not the owner, be delivered with the concurrence of such person, to the owner thereof on payment of the debt due to the State secured by the value of such thing at the time of such delivery and any reasonable costs and expenses incurred by and charges due to the Commissioner in respect of any detention in terms of subsection (2).

(c) Any refund of duty or a deposit or any other amount due to such person in respect of any matter whatsoever, may be set off against such debt.

(2) (a) The Commissioner or an officer may detain anything referred to in subsection (1) (a) by sealing, marking, locking, fastening or otherwise securing or impounding it on the premises where it is found or by removing it to a place of security determined by the Commissioner: Provided that the Commissioner may allow any such thing to be used under such conditions as he may impose in each case which conditions

shall include that the person who is allowed to use such thing shall not enter into any agreement whereby-

(i) ownership or possession of such thing is transferred or relinquished in any manner whatsoever to any other person;

(ii) such thing is pledged or otherwise hypothecated in favour of any other person.

(b) (i) Any agreement entered into contrary to those conditions shall be null and void.

(ii) If such person so enters into any such agreement or otherwise deals with such thing contrary to any conditions imposed by the Commissioner, an officer may detain such thing wheresoever and in possession of whomsoever found and remove it to a place of security, whereafter the Commissioner may dispose thereof at any time as contemplated in subsection (1) (b) if the debt has not been paid.

(iii)The person by whom the debt is due shall be liable for all reasonable costs and expenses incurred by and charges due to the Commissioner in respect of such detention or removal of the thing concerned; and

(2A) Except with the permission of the Commissioner, no person shall remove-

(a) any plant or stills, subject to a lien in terms of subsection (1) (aA), from the place indicated by an officer;

(b) anything detained under subsection (2) from the premises referred to in that subsection or from the place of security to which it may have been removed under that subsection.

(3) Any reference to goods in this section shall be deemed to include a reference to the containers of such goods."

After the institution of the proceedings in the Republic Shoes case, and by operation of s 2 of the South African Revenue Service Act 34 of 1997 which came into effect on 1 October 1997 the South African Revenue Service was established as a semi-independent organisation of the state outside the public service. In terms of s34(1) of that Act, the 'Commissioner' referred to in s1 of the Customs Act is now the Commissioner for the South African Revenue Service and no longer the Commissioner of Customs and Excise.

Access to Court

It was contended on behalf of the applicant that s114 invades the authority of the courts to adjudicate justiciable disputes and to grant appropriate relief, followed, where necessary, by enforcement of the order by the attachment and sale of the debtor's goods. It was argued that it purports to empower the Commissioner to take the law into his own hands. Customs debtors, and others such as instalment sale sellers, so it was contended, are by the processes authorised by s114 denied (a) the protection of the adjudicatory process (by which I mean the steps leading up to judgment) as well as (b) the supervision exercised by the court over the process of execution.

The applicant relies in this regard on s34 of the Constitution and on s22 of the Interim Constitution. S34 of the Constitution provides that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' The wording of s 22 of the Interim Constitution was much the same. The difference in wording is due to a simplification of the language. There has been no change to the content of the protected right. I

accordingly make no distinction between the Constitution and the Interim Constitution and deal only with the provisions of the former.

The amendment to the notice of motion was prompted by the decision of the constitutional court in *Lesapo v North West Agricultural Bank and Another 1999 (12) BCLR 1420 (CC).* The case concerned the attachment and sale in execution by an agricultural bank of a debtor's property without the prior involvement of a court. *Mr Breytenbach* submitted for the applicant that there was no essential difference between *Lesapo's* case and this one, and that the same reasoning which led the constitutional court to hold that the respondent in that case violated the applicant's s34 right of access to the courts impels me to find that the same right was infringed by the Commissioner.

It is unconstitutional, said *Mr Breytenbach,* to burden a customs debtor with an enforceable debt unless the debtor's liability has first been determined by a court. The initial determination, as I understood him, might be made administratively, but a judgment by way of revision of the determination was, in his submission, a pre-requisite to enforcement of the debt.

The *dicta* in *Lesapo's* case, and here I think particularly of the statement at paragraph [20] that post-deprivation redress would not be adequate to meet the requirements of s34 of the Constitution, are of general but not universal application. The *Lesapo* judgment says so very clearly. This is confirmed in *Metcash Trading Limited v The Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC) where s34 was held to permit post-deprivation relief in the case of a revenue statute. *Lesapo's* case did not deal with the non-suspension of the effect of an administrative decision. It did not deal with an administrative body at all. It dealt with what was to all intents and purposes a statutorily established commercial enterprise on which debt collecting powers of quite unnecessary amplitude had been conferred. The North West Agricultural Bank was, like its older sibling the Land and Agricultural Bank of

South Africa (as to which see *First National Bank of SA Ltd. v Land and Agricultural Bank of South Africa and Others 2000 93) SA 626 (CC)),* empowered to decide for itself how much its debtors owed it and then to take and sell the debtor's property. This is far removed from the administrative function performed by the Commissioner in the vital endeavour to collect revenue for the state. The real question in *Lesapo*, however,was whether the suggested advantages to the respondent justified the drastic expedient of dispensing altogether with the right of a debtor to have claims against him determined by a court. The court held (at page [27] that –

> '...the purpose of saving time and costs is achieved by s38(2) only minimally, while it makes serious inroads into the rights of debtors'

The two agricultural bank cases must be seen in the context of their facts. Neither bank, although a statutorily established body, is an administrative organ of state. They are bodies that, albeit under their statutory umbrella, operate like private sector money-lenders. They have functionally and structurally nothing in common with an organ of state such as the department of customs and excise which performs a regulatory and tax collecting function.

The court declined to comment on the correctness of the decision in *Hindry v Nedcor Bank Ltd and Another 1999 (2) SA 757 (W)* save to say that the circumstances of the Lesapo case differed from those in revenue cases.

Thousands of tax debts arise every day. To suggest that judicial sanction should be a prerequisite to enforceability, and that this is what is required by the Constitution, would be to apply s34 outside of its context and to give it a wholly impractical reach. Interpretation of the Constitution must, after all, be 'purposive'. (see, *Dawood, Shalabi, Thomas and Another v MInister of Home Affairs 2000 (1) SA 997 (C) at 1036 E-F)*

A revenue statute may not cut off or, having regard to the practicalities of tax collection, unnecessarily restrict post-deprivation access to the courts. That may be unconstitutional. If a dispute between the Commissioner and a customs debtor is one which can be resolved by the application of law, the debtor has the right to a hearing before a court or other suitable tribunal. It is now necessary to investigate how the Customs Act regulates the revision of administrative decisions concerning the imposition of duties.

There are three stages during the s114 process when a debtor's property rights might be affected. There is firstly the assessment or determination of the customs debt by the Commissioner; next there is the detention of the goods and the placing of a lien on them to secure a debt due under the Act; finally, there is an enforced sale of the secured goods in order to recover the customs debt.

The Procedures for Revision

The opening words of s114 provide that the correct amount of duty shall from the date on which liability for the duty commences, constitute a debt to the state. Duty on imported goods becomes payable in terms of s 47(1) when those goods are entered for home consumption. At that moment the Commissioner has an enforceable claim against the customs debtor.

The expression in s114 'the correct amount of duty' refers to duty which has earlier been determined. There are two main components to the computation of customs duty. First, there is the category into which the goods have been classified for customs duty purposes. These so-called tariff headings (with the subsidiary tariff subheadings and items) are determined by the Commissioner. S 47 (9) (b) of the Customs Act provides that –

> "(b) any determination so made shall, subject to appeal to the court, be deemed to be correct for the purposes of this Act, and any amount due in

terms of any such determination shall remain payable so long as such determination remains in force."

The second component of the computation of customs duty is the value for customs duty purposes, that is, the 'transaction value', of the imported goods. Under s 65 (4) that is also determined by the Commissioner:

> "(4) (a) The Commissioner may determine the transaction value of any imported goods...and such determined value shall, subject to a right to appeal to the court, be deemed to be the value for customs duty purposes of the goods."

The two component values are expressly made subject to scrutiny by the court, in each case by the division of the high court with jurisdiction to hear appeals in the area where the determination was made or the goods entered for home consumption. (Ss 47(9)(e), 65(6)(a) and 69(5) of the Customs Act)

The other possible components of an amount exacted by the Commissioner are interest payable under the Customs Act, fines, penalties and forfeitures. Fines for certain specified offences are dealt with in s86. Under that section a fine can only be imposed once a person has been found guilty of an offence. Penalties are dealt with in s94. It stipulates that –

> '...any penalty fine or forfeiture incurred under this Act may be recovered either by civil action or upon criminal prosecution in any court of competent jurisdiction...'

Forfeiture of goods dealt with contrary to the provisions of the Customs Act is treated differently. Goods liable to forfeiture may be seized in the possession of anyone and wherever they are found.

Interest, fines, penalties and forfeitures are not, explicitly, made subject to the jurisdiction of the courts. There is, however, no doubt that they are so subject. They are all ancillary to the customs duty itself. I would not have thought that a court charged with re-examining the Commissioner's determination of customs duty would be powerless to grant (consequential) relief in respect of interest, fines, penalties or forfeitures. In any event, s94(a) which deals with the recovery of penalties, (but not it would seem, duties) provides that any penalty, fine or forfeiture incurred under the Act may be recovered either by civil action or upon criminal prosecution in any court of competent jurisdiction. In the case of a criminal prosecution the court passing sentence may also make an order regarding any unpaid duty or charge and impose civil penalties or enforce forfeiture. There is ample opportunity for these matters to be ventilated in the courts of the land.

The Value Added Tax Act provides that the Commissioner may suspend the tax debtor's obligation to pay pending an appeal to the income tax special court. *Metcash* para. [42] decided that in coming to such a decision the Commissioner would be exercising administrative power falling within the administrative justice clause of the Constitution. This competence of the Commissioner – and the power of the court to control it by way of review – played a role in persuading the constitutional court that the impugned sections of the Value Added Tax Act did not impermissibly impair a taxpayer's access to the courts. There is no comparable provision in the Customs Act.

However, review of the Commissioner's decision (to grant a deferment of payment pending an appeal) was in *Metcash* held to be only one of the ways in which a court might grant interlocutory relief. Declaratory relief is also competent in cases where a payer of both value added and income tax wishes to challenge an assessment (*Metcash* para [45]. Kriegler J concludes in para [46]-

> 'Neither the injunction to pay first, regardless of a resort to the Special Court, nor the non-suspension provision is intended [to prohibit] or has the effect of prohibiting judicial intervention. Nor is there any hidden or implicit ouster of the jurisdiction of the courts to be found in s36 as it stands. That section, therefore, cannot be said to bar the access to the courts protected by s34 of the Constitution.'

In my opinion s114 of the Customs Act is as inoffensive as the impugned sections in the Value Added Tax Act were found to be. The determination of a tariff heading and the value of the goods are deemed to be correct unless the high court decides otherwise. Pending an appeal, the administrative determination is not suspended. That is all. That, according to *Metcash*, is not an invasion of a tax debtor's rights.

If it were, however, the constitutional court held that the invasion was justifiable under s36 of the Constitution. I think that the two cases are sufficiently close for me to adopt the same reasoning in this case.

In *Palmer v McMahon,* 133 U.S. 660 (1890), the United States supreme court gave a decision in a matter in which it was contended that the plaintiff had, in violation of the fourteenth amendment to the United States constitution, not been given the opportunity to be heard and had therefore not been afforded the protection of a judicial trial upon the merits. The court held that-

> "The imposition of taxes is in its nature administrative, and not judicial, but assessors exercise quasi-judicial powers in arriving at the value; and opportunity to be heard should be and is given under all just systems of taxation according to value. It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and describes the time during which, and the place where, such complaints may be made."

One hundred years after *Palmer v McMahon* the United States supreme court in *McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida* 496 US 18 (1990) re-affirmed the principle in these words -

> '...it is well established that a State need not provide pre-deprivation process for the exaction of taxes, Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect the government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to the resolution of any dispute over the validity of the tax assessment.'

The case of *McKesson Corp. (supra)* concerned a tax scheme which was found to be unconstitutional because, by providing preferences for distributors of local products, it discriminated against inter-state commerce. It is therefore a case in which not only the method of exaction but the imposition of the tax was challenged. Justice Brennan remarked at page 12:

> "We have already noted that States have a legitimate interest in sound fiscal planning and that this interest is sufficiently weighty to allow States to withhold pre-deprivation relief for allegedly unlawful tax assessments, providing post-deprivation relief only."

(See also: *Phillips v Commissioner of Internal Revenue* 283 U.S. 589 (1931); *Bob Jones University v Simon, Secretary of the Treasury et al 416 U.S. 725 (1974).*

The applicant contends that as a credit grantor, it should also have been given an opportunity of challenging the Commissioner's assessment. *Mr Breytenbach's* point is that since the applicant's goods were liable to detention it was entitled to have the issue debated in court before the detention occurred. It might, he argued, in an endeavour to protect its own interests, even contest the customs debtor's liability. Since any entitlement of an affected owner to challenge the Commissioner's assessment, cannot arise until its goods have been detained (or a detention has been threatened), I shall deal with this point in the next section.

Detention – the Customs Debtor

The next step in the s114 process is the detention. It was contended that, even assuming there to have been a judgment for the customs debt, further judicial intervention was required before the customs debtor's goods could have been detained as security for the Commissioner's claim.

The detention of a customs debtor's goods is a method of establishing the statutory lien that confers preference on the Revenue's claim. This type of lien by detention is authorised by s114(1)(a)(ii). There is also an automatic lien provided for by ss114 (aA) and (aB). It secures excise duties and fuel levies. Its ambit is limited. It subjects plant and stills for the manufacture of excisable or leviable goods to a lien as long as excise duties or levies remain unpaid.

The sphere in which s114 is utilised is of great importance. It is used in the collection of debts in cases where a debtor has already failed to comply with its obligations and, having been called upon, neglects or refuses to do so. It is at

this stage that the Commissioner most needs security. Interposing court procedures as a prerequisite to the creation of the security would destroy the swiftness that makes the lien an effective debt collecting measure. Moreover, there are grave practical difficulties in affording a defaulting customs debtor an opportunity of disputing the detention before a lien is established. (*Traco Marketing (Pty) Ltd v The Commissioner for Customs and Excise* (Case 3098 1994 EDLD unreported).

Mr Breytenbach argued that judicial enforcement orders such as interdicts, which could be granted with or without notice to the debtor depending on the exigencies of the situation, would be adequate to meet the Revenue's needs. I think that this submission loses sight of the fact that the detention procedure is also intended to confer a preferential claim on the Revenue. The conferral of a preference on the Revenue is a feature of tax regimes in several democracies.

More so than in the case of the customs debtor itself, it would be wholly impractical to give a credit grantor or an affected owner notice of an impending detention and then vouchsafe it a hearing before its goods are detained. In most cases the Commissioner would not, prior to the detention, know of the credit grantor or affected owner's existence. Moreover, advertising the intention to detain such goods might simply prompt their removal from the customs debtor's possession, thus defeating the Commissioner's preference.

There is nothing in the Customs Act to prevent a customs debtor from approaching a court for appropriate relief once a detention has been made. (*Cf Tosen Enterprises CC v Commissioner of Customs and Excise 1999 (3) SA 432 (D); Du Toit v Kommissaris van die Suid-Afrikaanse Inkomstediens en 'n Ander 2000 (2) 98 (C);* Nor is there anything to prevent any other owner from approaching the court. It is true that neither the customs debtor nor any other owner would have had notice of the detention, but that does not seem to me to be of any great importance. The detention by itself accomplishes nothing except

to establish the Commissioner's preference over the proceeds of a sale of the goods. No harm would have been done if the detention were *ex post facto* to be set aside. The right of a customs debtor to challenge a detention of its goods is limited by the provision that the assessment of customs duty is taken to be correct until it has been revised by a competent court. It seems to me that a credit grantor or an affected owner is not even precluded from challenging the detention on the ground that the determination giving rise thereto was incorrect. The Customs Act cannot be interpreted to mean that a determination of customs duty is deemed to be correct as against anyone other than the customs debtor. There is nothing in the Customs Act prohibiting a customs debtor or any other owner from requesting a court to interdict any contemplated sale of the goods until a dispute about the detention (or a pending appeal against the determination of duties) has been resolved.

<u>The Sale of the Detained Goods</u>

The third, and final, phase in the execution procedure is the removal and sale of the detained goods. *Mr Breytenbach* argued that it is unconstitutional for this process not to be monitored by the court. In theory, the sale of the detained goods could certainly be monitored by a court. This is the scheme which has been adopted for the collection of tax on income. The Income Tax Act in s91(1)(b) makes provision for a judgment to be granted on production of a certificate by the Commissioner to the clerk of the court setting out the tax debtor's indebtedness. Judgment on the certificate enables the Commissioner to levy execution against the goods of a tax debtor. Section 40(2)(a) of the Value Added Tax Act is similarly worded. It was in *Metcash* held to be constitutionally inoffensive.

> "[51] ...On a plain reading of its words, the provision expressly contemplates the involvement of the courts. In contradistinction to the self -initiated, self-driven and self-supervised mechanism involved in *Lesapo*

and the two cases following it, the execution process created by section 40(2)(a) of the Act specifically goes via the ordinary judicial institutions. It requires the intervention of court officials and procedures. The subsection, by saying that once the Commissioner's statement has been filed it has "all the effects...of a civil judgment", quite unequivocally includes by reference the whole body of legal rules relating to execution. Filing the statement sets in train the ordinary execution processes of the particular court. Execution in the high courts is primarily governed by rules 45, 45A and 46 of the Uniform Rules of Court, and in the magistrates' courts by rule 36 and following of the rules of those courts. Whether and to what extent the rules of court and the myriad of common law and judge -made ancillary rules relating to execution have to be adapted to fit this particular process, need not be determined here. The substance of the matter is that the ordinary civil process of execution is employed; and the Commissioner is not authorised to usurp any judicial functions. Manifestly 40(2)(a) of the Act is a far cry from the kind of open ticket to self-help condemned in the *Lesapo* and kindred cases.

[52] Indeed, in a particular sense, section 40(2)(a) of the Act is the direct reverse of the provision found constitutionally unacceptable in *Lesapo*. Here we have an administrative decision fixing liability for a statutory debt on the part of a vendor which, in terms of the scheme of the Act, cannot be executed upon otherwise than by involving the judiciary. In *Lesapo* this Court was concerned with a contractual debt which could be executed upon domestically without involving the judiciary. The two statutory provisions, far from being closely similar, are virtually diametrical opposites."

One might on this reasoning be tempted to think that, unless a statutory provision for the sale of a debtor's goods were framed so as to incorporate the rules of court relating to execution it would not meet the test of constitutional validity. I

believe, however, that this would be too narrow an approach. The essential question is not whether the statute provides for judicially supervised execution procedures. The question is whether the court's general supervisory function over the (administrative) act of selling the property has been excluded. The action of the Commissioner and his agents in regard to the advertising of the sale and so forth are open to judicial scrutiny. In scrutinizing such action a court would probably be guided as to what is fair by the rules in regard to sales in execution and would, in that fashion, exercise a measure of control over the Commissioner's sale which is not significantly different from that applicable to a sale under the Value Added Tax or the Income Tax Act. I realise that this kind of supervision (which the court in *Metcash* did not have to consider) was not found to be adequate in *Lesapo's* case. It is important to appreciate, however, that the bank whose actions were under investigation in *Lesapo,* although a body set up by statute is nothing but a statutorily empowered commercial entity. Its main attributes are those of an ordinary money-lender. I accordingly do not think that the provision in s114 for the sale of detained goods is in the circumstances so removed from judicial control that it amounts to a constitutionally offensive limitation of a customs debtor's right of access to the courts. As far as a credit grantor or an affected owner is concerned, it seems to me that it could by interdict or declaratory order stop the Commissioner from failing to deal properly and fairly with its goods.

In any event, there is no explicit provision in the Customs Act that a customs debtor's property may be sold despite a pending appeal. It is provided only that, subject to appeal, the Commissioner's determination remains in force. This no doubt means that any detention remains in force as well, but this need not cause the customs debtor any inconvenience. The Commissioner may allow it to use the detained property. But the court's power to stop a sale pending an appeal, seems to me to be untouched.

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believe, however, that this would be too narrow an approach. The essential question is not whether the statute provides for judicially supervised execution

The self-help procedure enacted for the bank in *Lesapo* was repugnant because it conferred on that institution functions which traditionally belong to the courts. It is clear that there are, in both the public and private domain, invasions of fundamental rights which we all accept may properly occur without the prior intervention of the courts. No one would suggest that the dismissal of an employee (which may be a violation of his or her right to fair labour practices under the Consitution) requires the prior sanction of a court. Machinery which is likely to threaten the health or safety of employees may be shut down by an inspector without the prior intervention of the courts. Immovable property is expropriated by notice; compensation by a court is only determined later. In the spheres of disease control and mental health, a deprivation of freedom (which is considered to be more grave that a deprivation of property) may occur without the prior interposition of a court. (See *De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) at para 100)* In most cases where a suspect is arrested, there has been no prior judicial intervention. None of this has ever been considered to be (statutorily authorised) 'self-help'.

The suggested Invasion of Property Rights

Section 28 of the Interim Constitution was worded as follows:

> "28. (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights. (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law. (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation..."

Section 25(1) and (2) of the Constitution read -

> "25 (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. Property may be expropriated only in terms of law of general application –
>
> (2)(a) for a public purpose or in the public interest; and
>
> (2)(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."

The mechanism by which the Commissioner obtains a preferent claim is the statutory lien. Its effect and scope is discussed in *Rand Bank Ltd v Government of the Republic of South Africa and Others 1975 (3) SA 726 (A).* Even at common law the *fiscus* enjoyed a hypothec over the property of citizens for taxes and dues owing to the state. *(Secretary for Customs and Excise v Millman NO* 1975 (3) SA 554 (A). This hypothetic did not, like the statutory lien, extend to the property of a third person. The Commissioner's statutory lien has much in common with its two cousins, the common law lien and the landlord's hypothec. Both may operate to defeat the rights of the owner of goods falling under the lien. Both of these are established without court intervention. Although the landlord's hypothetic is only 'perfected' by judicial attachment of goods on the tenant's premises, debtor/creditor or improvement liens are perfected by the creditor retaining possession of the goods. The Commissioner's lien is 'perfected' by attachment or, as it is called, detention of the goods. As I understand the scheme of the Customs Act, the detention of goods does not deprive the owner of his ownership. If goods were to be alienated by the customs debtor in defiance of the lien it is the owner who would be entitled to vindicate them, not the Commissioner.

The question as to the 'expropriation' of a credit grantor or affected owner's rights only really arises on the sale of the goods. There are five classes of goods subject to detention and sale -

Class 1: any goods in a customs and excise warehouse or in the custody of the Commissioner which belong to the customs debtor;

Class 2 : any goods afterwards imported or exported by the customs debtor. This class of goods is not qualified in any way. The goods (among them goods destined for export and not subject to customs duties) need not be in the possession or under the control of the customs debtor or on premises in its possession or control. An article imported by the customs debtor forever bears a stigma. It is liable to attachment by the Commissioner wherever it is and regardless of whether import duty has been paid on it or not. So, for example, any article imported (or exported) by Airpark or Lauray is liable to detention no matter what has since its importation (or exportation) become of it.

Class 3: 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. Presumably the goods in this class comprise those imported before the customs debt arose but still on the customs debtor's premises. They can belong to anyone.

Class 4 : locally manufactured goods on which excise duty or a fuel levy is payable. The class includes 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. It does not matter whether excise duty on the goods have been paid or not. If a visitor were to take a bottle of wine onto premises controlled by a customs debtor, it would be liable to detention.

Class 5 : any vehicles, plant or equipment in the possession or under the control of a custom's debtor 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. The motor cars attached in the present case fall into this class because the petrol they use are subject to a fuel levy.

Goods in these five classes ('affected goods') may or may not be owned by the customs debtor. The first category is the only one to require ownership by the customs debtor, the person liable for customs duty. Such a person is called an 'importer' in the Customs Act.

An importer is in terms of s39(1) of the Customs Act liable for customs duty. 'Importer' is widely defined. It includes any person who, at the time of importation –

(a) owns any goods imported;
(b) carries the risk of any goods imported;
(c) represents that or acts as if he is the importer or owner of any goods imported;
(d) actually brings any goods into the Republic;
(e) is beneficially interested in any way in any goods imported;
(f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e).

Paragraph (f) means that a licensee of a customs and excise warehouse is liable for duty on goods in its warehouse. There are other persons who may become liable for the payment of duty. A master of a ship or pilot of an aircraft may be liable for duty (s11(2)). An agent appointed by any master, container operator or pilot or any importer, exporter, manufacturer, licensee, or remover of goods in bond may be liable for the payment of duty (s99(1) & (2)).

What the Customs Act in S114 has done, it seems to me, is to create subsidiary categories of co-principal tax debtors. 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.

Taxation does not amount to a deprivation of property. Nor is there anything which is expropriated. No one would think of claiming compensation for having been taxed. Freedom from taxation is not a fundamental right. Nothing protects the subject against taxation. Not even death. I consequently do not consider that the taking of the property of an affected owner (i.e. one who is not by definition an importer) is, in principle, a violation of s28 of the Interim Constitution or s34 of the Constitution. It may be different where the impugned tax is oppressive or partial and unequal in its operation; but customs duty is a form of taxation acknowledged world-wide. If its reach seems broader than it need be, that is no ground for a constitutional challenge.

Another argument was advanced by *Mr Seligson* for the respondents in support of his proposition that affected owners who are credit grantors, are not constitutionally protected.

Goods in the give classes discussed above are owned by owners who may be divided into three categories. First, there is the credit grantor who finances the sale or long term lease of goods to the customs debtor. Next, there is the affected owner who stands in a contractual relationship with the customs debtor with regard to the goods. Where the customs debtor is a clearing agent few of the goods in its possession or control would ordinarily belong to it. Finally, there is the affected owner who has not sold or let or lent or in any way given

possession of its goods to the customs debtor but whose goods happen to be on premises in the custody or control of the customs debtor.

The effect of a sale of detained goods will vary, depending on who their owner is. The credit grantor is an owner of goods who is in contractual relations with the customs debtor. Its goods serve as security for the payment of the price or the rental in terms of an instalment sale or lease agreement. This type of ownership interest has been called a security interest to distinguish it from the case where an owner holds property for the sake of using it.

Mr. Seligson relied on a decision of the European court of human rights in a case reported as Gasus Dosier- and Fördertechnik GmbH v The Netherlands [Series A, 306/B (1995)] where the majority of the court said this –

> "Whatever the nature of retention of title compared with "true" or "ordinary" property rights – a question on which the court discerns no common ground among the contracting states – it is apparent that whoever sells goods subject to retention of title is not interested so much in retaining the link of ownership with the goods themselves as in receiving the purchase price."

A credit grantor's 'enjoyment' of its ownership is limited to the warm feeling of having security for the payment of the purchase price. 'True' or 'economic' ownership is vested in the purchaser who tends to lose by damage to or loss of goods and stands to gain by their use or resale. The credit grantor's property rights are really its secured claims for payment against the customs debtor. This being so, the credit grantor's principal – and indeed only – concern is for the loss of its ranking in the creditor line-up. It may, if the Commissioner's claim is large enough to swallow up the value of the detained goods, be left with only a concurrent claim against the customs debtor.

A preliminary question, then, is whether the elimination of the credit grantor's preferent claim deprives it of its property within the meaning of s 25 (1) of the Constitution. *Mr Seligson* argued that the reservation of title to leased or instalment sale goods as a form of security is not a constitutionally protected property right.He suggested that the preferential position accorded to a lien holder as a creditor in enforcement proceedings is not something with which the property clause in either constitution ought to concern itself; and that what might be considered to be 'property' for common or statutory law purposes would not necessarily be 'property' deserving of protection for constitutional law purposes.

I nonetheless, and without deciding the question, assume that this form of property is worthy of constitutional protection. For even if it were worthy of protection, the deprivation of that form of security would not be an 'expropriation', as that word is commonly understood. The effect of an expropriation is to vest ownership (of land) in the government. (*Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A) at 972D). Not every act of government which amounts to a deprivation of a right in property amounts to an 'expropriation.' *(Harksen v Lane NO & Others 1998 (1) SA 300 (CC) at 315 - 317 paragraphs 30-35; Administrator Cape Province v Ruyteplaats Estate* 1952 (1) SA 541 (A) at 550H – 551F*; Portion 675 Zandfontein CC v Sandton City Council and Another* 1995 (4) SA 826(T) at 883F – 834E)

Burton v Honan (1952) 86 CLR 169 is an Australian case concerning the constitutionality of a section of the Australian Customs Act which empowers Customs to seize as forfeited prohibited imports even where they might be found in the hands of persons who had dealt with them quite honestly and had acquired them for value. The court described the effect of the section as 'nothing but a forfeiture'...It has no more to do with the acquisition of property than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender.'

In *Hewlett v Minister of Finance and Another* 1982 (1) 490 (ZSC) Fieldsend CJ, in discussing s 16(1) of the Zimbabwean constitution said –

> "The fact is that the limitation imposed on the legislature by s 16(1) is that it shall not pass a law compulsorily acquiring property without compensation, not it shall not pass a law depriving a person of property without compensation. The distinction is an important one. I do not think that even the application of the principle enunciated by Latham CJ in *Dalziel's* case *supra* that a provision of a Constitution plainly intended for the protection of the subject should be liberally interpreted is of itself justification for departing from clear words."

In my view, the placing of a lien upon and the sale of a credit grantor's goods subject to attachment, does not amount to an expropriation of those goods. In any event, as I hope to show further on, recourse to the goods of affected owners to recover customs duties is a measure justifiable in an open and democratic society.

Mr. Seligson argued that the justifiability of measures directed against the goods of owners other than credit grantors should not be decided in this case. He advanced two reasons for his submission, the one theoretical, the other practical. The theoretical consideration is that as a general rule abstract questions of constitutionality ought not to be pursued. For this proposition he relied on *Ferreira v Levin and Others I996 (1) SA 984 (CC) and on Zantsi v Council of State, Ciskei and Others 1995 (4) SA 615 (CC)*. In the *Ferreira* case it was held that a plaintiff should have a real and substantial interest before being allowed to challenge the constitutionality of a statute.

A plaintiff may challenge a provision clearly intended to apply to him or her on the ground that it also embraces others to whom, on account of an invasion of their fundamental rights, it ought not to apply. *Mistry v Interim Medical and Dental*

Council of South Africa 1998 (4) 1127 (CC) is a case in which a medical doctor complained that a search of the premises where he carried on his practice, violated his right to privacy. The laudable object of the Medicines and Related Substances Control Act 101 of 1965, is to regulate the activities of health professionals. At para [28] Sachs J writes, "Had s28(1) confined itself to authorising periodic inspections of the business premises of health professionals, such inspections would accordingly have entailed only the most minimal and easily justifiable invasions of privacy, if they had qualified as invasions of privacy at all. It is clear however that s 28(1) does not limit itself to authorising regulatory inspections of the premises of doctors and chemists...The section is so wide and unrestricted in its reach as to authorise any inspector to enter any person's home simply on the basis that aspirins or cough mixtures are or are reasonably suspected of being there."

The constitutional court found s28(1) of the Medicines and Related Substances Control Act to be invalid, despite the fact that the search of the plaintiff's premises was not an invasion of his right to privacy, or, if it was, was justifiable.

This approach corresponds with that which South African courts have for many years adopted in determining the reasonableness of subordinate legislation. Since the advent of the Constitution, all legislation is in a sense subordinate, and required to be reasonable, which is much the same as being justifiable. In *Amoils v Johannesburg City Council 1943 TPD 3866 at 390* it was said that a bye-law that would be grossly unreasonable if applied in some cases covered by its language is also grossly unreasonable as a whole and cannot be saved by the fact that it could be reasonable applied to many or even the great majority of cases.

As for the practical objection, the applicant quite clearly put the validity of the attachment of the property of what it called 'entirely innocent third parties' in issue. The respondents in their answering affidavit confine themselves to credit

grantors and do not really put up any justification for the detention of the goods of affected owners.

S 36 (1) of the Constitution provides that –

> 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom…'

S 33 (1) of the Interim Constitution read rather differently, but the differences are not material to the question before me. The test of reasonableness and justifiability by the standards of an open and democratic society are the same. After stating that no absolute standard can be laid down for determining reasonableness, the constitutional court in *S v Makwanyane and Another 1995 (3) SA 391 (CC) at 436 c–g,* per Chaskalson P articulated the following test:

> "Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

I was urged on behalf of the applicant to find that there are less invasive remedies by which the interests of the state in the collection of revenue might be

safeguarded than by the detention and sale of goods belonging to others. It was suggested that the state could require those engaged in the export and import trades to provide security for the payment of customs duties. There is no evidence from the side of the applicant that this is feasible. The respondents say that despite what might be the practice in certain European countries, such a system in South Africa is not practical. Too many importers and exporters do not have the resources to comply.

It was further suggested on behalf of the applicant that the state's remedy lies in the more effective utilisation of its enforcement powers to control and prevent fraudulent entry of goods into South Africa. It is clear form the evidence presented by the respondents that this would at best be a partial solution. The State relies on a system of self-assessment that is not, save as a control measure, policed by customs officials.

Finally, it was suggested that instead of relying for security on the goods of others the Customs could make use of s103 which permits recovery of unpaid customs duties against the manager of a business in connection with which a liability for customs duty was incurred. There is no evidence before me to indicate that the right of recovery which the state has against the manager of an enterprise failing to pay customs duty is an effective substitute for recourse against the property of others. Moreover, a court must be careful in coming to the conclusion that there are less restrictive means for attaining a governmental objective. (*S v Manamela and Another (Director General of Justice Intervening) 2000 (5) BCLR 491 (CC)).*

The contention on behalf of the respondents was that statutes in Holland Belgium, and the United Kingdom confer on their tax authorities powers similar to those contained in s114. *Mr. Seligson* sought to draw from this the conclusion that the existence of s114 powers are consistent with the manner in which a customs department operates in an open and democratic society.

The European court of human rights in the *Gasus Dosier- und Fördertechnik* case (*supra*) made the following comment:

> "[66] The Court notes at the outset that the grant to the tax authorities of a power to recover tax debt against goods owned by certain third parties – such as a seller of goods who retains his title – does not in itself prompt the conclusion that a fair balance between the general interest and the protection of the individual's fundamental rights has not been achieved. The power of recovery against goods which are in fact in a debtor's possession although nominally owned by a third party is a not uncommon device to strengthen a creditor's position in enforcement proceedings; it cannot be held incompatible *per se* with the requirements of Article 1 of Protocol No. 1. Consequently, a legislature may in principle resort to the device to ensure, in the general interest, that taxation yields as much as possible and that tax debts are recovered as expeditiously as possible. Nonetheless, it cannot be overlooked that, quite apart from the dangers of abuse, the character of legislation by which the state creates such powers for itself is not the same as that for legislation granting similar powers to narrowly defined categories of private creditors. Consequently, further examination of the issue of proportionality is necessary in this case."

It was argued on behalf of the respondents that it is justifiable and reasonable to enhance the security enjoyed by Customs since it cannot chose its debtors and is seldom able to obtain effective security from import businesses or the individuals who own or control them. Private sector creditors, on the other hand, are able to establish security in respect of debts owed to them and can refuse to extend credit to doubtful debtors. In regard to this the European court said:

"Having allowed Atlas (the installment-sale creditor) to pay the price of the concrete-mixer in installments, and being aware of the danger that Atlas might default on its payments, Gasus reserved their title to the concrete-mixer until the full price had been paid. This, under Netherlands law, provided them with a considerable degree of security, as their claims to the concrete-mixer thus took priority over those creditors except the tax authorities, who were entitled under section 16 (3) of the 1845 Act to seize it and take the proceeds for the state.

Like the Commission, the Court considers that Gasus could have eliminated their risk altogether by declining to extend credit to Atlas: they could have stipulated payment of the entire purchase price in advance or else refused to sell the concrete-mixer in the first place. It also accepts that the applicant company might have obtained additional security, e.g in the form of insurance or a banker's guarantee, which pass the risk on to another party.

It is therefore unnecessary for the Court to establish whether the applicant company could have ascertained the existence and extent of Atlas's tax debts, this point being in dispute. Nor is it material that the applicant company bore no responsibility for the tax debt.

In the present context it is not without relevance that the owners of goods subject to seizure under section 16(3) of the 1845 Act had knowingly allowed them to "serve" as "furnishings" of the tax debtor's premises. They might therefore well be held responsible to some extent for enabling the tax debtor to present a semblance of creditworthiness.

Furthermore, whether or not the tax authorities are under any legal or other obligation to be more flexible in respect of tax debtors in temporary

financial difficulties, they do not have the same means at their disposal as commercial creditors for protecting themselves against the consequences of their debtor's financial problems. Nor have they any other means of protecting themselves against their debtors' attempts to solve such problems by vesting the_title to his "furnishings" in another party as a device or borrowing against a security."

In terms of paragraph 3 of article 22 of the Netherlands Levy Law of 1990 the receiver of revenue may attach, in order to recover certain taxes, harvested or unharvested fruits and movable items found on "the territory" of the person in arrears irrespective of who the owner is.

The departmental guidelines on article 22 provide as follows in regard to ownership utilized to provide a means for preferential recourse:

> "From a point of view of fairness and good policy, recourse against items of third parties is generally justified in cases where the economic relationship between the person in arrears of taxes and the item in question induce us to consider them to be his belongings, and the situation wherein the items do, juridically, belong to another, has mainly been created to exclude recourse against items chargeable to the person in arrears or to achieve that the third person is able to have preferential recourse against the said items. As an example whereof may be used those cases in which items have been supplied on hire purchase or through different types of leasing or in other ways where the supplier of the goods reserves the ownership of the said goods."

In Belgium article 313 of the General Law of 1977 on Customs and Excise, as far as it is relevant, provides that the administration shall have a preferential claim to

the movable property of persons owing duty on excise. Included in the preferential claim are -

> "all tools and equipment which are found in the factories and processing plants/industries of the tax debtors, without distinction as to who is the rightful owner of the above"

In the United Kingdom section 117(1) of the Customs and Excise Management Act 1979 provides that where any sum is owing by a revenue trader in respect of any excise duty or any relevant penalty, then among the things which are in the possession or custody of that trader or of any agent of his liable to be taken in execution are –

> 'all apparatus, equipment, machinery, tools vessels and utensils for manufacture or production, or by which the trade in respect of which duty is imposed is carried on.'

It is plain then, 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. The fact that there are other democracies in which, it would appear, the goods of third persons are not liable to attachment, does not mean that such a provision is not justifiable. Moreover, what is or is not permitted elsewhere is at best a guide to what would or might in our democracy be justifiable. Principles, as Chaskalson P pointed out, in (*Makwanyane's* case, *supra*) must be applied on a case by case basis

An affected owner who has with the customs debtor a contractual relationship other than an instalment sale or long term lease, does not have a mere security interest in its property. An owner in this category is likely to be an importer, either as commonly understood or as defined in the Customs Act. Having

entrusted its property to the customs debtor, it has a claim for the return of the goods or payment of their value.

Then there is the owner who has no connection with the customs debtor other than that its property happens to be on premises under the control, or in the possession of the latter. It has not sold or let or even lent goods to the customs debtor. It does not have the consolation of being left with a claim against the customs debtor. It is difficult to see what claim would lie, if the customs debtor was not obliged to deliver or return the detained goods to their owner. Perhaps an affected owner who has paid the duty would have an enrichment claim against the customs debtor.

Customs is responsible for recovering duties of more than R24 billion. R18 billion is for domestic (excise) duties. In 1999 the monthly average number of bills of entry at the main ports of entry into the Republic was 101 700. During that period post-importation inspections and audits were carried out in 3424 cases. As a result of this, 1553 demands for unpaid duty amounting to R747m were issued. Two hundred and seven customs debtors on whom liens were imposed paid R27m to have the liens lifted. Judging by this figure, the imposition of liens has quite a powerful coercive effect. Still, liens were used in only 0.0011 of total recoveries. It is not known, of course, how many customs debtors would have failed to pay if there had been no prospect of the imposition of a lien. It is also not known what property of persons other than customs debtors was detained. According to the evidence sales needed to be held in only two cases. They yielded R570 000. It is unknown what part of this amount was attributable to the proceeds of goods belonging to credit grantors or affected owners. There were probably, on the evidence, more sales which have not been reported. But their number is unlikely to have been much higher. How much revenue did the state derive from selling the goods of persons other than customs debtors? One can only guess. My guess is that it was next to nothing. The coercive effect on a shipping agent of having its customers' goods attached as security for duty which

it owes, must be considerable. I am not prepared to say that the Revenue should get along without the use of such invasive measures. A decision on where the burden of taxation should fall is a policy one.

<u>The Right to choose one's Profession</u>

The applicant has also complained, although in muted tones, that there has been a violation of its rights under s22 of the Constitution. This section reads –

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

Section 26(1) of the Interim Constitution was in somewhat broader terms. It provided for every person to be able to 'freely engage in economic activity and to pursue a livelihood anywhere in the national territory.'

As appears from facts recited elsewhere in this judgment, it cannot seriously be suggested that the small impact which the operation of s114 might have had on the applicant's business, during the currency of the Interim Constitution, violated its right to freely engage in economic activity. It would be far-fetched to hold that the applicant's right to freely carry on its trade as a financier of durable goods was inhibited merely because s114 of the Customs Act made the recovery of a debt in the circumstances dealt with therein more difficult than it would otherwise have been.

As for the alleged violation of s22 of the Constitution, the applicant, being a corporation, is not a 'citizen'. (*City of Cape Town v AD Outpost (Pty) Ltd and Others* 2000 (2) BCLR (C) at 142 A-G; *Van Rensburg v South African Post Office* !998 (2) BCLR 1307 (E) at 1322 A-D). The applicant's reliance on the section is therefore misplaced.

Costs of the Application

Mr Breytenbach suggested that if the applicant were successful, the respondents should be ordered to pay its costs. He submitted by reference to two decisions of the constitutional court that the respondents, as organs of state in the national sphere, were unlikely to be deterred from resisting future constitutional challenges by the financial consequences of failure. (see, *Member of the Executive Council for Development Planning, Gauteng v Democratic Party 1998 (4) SA 1157 (CC) at par 66; Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and others 1995 (4) SA 877 (CC) at par 123.)*

He submitted further that since the applicant has ventilated an important point of constitutional principle, no order for costs should be made against it even if it were unsuccessful. Persons should not be discouraged from bringing constitutional challenges by the risk of having to pay the costs of their adversaries. *(Ex Parte Gauteng Provincial Legislature: in re Dispute concerning the Constitutionality of certain Provisions of the Gauteng School Education Bill 1996 (3) SA 165 (CC) at para 36; S v Steyn 2001(1) SACR 25 (CC) at para [52].*

The applicant has been unsuccessful in persuading me that it is entitled to relief. Nor has it succeeded in persuading me that s114 of the Customs Act is invalid in any respect. This is not public interest litigation. The applicant did not come to court to strike a blow for others. It came to court to protect its commercial interests. It failed in doing so. I see no reason why the unusual consequences of forensic failure should not follow this result.

Costs of 22 February 2000

On 25 January 2000, the applicant delivered an application to amend its notice of motion in order to introduce the contention that s114 violated the right to access to court of customs debtors (and, by extension, the right also of affected owners.) The respondents opposed the application, averring absence of *locus standi.* The defence has now been abandoned. It also objected that the application had been brought too late for the hearing to proceed on 22 February 2000. It was then by agreement postponed to 25 April 2000. The wasted costs of the hearing were to be determined later.

In my opinion notice of the amendment was indeed given too late. The notice and the supporting affidavit were dated 25 January 2000. The new main claim was one declaring the entire s114 to be invalid. It was a major shift of ground. The *Lesapo*-decision which had brought about the shift was delivered on 16 November 1999. There is no explanation for the two month delay between then and the date of the amendment. What is more, the decision which was before the constitutional court for confirmation had been given in the Bophutswana provincial division long before, on 20 May 1999.

The deponent to the supporting affidavit suggested that the respondents had put up such a 'wide ranging' justification of s114 that it was sufficient to meet the new attack as well. Whether or not this is so, does not matter. The respondents were entitled to adequate time to consider their position and prepare for the hearing. Difficult questions on the constitutional acceptability of administrative tax recovery measures had to be researched, both here and abroad. There was not enough time to do this. When the matter was by agreement postponed on condition that the respondents deliver their supplementary answering affidavit by 24 March 2000, the date proved impossible to comply with. An extension until 27 June 2000 was negotiated. This goes some way to showing how complex the new issues were.

Costs in the Republic Shoes Matter

The detention of the three motor vehicles which the applicant sought to challenge in the Republic Shoes matter occurred on 5 August 1993. The Interim Constitution came into effect on 27 April 1994. The applicant conceded that the detention of those vehicles was accordingly not open to constitutional attack. It nevertheless submitted that it would be unfair to order the applicant to pay the costs, or some of the costs, in that matter, since a great deal of the research done by the applicant there was utilized in the Lauray-Airpark matter.

In view of the result of the Lauray-Airpark case, it is not necessary to deal with the careful argument on this score presented by *Mr. Kirk-Cohen* for the applicant in the Republic Shoes case. The costs in that case must follow the result of this one.

The Order

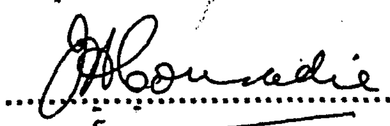
1. The detention of a Volkswagen Jetta motor vehicle in the possession of Lauray Manufacturers CC belonging to the applicant and the detention of Mercedes Benz and Volkswagen Golf motor vehicles in the possession of Airpark Halaal Cold Storage CC belonging to the applicant was not unlawful.

2. The applicant is to pay –

   (a) the costs of this application;

   (b) the costs of the postponed hearing on 22 February 2000;

(c) the costs of *First National Bank Limited v The Minister of Finance* (Case no 1901/94).



J.H. CONRADIE