

**THE RECENT DEVELOPMENT OF THE
CUSTOMS AND EXCISE LIEN**

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1 Introduction

The Customs and Excise Act, 91 of 1964 (hereinafter the Customs and Excise Act) provides for the levying of customs and excise duties and a surcharge; for a fuel levy, an air passenger tax, environmental levy; and the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto.¹ It is primarily a fiscal measure and has counterparts in countries throughout the world.²

In a perfect world the South African Revenue Service would not need efficient revenue collection and enforcement procedures as taxpayers would voluntarily pay their fair share of the tax burden.³ However, this is not the case as it is often difficult to determine what a taxpayer's fair share would be due to the complexity of the revenue laws and due to the propensity of taxpayers to want to pay as little tax as the law would allow them. Many taxpayers try to avoid the payment of tax at all cost, even by illegal means.

Section 114 of the Customs and Excise Act is concerned with the collection of debts due to the state by the debtor under the Customs and Excise Act. Prior to a 2002 amendment, this section provided for measures which allowed the Commissioner to sell goods under lien without requiring a judgement, in order to collect customs and excise debt due to the state. As judicially interpreted it even allowed the Commissioner to sell goods which did not belong to the customs debtor but to third parties.⁴

The collection procedures in the Customs and Excise Act are based on a system of self-accounting and self-assessment. The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected evasion.

¹ Long title to the Customs and Excise Act.

² *First National Bank of SA v/a Wesbank v Commissioner for the South African Revenue Service* 2002 4 SA 768 (CC) [4].

³ Olivier 2003 TSAR 382.

⁴ *Randbank v Regering van Suid Afrika* 1974 4 SA 764 (T); *Randbank v Regering van Suid Afrika* 1975 3 SA 726 (A).

The Constitutional Court in *First National Bank of SA t/a Wesbank v the Commissioner for the South African Revenue Service*⁵ (hereinafter the *Wesbank-case*) held that –

No matter how indispensable [fiscal statutory provisions]... may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority [they] are not immune to the discipline of the Constitution and must conform to its normative standards.

The placement of a lien on goods in terms of section 114 of the Customs and Excise Act has always been an effective means of safeguarding the interests of the *fiscus* in the recovery of duty, in the absence of other security.

This section did not survive constitutional scrutiny and was drastically amended in 2002.⁶ The question is now whether the customs and excise lien complies with the Constitutional Court judgement and will survive similar constitutional scrutiny. To answer this question, it is imperative to briefly consider the common law development and the principle of the lien, and to analyse the operation and the legislative amendments relating to the lien before and after the Constitutional Court judgement in *First National Bank of South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service and the Minister of Finance*.

2 The principles of a lien

A lien or right of retention, as found in the common law can be defined as the right of enjoyment by the possessor of the property of another, on which he or she has spent money or labour to retain possession of that property until properly compensated for the expenditure, either according to contract or, if there was no contract, for the actual expenditure of

⁵ 2002 4 SA 768 (CC).

⁶ *Revenue Laws Amendment Act 74 of 2002*.

money or labour, but not exceeding the extent to which the owner has been enriched.⁷

Scott defines a lien as the right to retain physical control of another's property, whether movable or immovable, as a means of securing payment of a claim relating to expenditure of money by the possessor (or lien holder) on that property until the claim has been satisfied.⁸ A lien not only presupposes the existence of an enforceable debt, but is only enforceable whilst the debt remains unpaid. The lien holder will therefore not be able to secure payment in excess of the owner's actual indebtedness or enrichment.⁹

Liens are primarily a defensive weapon against the owner's vindicatory action, and are not a cause of action.¹⁰

Three types of liens can be distinguished namely enrichment liens¹¹, debtor and creditor liens and statutory liens. The nature of the lien is determined by the nature of the expenditure on the property concerned and by the existence or not of a contractual relationship in terms of which the expenditure was incurred.

2.1 Real liens

An enrichment lien comes into being if the lien holder *bona fide* incurs expenditure necessary for the preservation of property (salvage lien) or effects useful improvements to it, which enhances the market value of the property (improvement liens).¹² An enrichment lien is a real right enforceable against the world,¹³ but merely secures the claim against the owner in respect of the unjust enrichment.

⁷ Kritzinger *Principles of the Law of Mortgage, Pledge and Lien* 62.

⁸ Scott *Lien* 31.

⁹ Scott *Lien* 31.

¹⁰ Van der Merwe *Sakereg* 153 ; *Bombay Properties (Pty) Ltd v Ferrox Construction* 1996 2 SA 853 (W).

¹¹ Also called "real liens".

¹² Sharrock *Business Transaction Law* 564.

¹³ *United Building Society v Smookler's Trustees and Golombrick's Trustee* 1906 TS 623; *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 3 SA 642 (A).

These types of liens are based on the equitable doctrine that no one may enrich himself at the expense of another. A real lien is afforded to a person who has put money or labour which represents money's worth, into another's property, irrespective of any prior contractual relationship between the parties. A lien can be placed over the property of another in order to secure certain expenses incurred for the salvage and improvement of the property. The legal position with regard to the categories of expenses is set out in the *Brooklyn House Furnishers v Knoetze and Sons*¹⁴ judgement.

The first two categories are necessary expenses for the salvage of the subject matter (*impensae necessariae*) and useful expenses for the improvement of the subject matter, which will increase the market value (*impensae utiles*). Liens as security for these expenses will fall under salvage and improvement liens, respectively.¹⁵

There is also a third type of expense namely luxurious expenses (*impensae voluptuariae*). These expenses are not incurred to salvage the property or to increase its market value, but merely gratify the fancy of a certain person. Such expenditure gives rise to no lien, unless in terms of an express or tacit agreement.

The basis of salvage and improvement liens is the owner's enrichment. The question whether a person has a salvage lien will arise if that person has protected another person's property against loss or damage as a person taking care of another's property without express authorisation to do so (*negiotorum gestor*); or in instances where the possessor or occupier of property in good faith reasonably believed that he or she was the owner of the property (or the duly authorized agent of the owner), and effected improvements.¹⁶ Case law sheds further light on the various scenarios when enrichment could be claimed.

¹⁴ 1970 3 SA 264 (A) 270.

¹⁵ Manamela 2003 15 SA Merc LJ 130.

¹⁶ Badenhorst *et al* *The Law of Property* 78.

In the matter of *Singh v Santam Insurance Ltd*¹⁷ the appellant claimed the return of her vehicle which was then in the possession of the respondent (*Santam*). *Santam* had issued a motor dealer's external risk policy to a firm owned by the insured. The appellant's car had been damaged in an accident in circumstances which obliged *Santam* to indemnify the insured. *Santam* instructed a panel beater to effect repairs, and paid for them. When *Santam* afterwards realised that the insured had failed to pay any premiums, it cancelled the policy and removed the car from the possession of the panel beater. The appellant held that *Santam's* possession was unlawful. *Santam* submitted that it was impoverished and the appellant enriched to the extent of the payment to the panel beater, and that it was accordingly entitled to retain possession under a lien operative against the appellant.¹⁸

The court pointed out that the problem with *Santam* having acquired a lien was that no expenditure was incurred and no improvement made to the car after *Santam* had taken possession of the vehicle. The Appellate Division held that a party who relies on an enrichment lien must prove that the expenditure on or improvement of the thing occurred while he was in possession of it. An enrichment lien does not exist *in vacua*. It serves merely to secure or strengthen an underlying cause of action based on unjust enrichment.

The court found that even if such enrichment were established, it had not been *sine causa*. The appellant's enrichment (if any) rather flowed from the insured's insurance policy and not from *Santam's* payment.¹⁹ It was rather akin to the enrichment mentioned in *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty)Ltd*.²⁰ In this case Van Heerden JA distinguished between two kinds of enrichment claims. One where A contracts with B to improve property belonging to a third person (the owner), and A then claims that the owner is liable for unjustified

¹⁷ 1997 1 SA 291 (A).

¹⁸ Vd Merwe 1997 *Annual Survey of SA Law* 319.

¹⁹ 297H-J.

²⁰ 1996 4 SA 19 (A).

enrichment. The other scenario would be where the owner contract with B for improvements to his property, but B instead of doing the work himself, subcontracts it to A, and A sues the owner once he has completed the work. The situation in *Buzzard* was the latter kind. In *Buzzard* it was held that in this type of situation the subcontractor had no enrichment action and consequently no lien. It was again clear from this judgement that a right of retention does not exist *in vacuo* but served as reinforcement of an underlying claim.²¹ In this case A had neither a direct nor an indirect claim against the owner, because any enrichment of the owner was not a *sine cause* and thus not unjustified.²² This decision was welcomed for the certainty that it has brought in regard to the issues of causality, indirect enrichment and retention rights.²³ The clear *dictum* that there can be no retention right if there is no concomitant enrichment claim, brings to an end the uncertainty that the *Brooklyn House* decision created in this regard.²⁴

The court in *Singh* decided that the reasons advanced in *Buzzard* also applied in this case and accordingly decided that the respondent had not proved an enrichment lien.

2.2 Debtor and creditor liens

This type of lien is also known as an *ex contractu* lien, and secures the amount owing to a creditor in terms of a contract. The nature of the expense incurred is irrelevant for this category of lien, as they spring out of the soil of contract, so that they are confined within the limits of contractual privity.²⁵

The fundamental difference between debtor and creditor liens and real liens are the fact that the first are a personal right against the person

²¹ 26J-27A.

²² 2911-J.

²³ Eiselen and Pienaar *Unjustified Enrichment* 77.

²⁴ Eiselen and Pienaar *Unjustified Enrichment* 78.

²⁵ *United Building Society v Smookler's Trustees and Colombrick's Trustee* 1906 TS 623.

with whom the claimant has contracted. An enrichment lien on the other hand, is a real right and as stated above, based on the doctrine of unjust enrichment - the enrichment of the owner versus the impoverishment of the *rententor*. The debtor-creditor liens secure the entire amount of the contractual claim, but can only be enforced against the other contracting party.

Some examples of such liens are: a builder who has a lien for moneys due to him over a house or other structures which he has erected in terms of a contract;²⁶ an artificer's lien which may be claimed by a person who has made, manufactured or repaired goods for another person;²⁷ and advocates, attorneys, accountants, bookkeepers and architects having liens for their fees and disbursements over documents prepared and books kept on behalf of their clients

It would be clear that this type of lien does not exist separate from the contract, and would be a defence to any vindicatory action.

2.3 Statutory liens

The statutory lien finds its existence in statute and attaches *ex lege* to property, in respect of specifically defined claims. Such claims often extend further than that which can be entertained under the common law principles of liens. The legal requirements for the placement and existence of such liens also differ from the common law principles.

The lien envisaged in section 114 of the Customs and Excise Act is one such example of a statutory lien. In terms of the Customs and Excise Act, the debt to the state is secured through the detention of certain classes of property for the placement of a lien. Prior to such act of detention the State would in general not have had possession of the property.

²⁶ *Mancisco and Sons CC (in liquidation) v Stone* 2001 2 SA 168 (W).

²⁷ *Rootes (Central Africa) (Pvt) Ltd v Mundawarara* 1973 2 SA 447 (R).

Another example is found in the Admiralty Jurisdiction Regulation Act,²⁸ which creates a lien over the ship and its freight.²⁹ The essential effect of a maritime lien is that it attaches *ex lege* to the ship or property in respect of which the maritime claim arose and it follows the ship, irrespective of changes in ownership or possession, and irrespective of the knowledge of the new owner or possessor. This lien does not depend on the holder of the lien acquiring or retaining possession of the ship, but only enables the lien holder to bring an action *in rem*, even though no claim *in personam* lies against the owner of the ship. It also confers upon the lien holder a certain preference when the ship is sold and there are limited funds for the satisfaction of creditors' claims. The lien is asserted by the arrest of the ship in a proceeding *in rem* and it then relates back to the time when the first attaches.³⁰ In South African law it is trite that there are maritime liens for master's wages and disbursements, salvage, bottomry and respondentia bonds, seamen's wages and damage done by a ship.³¹

The Wreck and Salvage Act³² also provides for a salvage lien in terms of which the salvor has a maritime lien over the wreck.³³

The Arbitration Act³⁴ provides for a very specific debtor-creditor lien, in terms of which an arbiter or umpire may withhold his award pending payment of his fees and any expenses incurred by him in connection with the arbitration with consent of the parties, or pending furnishing of security for payment.

²⁸ Act 105 of 1983.

²⁹ S 134(1).

³⁰ *Transol Bunker BV v MV 'Andico Unity' Grecian-Mar SLR v MV 'Andico Unity'* 1989 4 SA 325(A).

³¹ Staniland H 1996 *Fundamina A journal of legal history* 287.

³² Act 94 of 1996.

³³ S 17 read with a 20 to the *International Convention on Salvage*.

³⁴ S 34(4) of Act 42 of 1965.

2.4 Legal requirements for a lien

The lien differs from any other form of tacit security in that possession of the subject matter of the lien is an absolute requisite for its operation.³⁵

The right of lien only exists if the lien holder is in possession of the thing to which his or her claim relates and for as long as he or she retains possession thereof.³⁶

The lien holder's possession comprises of two elements, namely physical (*detentio*) and mental (*animus possedendi*).³⁷ As a rule the possession has to be continuous to be effective. The loss of *detentio* for a considerable period of time can result in the termination of the lien.³⁸ Whether sufficient control has been obtained so that the lien may be enforced will depend on the circumstances of each case.

In *Scholtz v Faifer*,³⁹ S contracted to erect certain buildings for F, who agreed to supply the material and pay for the work as progressed every two weeks. At a point when the buildings were partially complete, S stopped working, alleging that F failed to provide material and pay the instalments due. Seven weeks lapsed in which S did not work and no worker occupied the premises. F then cancelled the contract and employed a new contractor to complete the work. S claimed that he had a lien over the property and that he had been illicitly ousted from possession. The court held that S relinquished possession and accordingly his lien lapsed. Innes CJ said that the mere temporary absence for a short time does not destroy the physical element which is necessary to constitute possession, but if work is suspended for a considerable time, then special steps must be taken if possession is not to be lost, e.g. leaving a caretaker in charge, or putting a hoarding around the premises. This was not done by S therefore he had no claim.

³⁵ 768 B.

³⁶ *Rondalia Bank Bpk v Pieter Nel Motors (Edms) Bpk* 1979 4 SA 467 (T).

³⁷ *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd* 1968 2 SA 528(C).

³⁸ Scott 15 LAWSA 52.

³⁹ 1910 TPD 243.

The lien is extinguished if possession is voluntarily relinquished, and it does not revive if possession is thereafter regained.⁴⁰

It is not necessary for such possession that the property be held personally by the claimant, as it may be held on his or her behalf by a duly authorized representative.⁴¹ However, if the lien holder is induced to part with the property by fraud, he may revive the lien by recovering possession, provided he does so in a lawful manner.

In *Hamilton Paneelkloppers v Nkomo*⁴² H as a result of fraud of one R, lost possession of a motor vehicle, which he (H) had repaired and over which he had a valid lien. H then recovered the vehicle from N, the owner, by threatening him with prosecution. The threat was unlawful as N was not a party to the fraud and did not act illegally in regaining possession of the vehicle. N successfully sued for the return of his vehicle. The court held that H regained possession of the vehicle by unlawful means, and his lien did not revive.

The remedy for a lien holder, who has suffered involuntary loss of possession, is a spoliation order.⁴³ However, should possession have been voluntarily given up by agreement, but such agreement had been induced by fraud, the remedy has been said to be *restitution in integrum*.⁴⁴ On recovery of possession, the lien will revive.

In the *Singh* – judgement the question of possession also came under the spotlight. When Santam claimed possession of the vehicle, no improvements were affected and no expenditure incurred at that stage.⁴⁵ The improvements were effected and expenses paid when the panel beater was still in possession of the vehicle. The mere fact that Santam authorised the panel beater to effect the repairs did not constitute

⁴⁰ *Marinus v Taljaard* 1952 1 SA 49 (C).

⁴¹ *De Jager v Harris NO and the Master* 1957 1 SA 171 (SWA).

⁴² 1991 2 SA 534 (O).

⁴³ *United Building Society v Smookler's Trustees and Colombick's Trustee* 1906 TS 623 632.

⁴⁴ *Donaldson v Estate Veleris* 1938 TPD 269.

⁴⁵ 295I-J.

agency. There was also no evidence that the possession was lawfully required. Schultz JA unequivocally stated that a lien cannot be completed by subsequent possession.⁴⁶ When the improvements were effected Santam was not in possession of the vehicle.

However, subject to any specific rules that apply to a particular class of occupier (such as a lessee or usufructuary), all persons who lawfully come into possession of property on which they then spend money or money's worth, by which the owner is unjustifiably enriched, would generally have an enrichment lien for such expenditure to the extent of the owner's enrichment. Someone who wrongfully comes into possession of property (such as a thief), cannot obtain a lien over that property as seen in the *Hamilton Paneelkloppers* case. On the other hand, a person who innocently comes into the possession of stolen property, and incurs necessary or useful expenditure to it, obtains a lien which he or she does not lose merely on becoming aware of the fact that the property was stolen.⁴⁷

The lien holder may not, merely by virtue of the existence of that lien, use the retained property for their own benefit.⁴⁸ Where the lien holder has the use of the property through some other right, then obviously the acquisition of the lien does not preclude the continued exercise of that right.

A lien can only be exercised over the property on which the expenditure has been incurred.⁴⁹ A lien can exist over part of that property only if it can be separately possessed as security, either for the portion of the claim relating to that part or, if the claim which it secures is not divisible between the possessed part and the remainder, for the whole of the claim. Mere possession of part of the property on which the expenditure was incurred does not constitute a lien to secure the expenditure on the

⁴⁶ 296E-G.

⁴⁷ *Minister van Wet en Orde v Erasmus* 1992 3 SA 819 (A).

⁴⁸ *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 1 SA 646 (C).

⁴⁹ *Lamontville African Transport Co (Pty)Ltd v Mtshali* 1953 1 SA 90 (N).

remainder of the property if the claim for the expenditure is properly divisible between possessed part and the remainder.⁵⁰

A lien affords a defence against the owner's vindication of the property, and in effect secures a claim for compensation in respect of the retained property. A lien can not exist independently of the claim which it secures, the claim itself of course constituting a cause of action. The question of whether the asserted claim exists is determined on exactly the same basis, whether the issue arises directly in an action to enforce the claim, or indirectly as a defence to an action for vindication of the property concerned. Therefore an enrichment lien only exists, if at all, to secure an enrichment claim against the owner. Likewise, a debtor-creditor lien only exists, if at all, to secure a contractual claim by the possessor against the owner of the property.

In the case of an enrichment claim, the owner's enrichment must have been unjust. If the owner has been enriched, but not unjustifiably, the possessor has no enrichment action, and therefore no lien. If the possessor has not been impoverished by expenditure of money or money's worth, there will be no enrichment action, and therefore no lien.

2.5 The termination of liens

Liens are terminated in the same way as any other form of security. This will include the payment of the amount due, complete destruction of the subject matter or termination of the lien, be it through consent or loss of possession. In the case of an improvement lien, the removal of the improvement concerned from the thing of which it is claimed that the right of retention exists, will also terminate the lien.⁵¹

The owner of the property over which the lien is exercised may defeat the lien by furnishing adequate security. As the object of the lien is to secure payment of a lien holder's claim against the owner, the court may

⁵⁰ *Louw t/a Intensive Air v Aviation Maintenance and Technical Services (Pty) Ltd* 1996 1 SA 602.

⁵¹ *Peens v Botha Odendaal* 1980 2 SA 381 (O).

also order that the lien be relinquished against adequate security being furnished by the owner. It appears that the court has a discretion not only as to the adequacy of the substitute security, but also as to the principle whether substitution of security should be permitted at all in any particular case.

In *Bombay Properties (Pty) Ltd v Ferox Construction*,⁵² the applicant was not a party to the building contract, but relied on an enrichment lien for useful improvements which improved the market value of the property. Here the applicant argued that ejection should be ordered and that the lien should be substituted by security tendered by the applicant. In this instance the court found that in cases of enrichment liens for useful expenses, the court did not have discretion to deprive the lien holder of its possession and to substitute it for a form of security which was meaningless.

In *Sandton Square Finance (Pty) Ltd v Vigliotti*,⁵³ the applicant tendered a guarantee for the payment still outstanding, claimed by the respondent in respect of effecting useful or necessary improvements to the property belonging to the applicant. Here the court rejected the conclusion in the *Bombay* case and held that it had discretion to deprive the lien holder of his possession, not only in the case of debtor- creditor liens, but also in the case of an improvement lien in order to achieve justice between parties. Here the court found that the substitution would not be meaningless, if it eventually appeared that the respondent had a valid claim against the applicant on the basis of unjustified enrichment, as the security tendered would provide it with the necessary security to enable that it was fully paid.⁵⁴

⁵² 1996 2 SA 853 (W).

⁵³ 1997 1 SA 826 (W).

⁵⁴ 834E-G.

2.6 Insolvency of the debtor

The Insolvency Act⁵⁵ provides that in the case of the insolvency of a debtor, the lien holder will not lose the security afforded to him, if he hands over the subject matter of the lien to the trustee, liquidator or master of the court. The only conditions are that he must inform the trustee in writing of his security when handing over the subject matter and he must subsequently prove his claim.⁵⁶

In *Soane v Lyle*⁵⁷ it was held that an enrichment lien in respect of property owned by a company is not lost simply as a result of a winding-up order nor as a result of a sequent sale and transfer of the said property by the liquidator to a third party, provided the holder of the lien has remained in possession at all relevant times.

In the matter of *Roux en andere v Van Rensburg*,⁵⁸ it actually went a bit further. The respondent was the curator of a family trust which, at the time of sequestration, was the owner of a farm. The appellants claimed to be the rightful possessors of the farm before sequestration of the trust. The appellants refused to hand over possession and control of the property to the respondent when requested to do so in terms of section 47 of the Insolvency Act. It was averred by the respondent that this conduct by the appellants resulted in not receiving a bid of an adequate amount during a subsequent auction of the farm. The court found that the trustee of an insolvent estate was in terms of the common law entitled to take possession of immovable property which is the subject of a lien, for improvements. The court also dismissed the appellants' contention that such right of the trustee was in conflict with the Insolvency Act, as section 47 was specifically aimed at protecting the rights of a *retentor* even when he gave up possession of property and was therefore not in conflict with the common law.

⁵⁵ S 47 of the Insolvency Act 24 of 1936.

⁵⁶ *Randbank v Regering van Suid Afrika* 1974 4 SA 764 (T) 769A.

⁵⁷ 1980 3 SA 183 (D).

⁵⁸ 1996 4 SA 271 (A).

The loss of possession of property under lien, when handing such over to a liquidator will not extinguish such lien.

It is against these fundamental principals that the Constitutional Court had to consider the constitutionality of a statutory lien as found in the Customs and Excise Act.

3 Historical background of the Customs and Excise lien

The principle regarding the placing of a statutory lien to enforce payment for a Customs and Excise debt or to serve as security for duty owed, is one of long standing. The detailed history of this section can be found in the dictum of Botha JA in the case of *Secretary for Customs and Excise v Millman*.⁵⁹

The principle of a lien was first introduced in South Africa in the period of colonisation. Prior to the Customs and Excise Act, 91 of 1964, matters relating to customs and excise were contained in separate enactments.

Section 114 of the Customs and Excise Act, appears to have had its origin in section 24 of the Collection and Management of the Duties of Excise Amendment Act,⁶⁰ of 1841 in England. In order to provide for the recovery of excise duty owed to the Crown, the Excise legislation of the Cape Colony of 1904 incorporated a provision under the heading "Power to Distrain for Duties Arrear."⁶¹ This section empowered officials to seize and realise brewing plant equipment in the possession and under the control of the brewer, whether such plant was the property of the brewer or not. This provision was re-enacted in section 89 of the Excise Consolidation Act, 1942⁶², which was in turn embodied in section 89 of the Excise Act, 1956.⁶³ The latter did not provide for the placement of a lien, but for the seizure and sale of certain goods, should a person fail to

⁵⁹ 1973 5 SA 544 (A).

⁶⁰ 4 Victoriae, 1841 Chapter XX.

⁶¹ S 8 of the *Excise Act* 36 of 1904, letter dated 10/9/1979 between the Secretary for Customs and Excise and the South African Law Commission.

⁶² *Excise Consolidation Act* 45 of 1942.

⁶³ *Excise Act* 62 of 1956.

pay excise duty.⁶⁴ This procedure certainly served the same purpose as a lien.

In the common law the *fiscus* enjoyed a legal hypothec over property of its citizens in respect of, *inter alia*, taxes and dues owed to the state. The Roman-Dutch law accorded tacit hypothecs, i.e. real rights of security arising by operation of law irrespective of an agreement to this effect. These real rights of security operated without any publicity thereto by registration or even possession of the subject matter by the creditor. Due to this preference afforded to the state, provisions similar to section 114 of the Customs and Excise Act were largely unnecessary to collect customs duty and the Customs Management Act⁶⁵ of 1913 therefore contained no such provisions.⁶⁶

This preference afforded to the state by tacit hypothecs was abolished in even pre-union legislation by section 86 of the Insolvency Act⁶⁷ in 1916. Due to this abolition, section 142 of the Customs Act⁶⁸ of 1944 was enacted to provide for the placement of a statutory lien over goods in a bonded warehouse or in custody of the department and belonging to the debtor and any goods afterwards imported by the person whom the debt is due.⁶⁹ This provision was re-enacted in the Customs Act of 1955.⁷⁰ What is important to note is that section 146 of the Customs Act of 1955, only provided for the placement of a lien over goods owned by the debtor and in custody or under the control of the Department of Customs and Excise.⁷¹

⁶⁴ 549 H.

⁶⁵ *Customs Management Act* 9 of 1913.

⁶⁶ 548 G-H.

⁶⁷ *Insolvency Act* 32 of 1916.

⁶⁸ *Customs Act* 35 of 1944.

⁶⁹ 549 A.

⁷⁰ *Customs Act* 55 of 1955.

⁷¹ 549 H.

It is fair to say that section 114 of the Customs and Excise Act enacted in 1964 is a consolidation of the provisions of section 89 of the Excise Act of 1956 and section 146 of the Customs Act of 1955.⁷²

In 1975 the Customs and Excise Act, 1964 was once again amended to create an automatic lien, which dispensed with the requirement of having to place a lien physically on goods.

Section 114 as it read at the time of the constitutional attack, provided for the placement of a lien over goods not only in the department's control and custody, but also goods in the possession or under the control of the debtor, irrespective of ownership.⁷³ Section 112 of the Revenue Laws Amendment Act⁷⁴ of 2002, amended section 114 to provide for the placement of a lien only over goods owned by the debtor. A distinction is also made between goods subject to a credit agreement and other goods owned by the debtor. Section 114 now also provides for judicial intervention before the sale of goods.

4 Constitutional attack

In *First National Bank of SA t/a Wesbank v the Commissioner for the South African Revenue Service*, initially the Cape of Good Hope High Court⁷⁵ and later the Constitutional Court of South Africa,⁷⁶ had to consider the constitutionality of section 114 of the Customs and Excise Act in its original form and the mechanism by which the Commissioner enforces payment of customs duties.

The particular provisions of section 114 of the Customs and Excise Act under scrutiny at that stage, provided as follows:

⁷² 550A.

⁷³ *Secretary for Customs and Excise v Millman* 1975 3 550A.

⁷⁴ *Revenue Laws Amendment Act 74 of 2002*.

⁷⁵ 2001 3 SA 310 (C).

⁷⁶ 2002 4 SA 768 (CC) [4].

- 114 (1) (a) (i) *The correct amount of duty for which any person is liable in respect of any goods imported 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 any imported goods in the possession and under the control of such person or on any premises in the possession and under the control of such person, and any goods in respect of which excise duty or fuel levy is prescribed (whether or not duty or levy has been paid) and any materials for the manufacturing 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 of fuel 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.*
- (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 goods cause shown, direct at any time on such conditions the Commissioner 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).

4.1 The High Court judgement

Two different cases, in which the same issues arose, were consolidated to form the facts before Court. In both instances the importers were indebted to the Commissioner for customs duties. The Commissioner agreed with the respective parties that the debt be paid off by way of monthly instalments. In order to obtain security for such debt, the Commissioner, acting in terms of section 114 of the Customs and Excise Act, detained vehicles which were in the possession of the importers. These vehicles were subject to a credit agreement as set out in the Credit Agreements Act⁷⁷ (hereinafter the Credit Agreements Act) with the reservation of ownership until the last instalment had been paid. On the importers' default on the payment of the agreed instalments, the Commissioner decided to sell the vehicles to recover some of the debt.⁷⁸

The two main issues in dispute were firstly whether the administrative collection of customs duty, without court intervention, is permitted by section 34 of the Constitution⁷⁹ and secondly whether, if section 34 does not permit such a procedure, section 114 of the Customs and Excise Act is saved by considerations relating to the reasonableness in an open democratic society of administrative tax recovery measures which limit the function of the courts in the recovery process.⁸⁰ Section 34 of the Constitution provides that –

Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.

⁷⁷ Credit Agreements Act 75 of 1980.

⁷⁸ 314-315.

⁷⁹ Constitution of the Republic of South Africa, Act 108 of 1996; Constitutional Laws Act [B 5B - 2005].

⁸⁰ 316.

It was argued that section 114 purports to empower the Commissioner to take the law into his own hands, which denied customs debtors, the protection of the adjudicatory process as well as the supervision exercised by the court over the process of execution.⁸¹

One of the cases referred to in argument was the Constitutional Court decision in *Chief Lesapo v North West Agricultural Bank and another*.⁸² This case also involved the attachment and sale in execution by an agricultural bank of a debtor's property without the prior involvement of the court. The Northwest Agricultural Bank Act⁸³ conferred on the bank drastic powers which no ordinary creditor enjoyed, and which encroached substantially on the normal rights of its debtors in respect of both movable and immovable assets. Section 38(2) of the Northwest Agricultural Bank Act gave the bank the right, without recourse to a court of law, to require a messenger of court to sell such property by public auction. This entailed that the messenger of court could only be acting as the bank's agent and no longer as an officer of court, as the section allowed the bank without any judgement or order from any court to seize and sell the debtor's property. In the *Lesapo* judgement the Constitutional Court found that section 38(2) of the Northwest Agricultural Bank Act was not a justifiable limitation of the right of access to court, and accordingly unconstitutional.⁸⁴

It was argued by the applicant in the Wesbank matter that there was no difference between the administrative collection procedures in terms of section 114 of the Customs and Excise Act, and the collection steps in the *Lesapo* case. Such reliance was, however, held to be inappropriate considering the fact that in *Lesapo* the real question was whether there was any advantage for the respondent in that case justifying the drastic expedient of dispensing altogether with the right of a debtor to have

⁸¹ 318.

⁸² 1999 12 BCLR 1420 (CC).

⁸³ *Northwest Agricultural Bank Act* 14 of 1981.

⁸⁴ 1421.

claims against him determined by a court.⁸⁵ Functionally as well as structurally, the respondent in that case had nothing in common with an organ of state of which the respondent in this case was part. What was repugnant in *Lesapo*, was that the “self help” procedure conferred functions on the Bank which traditionally belonged to the courts.

In the court *a quo* Conradie J referred to the matter of *Metcash Trading Limited v The Commissioner for the South African Revenue Service and another*,⁸⁶ where section 34 of the Constitution was held to permit post-deprivation relief in case of a revenue statute. The *Metcash* matter concerned an attack against section 36⁸⁷, section 40(2)⁸⁸ and section 40(5)⁸⁹ of the Value-Added Tax Act,⁹⁰ (hereinafter the VAT Act) on the grounds of breach of section 34 of the Constitution. In this matter it was held that section 36 of the VAT Act was not ousting the jurisdiction of the ordinary courts of law. The assessments and decisions of the Commissioner are administrative and not judicial actions and are still subject to judicial review in the ordinary course.⁹¹ This section is not concerned with access to a court of law and said nothing which could be construed as a prohibition against resort to a court.⁹² With regard to section 40(2) of the VAT Act, it was held that it created a short cut, but nevertheless expressly contemplated the involvement of the courts. The execution process created by section 40(2) specifically proceeded via ordinary judicial institutions, requiring the intervention of judicial officials and procedures. By providing that the Commissioner’s statement once

⁸⁵ 319- 320.

⁸⁶ 2001 1 SA 1109 (C).

⁸⁷ S 36 provides that the obligation to pay taxes is not, unless the Commissioner so directs, suspended pending an appeal. This entails the so called “pay now argue later principle”.

⁸⁸ S 40(2)(a) provides that if a person fails to pay any tax or penalty the Commissioner may file with the clerk of the court or registrar of any competent court a statement certified by him as correct and setting forth the amount due and such statement shall thereupon have the effect of a civil judgement lawfully given in that court in favour of the Commissioner.

⁸⁹ S 40(5) provides that it shall not be competent for any person in proceedings in connection with any statement filed, to question the correctness of any assessment upon which such statement is based, notwithstanding that objection and an appeal may have been lodged.

⁹⁰ *Value-Added Tax Act* 89 of 1991.

⁹¹ [32].

⁹² [34] and [37].

filed, had all the effects of a civil judgement, the section included by reference the whole body of legal rules relating to execution. The ordinary civil process of execution was employed and the Commissioner was not authorised to usurp any judicial functions and resort to self-help.⁹³ It was furthermore held that, to the extent that it could be argued that section 40(5) of the VAT Act, limited an aggrieved vendor's access to an ordinary court of law, such limitation was justified under section 36 of the Constitution.

In the opinion of the Conrادية J, section 114 of the Customs and Excise Act was viewed as inoffensive as the impugned sections in the VAT Act were found to be in the *Metcash* matter.⁹⁴ Conrادية J observed that there was also nothing in the Customs and Excise Act to prevent a customs debtor from approaching a court for appropriate relief.

With regard to the detention, the court *a quo* pointed out that the sphere in which section 114 is utilised is of great importance.

*It is used in the collection of debts in cases where the 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 collection measure. Moreover, there are grave practical difficulties in affording a defaulting customs debtor an opportunity of disputing the detention before a lien is established.*⁹⁵

In Conrادية J's opinion the detention itself of the goods in terms of section 114 accomplishes nothing except to establish the Commissioner's preference over the proceeds of the sale of the goods. There is nothing in the Customs and Excise Act which prevents a customs debtor or owner of the goods from approaching a court for appropriate relief once a detention has been made.⁹⁶

⁹³ [49] and [51].

⁹⁴ 322.

⁹⁵ 323.

⁹⁶ 325.

With regard to the subsequent sale of the goods it was Conradié J's view that the essential question is not whether the statute provides for a judicial supervised execution procedure, but rather whether the court's general supervisory function over the administrative act of selling the property has been excluded. Conradié J therefore held that the provisions of section 114 for the sale of detained goods are in the circumstances not so removed from judicial control that it amounts to a constitutional offensive limitation of a customs debtor's right to access to the courts.⁹⁷

On the question of the invasion of property rights, the court once again found in favour of the Commissioner. The court first considered the five classes of goods which can be subjected to a lien and which may or may not be owned by the customs debtor. The court pointed out the wide definition of importer and drew the conclusion that what section 114 has done, is to create subsidiary categories of co-principle tax debtors.⁹⁸

From these five classes of goods a further three categories of owners were identified, namely the credit grantor, the affected owner who stands in a contractual relationship with the customs debtor with regard to the goods, and the affected owner who has not sold or let or lent or in any way given possession of his/her goods to the customs debtor, but whose goods happen to be on the premises in the custody or control of the customs debtor. The effect of the sale would depend on the type of ownership. Conradié J viewed the credit grantor's property rights as in fact its secured claims for payment against the customs debtor, and therefore his only concern is for the loss of its ranking in the creditor line-up. The court did not see the placement of a lien and the subsequent sale of the goods as expropriation of the goods.⁹⁹

⁹⁷ 326.

⁹⁸ 328.

⁹⁹ 331.

The court *a quo* therefore held it had not been shown that section 114 of the Act was invalid in any respect and that the detention of the vehicles belonging to the applicant was not unlawful.¹⁰⁰

4.2 The Constitutional Court judgement

A direct appeal to the Constitutional Court was lodged, from the judgement and order of the Cape of Good Hope High Court in the *Wesbank* matter. The Constitutional Court disagreed with the judgement of the court *a quo* on a number of issues.

The first point of disagreement was with Conradie J's conclusion that the affected third party now becomes a co-principal debtor. In this regard the court interprets the lien as an ancillary right,¹⁰¹ which does no more than provide a further execution object for the recovery of the debt from the relevant customs debtor. The court sees the flaw in the reasoning of Conradie J in that section 114 does not make the third party a customs debtor; it merely makes the goods of that party liable to be seized in execution of someone else's customs debt.¹⁰² If the property is released, the debt remains the problem of the customs debtor. The Constitutional Court also does not make any distinction in its judgement between different classes of affected owners.

The Constitutional Court goes on to consider section 25 of the Constitution.¹⁰³ Section 25(1) provides as follows:

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

The argument was raised by the respondents that Wesbank's ownership in the vehicles was nothing more than a contractual device which

¹⁰⁰ Stretch June 2002 Taxgram.

¹⁰¹ *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* 1996 4 SA 19 (A); Eiselen and Pienaar *Unjustified Enrichment* 64.

¹⁰² [37].

¹⁰³ [41].

reserves 'ownership' of the vehicles and that they did not seek to protect the reservation of ownership right by financial institutions in leased goods. In this regard, reference was made to the case from the *Netherlands Gasus Dosier- and Födertechnik GmbH v The Netherlands*¹⁰⁴ in which it was said that:

*... it is apparent that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves as in receiving the purchase price.*¹⁰⁵

This argument was not accepted, and the court pointed out that the fact that an owner makes no, or limited use of the object in question, is irrelevant to the categorisation of the object as constitutional property. The court went further and said that neither the subjective interest of the owner in the thing owned, nor the economic value of the ownership, having regard to the other terms of the agreement, can determine the characterisation of the right. The court therefore concluded that the right of ownership that Wesbank had in the vehicles, constituted property for the purpose of section 25 of the Constitution.

With regard to deprivation the court held that if such deprivation infringes section 25(1) of the Constitution and can not be justified under section 36 of the Constitution, the provision is unconstitutional. If however, the deprivation passes the scrutiny under section 25(1) the question arises if it is expropriation. The question was raised if the detention and subsequent sale of goods in terms of section 114 of the Customs and Excise Act, amounts to the arbitrary deprivation of property within the meaning of section 25 of the Constitution.¹⁰⁶ After considering arguments on this issue and consideration of international law on the point the court held that:

... a deprivation of property is 'arbitrary' as meant in section 25 when the 'law' referred to in section 25(1) does not

¹⁰⁴ [1995] 20 EHRR 403.

¹⁰⁵ *Gasus Dosier- and Födertechnik GmbH v The Netherlands* 5.

¹⁰⁶ [61].

*provide sufficient reason for the particular deprivation in question or is procedurally unfair.*¹⁰⁷

The court also held that the *Gasus* case is distinguishable. The tax authorities in the Netherlands are empowered to seize and detain all movable property found on the tax debtor's premises which qualified as furnishings, irrespective of ownership. In the particular instance, *Gasus* delivered and sold a concrete mixer to the tax debtor in question but as a condition of sale ownership was retained until payment of the final instalment. The Netherlands Tax authorities proceeded to seize the concrete mixer. The European Court held that it was not a violation of Article 1 of the First Protocol to the European Convention on Human Rights,¹⁰⁸ which protects, among other, the peaceful enjoyment of possessions and protection against deprivation of possessions except if in the interest of the public and subject to the conditions provided for by law.

This article, therefore, went a bit further than section 25 of the Constitution with the provision that the preceding will not impair the right of a state to secure the payment of taxes.¹⁰⁹ This of course brought about the big distinction. The court also pointed out that the European Court's interpretation of ownership in the case of retention of title and ownership cannot be accepted under South African law.¹¹⁰

In its judgement the Constitutional Court acknowledged the importance of section 114, but pointed out that section 114 casts the net far too wide.

The means it uses sanctions the total deprivation of person's property under circumstances where (a) such person has no connection with the transaction giving rise to the customs debt; (b) where such property also has no connection with the customs debt; and (c) where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the

¹⁰⁷ [100].

¹⁰⁸ Rome 4 November 1950.

¹⁰⁹ [84].

¹¹⁰ [54].

*Commissioner to act to her detriment in relation to the incurring of the customs debt.*¹¹¹

The court, therefore, held that such deprivation is arbitrary for the purpose of section 25(1) of the Constitution and consequently a limitation of such persons' right. Furthermore, it pointed out that the object achieved by section 114 is grossly disproportional to the infringement of the owner's property rights,¹¹² and therefore the infringement by section 114 of section 25(1) is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹¹³ The court held that section 114 is constitutionally invalid, to the extent that it provides that goods owned by persons, other than the person liable to the state for the debts described in the section, are subject to a lien, detention or sale.¹¹⁴

The following is of great importance:

*This must not be taken to imply that there may not be circumstances when the nexus between the third party and the customs debtor, or that between the goods of the third party and the customs debtor or that between the goods of the third party and the customs debt is such that the detention and sale of the goods would pass constitutional muster.*¹¹⁵

With regard to section 34 of the Constitution, the court said that there are substantial doubts as to whether the procedural provisions of section 114 are consistent with section 34 in the light of the *Lesapo* judgement, as the Commissioner is empowered to take possession and sell the goods without having to invoke court processes beforehand.

The court pointed out that in the *Metcash* judgement, where the court declined to uphold a similar attack in respect of the VAT Act, the crucial distinguishing feature was section 40(2) of the VAT Act. This section provides that the Commissioner may file with the clerk of the court or

¹¹¹ [108].

¹¹² [111].

¹¹³ S 36 of the *Constitution of the Republic of South Africa, 1996*.

¹¹⁴ [120].

¹¹⁵ [114].

registrar of any competent court, a statement certified by him regarding the tax due and such statement thereupon has all the effects of a civil judgement.¹¹⁶ This, in contradiction with the self- initiated, self driven and self supervised mechanism involved in *Lesapo*, goes via the ordinary judicial institutions and requires intervention of court officials and procedures.

In this regard the Constitutional Court held:

*Any doubt as to the validity of section 114 on the grounds of its inconsistency with section 34 of the Constitution would be removed by an amendment of the present Act to incorporate provisions corresponding to that of section 40(2)(a) of the VAT Act.*¹¹⁷

It was, therefore, pointed out that Parliament remains free to amend or restructure section 114 of the Customs and Excise Act and any related provisions in response to the judgement; provided it does so in a manner which is consistent with the Constitution.¹¹⁸

5 The lien before and after the Constitutional Court judgement

5.1 Introduction

According to the explanatory memorandum to the Revenue Laws Amendment Bill 2002,¹¹⁹ section 114 was amended to comply with the constitutional requirements and suggested amendments as provided for in the Constitutional Court judgement.

In the amendment provision was made for a lien on the right, title and interest of the customs debtor on anything subject to a credit agreement. A distinction was also made between goods subject to a credit agreement and goods owned by the customs debtor.

The Commissioner is now also empowered to follow a process very similar to the process as envisaged in section 40(2) of the VAT Act.

¹¹⁶ [118].

¹¹⁷ [118].

¹¹⁸ [123].

¹¹⁹ Later promulgated as *Revenue Laws Amendment Act 74 of 2002*.

The amended section 114 now reads as follows:

- 114 (1) (a) (i) *Any amount of any duty, interest, fine, penalty or forfeiture incurred under this Act and which is payable in terms of this Act, shall, when it becomes due or is payable, be a debt due to the State by the person concerned and shall be recoverable by the Commissioner in the manner hereinafter provided.*
- (ii) *If any person fails to pay any amount of any duty, interest, fine, penalty or forfeiture incurred under this Act, when it becomes due or is payable by such person, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were a civil judgement lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.*
- (iii) (aa) *The Commissioner may by notice in writing addressed to the clerk or registrar, withdraw the statement referred to in subparagraph (ii), and such statement shall thereupon cease to have any effect: Provided that the Commissioner may institute proceedings afresh under that subsection in respect of any duty, interest, fine, penalty or forfeiture referred to in the withdrawn statement.*
- (bb) *Notwithstanding anything contained in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), a statement for any amount whatsoever may be filed in terms of subparagraph (ii) with the clerk of the Magistrates' court having jurisdiction in respect of the person by whom such amount is payable in accordance with the provisions of this Act.*
- (cc) *Pending the conclusion of any proceedings, whether internally or in*

any court, regarding a dispute as to the amount of any duty, interest, fine, penalty or forfeiture payable, the statement filed in terms of subparagraph (ii) shall, for purposes of recovery proceedings contemplated in subparagraph (ii), be deemed to be correct.

(iv) (aa) *Any imported or excisable goods, vehicles, machinery, plant or equipment, any goods in any customs and excise warehouse, any goods in a rebate store room, any goods in the custody or under the control of the Commissioner and any goods in respect of which an excise duty or fuel levy is prescribed, and any materials for the manufacture of such goods, belonging to such person whether imported, exported or manufactured before or after the debt became so due and whether or not such goods are found in or on any premises in the possession or under the control of the person by whom the debt is due; and*

(bb) *any imported or excisable goods, vehicles, machinery, plant or equipment, in the possession or under the control of such person or in or on any premises in the possession or under the control of such person and in respect of which such person has entered into any credit agreement as contemplated in the Credit Agreements Act, 1980 (Act No. 75 of 1980) and of which the right, title or interest of such person may be readily established and excused, may be detained in accordance with the provisions of subsection (2) and shall, subject to subparagraph (vi) (cc), be subject to a lien until such debt is paid.*

(v) *Whenever any of the goods mentioned in subparagraph (iv) (bb) are subject to a lien the person concerned shall without delay advise the Commissioner, or the officer detaining and subjecting such goods to a lien, of the existence of any such agreement setting forth at least the following—*

- (aa) *The name and address of the credit grantor as intended in the said Credit Agreement Act;*
 - (bb) *The amount of the principal debt as intended in the Usury, 1968 (Act 73 of 1968) in respect of the applicable credit agreement;*
 - (cc) *The duration of the agreement;*
 - (dd) *The outstanding balance due; and*
 - (ee) *A copy of such agreement.*
- (vi) (aa) *The Commissioner shall without delay advise the credit grantor concerned of such detention and lien and shall enquire as to the right, title or interest of such person in such goods.*
- (bb) *The credit grantor concerned shall, where such right, title or interest is determinable, without delay advise the Commissioner of such right, title or interest of the person concerned in the goods, expressed as a liquid amount, and the lien shall thereafter serve as security for such liquid amount and such amount may be recovered as provided for in paragraph (ii).*
- (cc) *In circumstances where such credit grantor advises the Commissioner that the right, title or interest of the person concerned is economically insignificant or does not exist, the Commissioner shall without delay remove such goods from the operation of the lien.*
- (dd) *Any person who, without reasonable cause fails to advise the Commissioner of the existence of any credit agreement contemplated in subparagraph (v) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000,00 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.*
- (ee) *In the absence of evidence to the contrary which raises a reasonable doubt, proof by the Commissioner of the failure to advise the*

Commissioner of the existence of such credit agreement shall be sufficient evidence of the absence of reasonable cause.

- (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.*
- (aC) Any dutiable goods of whatever nature, which are stored in any customs and excise warehouse licensed for any purpose under this Act shall be subject to a lien, as if the goods are detained in accordance with the provisions of subsection (2), as security for the duty on such*

goods from the time of receipt of such goods in such warehouse until such goods have been duly entered for any purpose under this Act and any liability for duty of the licensee of such warehouse in respect of such goods has ceased in terms of this Act.

- (b) (i) *The claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in paragraph (a), (aA), (aB) or (aC) and may be enforced in accordance with the provisions of this section if the debt is not paid upon demand after the person by whom the debt is due is in writing advised of such debt and of the date on which such debt becomes due and is payable.*
- (ii) *The Commissioner and the credit grantor concerned may, notwithstanding anything to the contrary in this Act or any other law contained, and subject to such conditions as may be agreed upon, agree to dispose of any goods contemplated in paragraph (a) (iv) (bb) in order to preserve and secure the interests of all parties in such goods and in the proceeds of the disposal of such goods pending the resolution of any dispute in respect of which an interest in such goods is secured by such lien.*
- (iii) *In the event of any goods subjected to a lien being attached pursuant to a warrant of execution, such goods shall, notwithstanding anything to the contrary contained in the said Magistrates' Court Act, 1944 (Act No. 32 of 1944) or its rules, where such goods are not detained in the State Warehouse, be removed by an officer to the State Warehouse and such goods may thereupon be disposed of in accordance with the provisions of this section.*
- (iv) *Where, in addition to any amount of duty which is due or is payable by any person in terms of this Act, any fine, penalty, forfeiture or interest is incurred under this Act and is payable by such person, any payment made by that person or any amount recovered pursuant to any sale of such goods as contemplated in this section shall be utilised by the Commissioner to discharge such payment or amount in the order of—*
- (aa) *any duty, interest, fine, penalty, forfeiture, expenses incurred by or charges due to the Commissioner, and*

- (bb) *payment of the overplus, on application, if any, to the person by whom the debt was due.*
 - (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.*
- (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.*

The relevant provisions and scope of the amended section 114 will now be critically scrutinized to determine whether the legislature has successfully met the requirements laid down by the Constitutional Court.

5.2 Debt to the state

Section 114(1)(a)(i) commences by providing for the time when duty, interest, fine, penalty and forfeiture shall constitute a debt. The correct amount of duty for which any person is liable constitutes a debt to the state from the date the liability for such duty commences. The duty need not be payable yet to constitute a debt to the state.¹²⁰ No amendment was made to this provision and the definition of a debt to the state is still applicable.

In the matter of *Little Saints (South - Africa) (Pty) Ltd v Commissioner for Customs and Excise*,¹²¹ it was decided that the lien could even be placed although the correct amount of duty payable had not yet been fixed. This principle was later considered in *Minister of Finance and others v EBN Trading (Pty) Ltd*,¹²² where the court held that the Act conferred draconian powers on the collector and Commissioner and that they had to use particular care in exercising them.¹²³ Magid J went further to comment on the *Little Saints* matter and said that, although it is binding upon him, the result is in his opinion manifestly inequitable. In the court's view this would be tantamount to allowing the Commissioner to blackmail a taxpayer who *bona fide* disputes liability for duty, into paying the duty which may ultimately be found not to be due and then having to sue for its repayment.¹²⁴

Section 44 to the Customs and Excise Act sets out clearly when the liability for duty on importation commences. This must be read with other provisions which specify the liability when goods are subject to

¹²⁰ Cronje *Customs and Excise* (7th ed) 12-35.

¹²¹ Unreported 1194/1988 (D).

¹²² 1998 2 SA 319 (N).

¹²³ 327 H.

¹²⁴ 328 A.

certain customs procedures, for instance when the goods are removed in bond,¹²⁵ stored or manufactured in a customs and excise warehouse¹²⁶ or entered under rebate of duty.¹²⁷¹²⁸

Since the introduction of the VAT Act, value-added tax was collected on imported goods at the time of entry or deemed entry for home consumption. The application of the Customs and Excise Act was extended in 1997 by amendments to section 13 of the VAT Act. According to the Explanatory Memorandum on the Taxation Bill of 1997,¹²⁹ the amendment to section 13(6) was intended to make it clear that, in collecting value-added tax on imported goods, all the provisions of the Customs and Excise Act apply *mutatis mutandis* as if those provisions have been enacted in the VAT Act. All the provisions of the Customs and Excise Act, as well as steps to be taken for the collection of customs duties, would therefore also be applicable for the collection of value-added tax on importation.

In this interpretation, the provisions of the Customs Act in respect of imported goods would apply even where no customs duties are levied on importation of goods, for example where a customs duty rebate applies or the duty is rebated in terms of a trade agreement. Section 114 will therefore be applicable for the securing of value-added tax as well.

Although section 39 of the VAT Act was subsequently amended to clear up any ambiguity as to which penalty and interest regime should govern the late payment of value-added tax on imported goods, the question arises whether such interest and penalties can also be collected in terms of section 114 of the Customs and Excise Act, or if it should be collected in terms of section 40(2) of the VAT Act. It seems arguable that, as the VAT Act specifically provides for the penalty and interest in section 39,

¹²⁵ S18.

¹²⁶ S19, 20, 36A and 37.

¹²⁷ S75(5) and (6).

¹²⁸ Cronje *Customs and Excise* (7th ed) 5-22; Gillooly 22 *LAWSA* 600.

¹²⁹ Clause 30.

section 114 of the Customs and Excise Act should not be the applicable collection mechanism.

5.3 The lien

5.3.1 Goods subject to detention under section 114

Section 114 specifies the categories of goods in general on which liens can be placed as well as the goods automatically subject to a lien.

The Constitutional Court¹³⁰ identified five categories:

- (a) Any goods in a customs and excise warehouse¹³¹ or any goods in the custody of the Commissioner (including a rebate storeroom)¹³² and belonging to the debtor.
- (b) Any goods afterwards¹³³ imported or exported by the debtor.
- (c) Any imported goods in the possession or under the control of the debtor or on any premises in the possession or under the control of the debtor.
- (d) Any goods in respect of which an excise duty or fuel levy is prescribed (whether or not such duty has been paid) and any material used for the manufacture of excisable goods or goods on which a fuel levy is prescribed and in the possession and under the control of the debtor or on any premises in the possession or under the control of the debtor.¹³⁴
- (e) 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 has been paid) is used, transported or stored.

¹³⁰ [19].

¹³¹ Chapter IV; with specific reference to sections 19, 20, 21 and 27 (also see s 114(1)(aC) inserted by s 140 of Act No. 60 of 2001).

¹³² R 75.08 - 75.10.

¹³³ Goods imported or exported after the debt became due.

¹³⁴ S 19(1) and s 19A.

Prior to the Constitutional Court ruling the Commissioner was empowered in terms of the Act as judicially interpreted,¹³⁵ to place liens on goods owned by third parties. The section was far more extensive than even the legal hypothec enjoyed by the state at common law for taxes due. Whereas the latter extended over the property of the debtors only, the former extended also over property belonging to third parties, including any vehicle in which fuel has been used, whether such goods were the property of the debtor or not.¹³⁶ The Constitutional Court judgement was not the first judgement on the very same issue, but all previous judgements were given prior to the South African democratic era.

The court *a quo* in *Randbank v Regering van Suid Afrika*¹³⁷ accepted that machines used for the manufacture of excisable goods could be detained in terms of section 114 although it belonged to a third party. The facts of the matter were in short: a manufacturer of excisable goods was provisionally on 13 February 1972 and finally liquidated on 8 August 1972. The liquidator accepted a claim filed by the state on 20 September 1972. The state also furnished a list with the claim, of goods subject to a lien in terms of section 114 of the Customs and Excise Act. The lists referred to, among other, four machines, which belonged to *Randbank* (the appellant in the matter), who leased the machines to the company for a period of 60 months. With the 'concurrence' of the state, the liquidator allowed all the machines to be sold at a public auction and subsequently received, *inter alia* the proceeds of the said four machines.

Both the state and the appellant claimed to be entitled to the money and this led to an application to the Transvaal Provincial Divisions by *Randbank* for, *inter alia*, a declaratory order that it was entitled to the proceeds of the machines.

¹³⁵ *Randbank* and *Millman* cases.

¹³⁶ Gillooly 22 LAWSA 625.

¹³⁷ 1974 4 SA 764 (T).

In his judgement Hiemstra J pointed out that there are a number of cases where the placement of a lien against the owner of goods are accepted, even though the owner was not involved with the agreement in terms of which the goods were salvaged or improved.¹³⁸ The important factor that crystallised in all these cases was that there was a *nexus* between the goods, the owner and the contracting parties. This is not the case with the statutory lien in terms of section 114. If the words of section 114 are given their natural meaning, one can come to no other conclusion that the section also extends to the property of third parties, although in contradiction with the common law.¹³⁹

On appeal Jansen JA set the crux of the appeal out as:¹⁴⁰

Die werklike geskil gaan oor die inhoud van die 'retensiereg'. Die appellant se hoofbetoog is dat die regsgevolge van die aanhouding verskil na gelang van die betrokke saak aan die verkoopregpligtige dan wel aan die derde behoort: in e.g. geval het die Staat die bevoegheid om die saak te verkoop; in lg. geval, slegs die bevoegdheid om die retensie af te dwing by wyse van 'ander stappe'. As ek Mnr. Roux, namens die appellant, reg verstaan, is die betekenis hiervan dat die Staat die saak van 'n derde nie te gelde kan maak nie, maar slegs besit van die saak aan die derde kan onthou deur, bv. 'n interdik aan te vra. Die beweerde onderskeiding word ontleen aan die woord 'kan' in art. 114(2) en 'n vermeende teenstelling tussen 'verkoop' en ander 'stappe'. Dié vertolking sou dan ook die onskuldige derde die minste beswaar en gevolg gee aan o.a. die interpretasiereëls wat verg dat 'n inbreuk op regte en op die gemenerereg streng uitgelê word. As egter na die bewoording van art. 114(1)(b) gekyk word, is die bedoeling duidelik genoeg, en bied dit geen grondslag vir die onderskeiding wat namens die appellant gemaak word nie. As eers aanvaar word dat ingevolge art. 114(1)(a) sake van derde vir aanhouding vatbaar is en dat aanhouding 'n 'retensiereg' laat ontstaan, dan sluit die woord 'enigiets' in die sinsnede ...'die eise van die Staat het voorrang bo eise van alle persone op enigiets wat aan sodanige retensiereg onderhewig is (art. 114(1)(b)) noodwendig ook die saak van 'n derde in.

¹³⁸ 769H; *Ford v Reed Bros* 1922 TPD 266; *Anderson and Co v Pienaar and Co* 1922 TPD 435.

¹³⁹ 771A.

¹⁴⁰ 731H-732B.

In the matter of *Secretary for Customs and Excise v Millman*,¹⁴¹ as well as both *Randbank* judgements (*a quo* and Court of Appeal), it appears that 'belonging to' was only in certain cases a qualification. For example, the provision for a lien on goods imported or exported afterwards by the person by whom the debt is due, is not qualified by 'belonging to.' The importer or exporter was not necessarily the owner of the goods imported or exported. The lien envisaged on 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 control of such person included not only the property of such person, but also the property of third persons.¹⁴²

Section 114(1)(b) was amended in 1999 by section 71(a) of the Revenue Laws Amendment Act.¹⁴³ In terms of this provision the Commissioner was able to, where the person by whom the debt was due, was not the owner of the goods concerned, deliver the goods to the owner on good cause shown. The concurrence of the person, by whom the debt is due, was necessary. The Commissioner could then deliver the goods on payment of the debt due to the state as well as on payment of all reasonable expenses or costs incurred in connection with the detention.¹⁴⁴

This has now been substantially amended. As the Constitutional Court suggested, the legislature has now devised a narrower category of non-debtors, which will, in my view, pass constitutional muster. Liens may now only be placed on goods belonging to the debtor, or goods in respect of which the debtor entered into a credit agreement as contemplated in the Credit Agreements Act.¹⁴⁵ The fact that a lien may still be placed on goods belonging to a third party which is subject to a credit agreement does not entail the total deprivation of such property.

¹⁴¹ 1975 3 SA 544 (A) 551G.

¹⁴² Cronje *Customs and Excise* (7th ed) 12-37.

¹⁴³ *Revenue Laws Amendment Act* 53 of 1999.

¹⁴⁴ Explanatory Memorandum on the Revenue Laws Amendment Bill, 1999.

¹⁴⁵ *Credit Agreements Act* 75 of 1980.

Only the right, title and interest of the debtor in the goods as expressed in a liquid amount, will serve as security.

There is then a further division between the goods on which a lien may be placed. Section 114(1)(a)(iv) as amended provides that liens may be placed on the following goods belonging to the debtor: imported or excisable goods, vehicles, machinery, plant or equipment, goods in a customs and excise warehouse, goods in a rebate store, goods in the custody or under the control of the Commissioner, goods in respect of which an excise or fuel levy is prescribed and any material for the manufacture of such goods. Goods belonging to the debtor may be detained for the placement of a lien, wheresoever and in possession of whosoever found, whether or not such goods are imported, manufactured or exported before or after the date the debt became due.¹⁴⁶

With regard to the second category of non-debtor goods, section 114(1)(a)(iv)(dd) provides for the placement of liens over goods in respect of which the debtor has entered into a credit agreement. The Commissioner can only place a lien in such an instance over imported or excisable goods, vehicles, machinery, plant or equipment, which must be in the possession and under the control of the debtor or on any premises in the possession or under the control of the debtor.

The process does not stop at the mere placement of a lien, as in the past. The Commissioner must determine *prima facie* whether the goods belong to the debtor or whether the debtor entered into a credit agreement in respect of such goods. The Commissioner or an officer¹⁴⁷ must advise the debtor of the requirements of section 114(1)(a)(v) when placing a lien. This provision requires that the debtor must inform the Commissioner of the existence of a credit agreement without delay. He must provide the Commissioner with the name and address of the credit grantor, the duration of the agreement, as well as a copy of the

¹⁴⁶ S 114(1)(a)(iv)(aa).

¹⁴⁷ S 3(1).

agreement. It is interesting to note that failure to inform the Commissioner without reasonable cause of the existence of a credit agreement, will be an offence,¹⁴⁸ but does not abolish the requirement to inform the Commissioner and does not entitle the Commissioner to place a lien on the total value of the goods.

Once established that the goods are subject to a credit agreement the Commissioner (or a delegated officer) must forthwith advise the credit grantor of the detention and lien, and enquire from the credit grantor as to the right, title and interest of the debtor in the goods. The credit grantor must without delay advise the Commissioner of such right, title or interest, expressed as a liquid amount. The lien will only serve as security for such liquid amount. If such amount is economically insignificant, the Commissioner must uplift such lien.¹⁴⁹ This new position therefore no longer leads to the total deprivation of a person's property where such person has no connection with the transaction.

Circumstance could arise where the debtor disputes the underlying debt and even litigation could follow, while the goods are still under lien. The Commissioner and credit grantor may then come to an agreement to dispose of the goods in order to preserve and secure the interests of all parties, pending the resolution of any dispute.¹⁵⁰

Subsection (1)(aA) makes provision for a lien which operates 'automatically',¹⁵¹ on any plant or stills used in the production of excisable or fuel levy goods in the possession or under the control of the debtor from the time when the liability for payment arises, until the debt is paid.

¹⁴⁸ S 114(1)(a)(vi)(dd).

¹⁴⁹ S 114(1)(a)(vi).

¹⁵⁰ S 114(1)(b)(ii).

¹⁵¹ As if such plant and stills are detained in accordance with the provisions of s 114(2).

Subsection (1)(aB) has a similar provision over capital goods in respect of which the surcharge¹⁵² was drawn in terms of a permit issued by the Director-General: Department of Trade and Industry, where such goods will be subject to a lien for the surcharge until all the conditions specified in the permit have been complied with. Surcharge was withdrawn by GN 1316 of 1 September 1995.

Subsection (1)(aC) provides for the third category of 'automatic liens', in terms of which dutiable goods, stored in any Customs and Excise warehouse is subject to a lien as security for the duty on such goods from the time of receipt of such goods in the warehouse until the goods have been duly entered and the liability for duty has seized in terms of the Act.

These three provisions were not amended with the 2002 amendment, but it is difficult to place them within the procedure as set out in section 114(1)(v) and (vi). As in the case of an automatic lien no physical act of detention is even required.

It appears that although it is possible that such goods could be subject to a credit agreement or could even belong to a third party, these three categories of goods should be treated quite differently. In my view, such goods fall squarely within the wise words of the Constitutional Court:

*This must not imply that there may not be circumstances when the nexus between the third party and the customs 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 is such that the detention and sale of such goods would pass constitutional muster.*¹⁵³

(own underlining)

The Constitutional Court referred to an Australian case, *Airservices Australia v Canadian Airlines International Ltd*,¹⁵⁴ where this principle

¹⁵² Any duty leviable under Part 4 of Schedule No 1 on any goods which have been imported into the Republic.

¹⁵³ [114].

¹⁵⁴ (1999) 167 ALR 392; *First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Service* 2002 4 SA 768 (CC) [80].

was highlighted. Here the court dealt with a statutory lien and the sale of an aircraft in pursuance thereof, where the owner of such aircraft was not the debtor. The Australian Court pointed out that the owner of the aircraft knew that such aircraft would be flown to, from and within Australia attracting charges. As a result the owners of the aircraft cannot be regarded as third parties who have no rational connection with the achievement of the purpose sought to be achieved by the impugned provision.¹⁵⁵

The same is true in all three instances of an automatic lien. Plant and stills are directly connected with the manufacturing process of the excisable or fuel levy goods (for which the manufacturer must be licensed).¹⁵⁶ Dutiable goods stored in a customs and excise warehouse are subject to an automatic lien until the goods have been duly entered and liability for the duty has seized. Section 19 and 20 of the Customs and Excise Act provides specifically that liability for duty shall seize when the goods have been duly entered in terms of section 20(4) of the Customs and Excise Act, be it for home consumption, export or re-warehousing. The owner and the licensee of the warehouse are jointly and severally liable for the duty.¹⁵⁷ If such goods are removed without entry or diverted, such goods will be dealt with irregularly and are liable to forfeiture¹⁵⁸ and may be seized wheresoever and in possession of whosoever found.

In terms of section 114(2) goods under an 'automatic' lien may also be attached and sold only once a judgement is obtained as set out in section 114(1)(a)(ii).

5.3.2 The placement of a lien

¹⁵⁵ [80-83] and [101].

¹⁵⁶ Sections 19A, 60, 61 and Schedule No. 8.

¹⁵⁷ Sections 19(6) and 44(6) read with section 44A.

¹⁵⁸ Section 87.

In the matter of *Secretary for Customs and Excise v Millman*,¹⁵⁹ the court held that detention of goods in accordance with section 114(2) is a condition precedent to the establishment of a lien over those goods of the lien envisaged by the then section 114(1)(a).

The provisions of section 114(2)¹⁶⁰ of the Customs and Excise Act were not amended subsequent to the constitutional judgement. This section must be strictly complied with in order to properly and legally establish the liens envisaged by the Customs and Excise Act.

Where possible, it is advisable that goods subject to a lien be removed to a place of security. Where lien goods cannot be removed and are left at the premises it should be detained by 'sealing, marking, locking, fastening or otherwise securing' as prescribed. As the Customs and Excise Act prescribes a physical action of identifying the goods, a sticker is usually attached to the goods. These actions not only establish the liens as envisaged by the Customs and Excise Act, but will also serve as notice to third parties of the existence of liens in favour of the state.

Where the goods are detained on the premises of the debtor or elsewhere as presented in subsection (2A) (which may even be the State warehouse), the removal of the goods without the permission of the Commissioner is prohibited. A contravention of this subsection is a serious offence in terms of section 80(1)(o).

Since the enactment of the Constitution and more specifically the Promotion of Administrative Justice Act¹⁶¹ (hereinafter the Promotion of Administrative Justice Act), more emphasis is placed on administrative justice. The question comes to mind whether the debtor must be given a right to be heard prior to the placement of the lien.

¹⁵⁹ 1975 3 544 (A).

¹⁶⁰ Section 114(2) was not amended in 2002.

¹⁶¹ *Promotion of Administrative Justice Act* 3 of 2000.

In *Traco Marketing (Pty) Ltd v Commissioner for Customs and Excise*,¹⁶² Erasmus J was called to consider just this question. The court held that the Commissioner's statutory right to retention required a prior decision followed by an overt act of detention, but found that no prior hearing was required before a lien was placed. The court also pointed out that the placement of a lien is a debt collection measure. Where common law liens favour the state, they do not owe their existence to any administrative act or attract a duty to act fairly. In general creditors are not expected to be nice to debtors and where a debt recovery mechanism is in place, one would not expect to be heard prior to a legal act being taken to secure the debt.

In the view of the court, section 114 is primarily designed to secure the position of the creditor. In securing the debt, time may be of the essence as delay could result in the debtor being liquidated before the lien is placed or allow the goods which might be detained to be removed.

5.3.3 Possession

Ordinarily a lien in respect goods provides security for the person in possession of those goods until the relevant debt is paid. Loss of possession usually terminates the lien. This is clearly not the case with the statutory lien. In *Rand Bank v Regering van die Republiek van Suid-Afrika*,¹⁶³ the question of 'possession' and the effects thereof were fully considered. The court *a quo* (Hiemstra J) pointed out the main difference between the common law and the statutory lien:

Gemeenregtelik word eers besit verkry en dan, as gevolg van die besteding van geld of arbeid, kom die retensiereg tot stand. Hier het die wetgewer die posisie verander deur te bepaal dat die verkoopreg 'n skuld verpligting word en dat die Staat dan daarna sekuriteit vir homself kan skep deur besit te neem van sekere goedere. Dit word 'aanhouding' genoem en hoef nie eers werklik detentio te behels nie. Die goed word aangehou deur dit te verseël, te merk, te sluit, vas te maak of andersins te bewaar of in beslag te neem

¹⁶² 1998 4 SA 1002 (SE).

¹⁶³ 1974 4 764 (T).

*deur dit na 'n plek van veiligheid te verwyder. Die retensiereg is hier nie, soos gemeenregtelik, bloot passief nie.*¹⁶⁴

Hiemstra J pointed out that the legislator placed 'detention' in the place of possession. Detention can be established by merely marking the goods.¹⁶⁵

In the matter of *Traco Marketing (Pty) Ltd v Commissioner for the Customs and Excise*,¹⁶⁶ the court stated that even where goods are already in the State warehouse, such goods must first be detained in terms of section 114(2) before they will become subject to a lien.

Except in the case of the 'automatic liens' referred to above, compliance with section 114(2) is always necessary to establish a valid lien.

5.2.4 Insolvency and the statutory lien

The effect of the Insolvency Act¹⁶⁷ is to bring about a *concursum creditorum* and it determines that all property belonging to the insolvent becomes vested in the liquidator and falls to be dealt with in terms of the provisions of the Insolvency Act. The 2002 amendment of section 114 does not change the effect insolvency has on goods subject to a lien. In instances of insolvency, the placement of a lien before the date of insolvency will ensure that the debt to the value of the goods under lien is preferent and secured.¹⁶⁸

Section 47 of the Insolvency Act deals specifically with the claims of a creditor of the insolvent estate who is in possession of any property belonging to that estate and over which he claims such a right of retention. This section obliges such creditor to deliver the property over which he has a lien, to the trustee, without losing his security thereby.

¹⁶⁴ 1974 4 764 768 C-D.

¹⁶⁵ 732 at G *et seq.*

¹⁶⁶ 1998 4 SA 1002 (SE).

¹⁶⁷ *Insolvency Act* 24 of 1936.

¹⁶⁸ *Minister of Finance v Ramos* 1998 4 SA 1096 (C) 1101A-D.

Section 95 of the Insolvency Act deals with the application of proceeds of securities, for instance, it provides how the proceeds of property over which the creditor has a secured claim, is to be dealt with.¹⁶⁹

The crisp issue for decision in *Millman* was whether in terms of section 114 of the Customs and Excise Act, the Commissioner could validly establish a lien after the provisional liquidation of a company and so constitute itself as secured creditor of that company in respect of a pre-liquidation debt.¹⁷⁰

The facts were shortly the following: Until 9 August 1972 the company manufactured goods in South Africa which were 'sales duty goods' as then defined in section 1 of the Customs and Excise Act. An amount of R6 897,81 constituted a debt due to the state. On 9 August 1972, an officer from the Department of Customs and Excise detained a certain plant, in the possession and under control of the company, by sealing and marking it in an attempt to establish a lien over the said plant in favour of the state in terms of section 114. On the same date the company was placed under provisional liquidation. It was common cause in the matter that the liquidation proceedings commenced and that the provisional order was granted prior to the detention of the plant.

Botha JA made it clear in the appeal that the lien must be placed before the liquidation:¹⁷¹

In light of the common law as thus stated, it's clear to me that, if Parliament had intended that a lien envisaged by section 114 could be established over the goods of a company after its winding-up, it would have made express provision to that effect in that section. In the absence of such expressed provision section 114 can not, in my view, be construed as authorising the establishment of such lien after the winding-up of the company.

There is another reason why I do not think that the goods of the company could have been detained under section 114 after the winding-up of the company. In terms of section

¹⁶⁹ See also s 83 and s 89(1) of the Insolvency Act.

¹⁷⁰ 544D.

¹⁷¹ 552E.

*124(3)(b) of the Companies Act, 46 of 1926, all the property of a company shall vest upon its winding-up-
' be deemed to be in the custody or control of the Master until a liquidator or provisional liquidator is appointed and is capable of acting as such.'*

Botha JA also referred to the judgement in, *Walker v Syfret*,¹⁷² where it was held that the effect of a winding-up order is to establish a *concursum creditorum* and nothing thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body.¹⁷³

Upon the compulsory winding-up of any company, the directors cease to function as such and they are therefore deprived of the possession and control of any goods as envisaged in section 114. The goods are deemed to be in the possession and under the control of the Master or liquidator.

In the *Randbank* matter the question arose whether the lien lapses when the Commissioner hands the goods over to liquidator.¹⁷⁴

Hiemstra J, in his judgement in the court *a quo* said:

*Deur saam te werk met die likwidasierverkoop, en die likwidateur se aandag te vestig op sy voorkeurregte, het die Staat die likwidateur by implikasie as sy agent aangestel. Die etikette het aan die masjiene gebly, en ek is van oordeel dat die 'aanhouding' nie beëindig is deur aan die likwidateur beheer oor die goed te gee vir die doel van verkoping nie. In sub-art. (2) word uitdruklik die reg aan die Staat gegee om sy eise af te dwing deur die aangehoue goed te verkoop. Dit kan die Staat doen deur middel van sy eie amptenare of deur 'n agent en laasgenoemde is myns insiens wat hier gebeur het'*¹⁷⁵

¹⁷² 1911 AD 141.

¹⁷³ *Millman* 552 C-D.

¹⁷⁴ See also 30.

¹⁷⁵ 769A-B.

Janse JA confirmed this in the Court of Appeal.¹⁷⁶ The concurrence of the state to the sale was in no way a waiver of its rights. The liquidator received the proceeds of the sale with the knowledge of the state's claim. The state's claim still has priority over the claims of all persons.

5.3.5 Use of the goods under lien

Section 114 specifically provides for the use of the goods. It is, as already discussed, not necessary for the establishment and the continuation of the lien to retain possession of the goods. The goods can be detained at the premises of the debtor and he can use the goods under certain conditions. The provisions with regard to the use of goods under lien were not amended in 2002.

In the matter of *The Minister of Finance v Ramos*,¹⁷⁷ the question of usage and disposal of goods under lien came under the spotlight. The facts of the matter were shortly the following: During 1994, JTS Footwear CC became liable to the Commissioner for Customs and Excise for the payment of duty in respect of goods imported into the Republic. As a result of the company's failure to pay the duties, a lien was placed in terms of section 114 over a number of cartons of shoes, as well as a vehicle. A notice was handed to a representative of the company, which recorded that the goods in question were 'hereby detained ... and are subject to a lien.' The goods were detained on the premises of the company and one of the representatives of the company was allowed to use the vehicle, but was required to keep possession thereof and was prohibited from alienating the vehicle. The conditions pertaining to the vehicle were never recorded in writing.

During 1995, the company applied to court for an order, declaring the lien in respect of the vehicle to be unlawful, reviewing and correcting and setting aside the decision to exercise the lien and directing the appellant to restore full and undisturbed possession of the vehicle to the company.

¹⁷⁶ 733 B.

¹⁷⁷ 1998 4 SA 1096 (C).

This resulted in a settlement between the parties and the settlement agreement was made a court order. In terms of the agreement the goods would be released from the lien on payment of a certain amount of money. During June 1996, the company sold the vehicle to a third party, Ramos. One of the officers in the employ of the Commissioner took possession of the vehicle from the third party in November 1997, because the company failed to make the necessary payment in terms of the settlement. This, in turn, led to Mr Ramos invoking the *mandament van spolie* in the Magistrates' Court in order to obtain return of the vehicle.

Conradie J in the Cape of Good Hope Provincial Division confirmed that the vehicle was susceptible to a lien, but stated that the representatives of the Controller of Customs and Excise took the law into their own hands in dispossessing the respondent of the vehicle.¹⁷⁸

The court confirmed that a lien established in terms of section 114 would continue to operate even though the goods are not held by the state, but used by the debtor. The state's claim to the vehicle will have priority over the claims of all other persons, including also the claim of the respondent in the case. This simply means that the state will have first claim to the proceeds of the vehicle, should it have the vehicle sold as it will be entitled to do and its claim against the debtor, in the event of the debtor's liquidation, will be secured and preferent.¹⁷⁹ This, however, does not mean that the state is entitled to take the law into its own hands and to dispossess the respondent of the vehicle. The court pointed out that a lien, after all, is merely a security and does not in itself confer a right of action to claim compensation. It does, however, confer a defence, usually in favour of the possessor of the property, to an action brought by the owner to recover the property.

¹⁷⁸ 1098 I.

¹⁷⁹ 1101 C-E.

This case gave rise to the amendments to the section with regard to the use of the goods placed under a statutory lien. According to the explanatory memorandum on the Revenue Laws Amendment Bill (1999), the amendment of section 114(2)¹⁸⁰ intends to address the problem experienced in the above matter. If a person is allowed to use any goods placed under lien, the person is not allowed to enter into an agreement whereby ownership is transferred or relinquished to any person or to pledge or hypothecate any such thing in favour of another.

Any agreement entered into contrary to these conditions is null and void. If the person enters into such agreement or otherwise deals with the subject matter contrary to any conditions imposed by the Commissioner, an officer may detain the subject matter and remove it to a place of security. The person by whom the debt is due is liable for all costs and expenses incurred by and charges due to the Commissioner.

5.3.6 Section 103 and the statutory lien

Section 103 provides that the person having the management of a business or premises in connection with which a contravention took place or any liability was incurred, will be also liable for any debt due by the company, close corporation, co-operative society, firm, partnership, statutory body or club.

In the matter of *Du Toit v Kommissaris van die Suid-Afrikaanse Inkomstediens*,¹⁸¹ it was said that in interpreting the phrase 'any person having the management, the question is a factual one which has to be answered in light of all the facts of the relevant matter. It also has to be accepted that more than one person can have control over a business and that even a lesser measure of control still amounts to control. The court pointed out that the legislator did not have the mere right of control or management in mind in section 103, but rather *de facto* control. The

¹⁸⁰ S 71 of the *Revenue Laws Amendment Act 53 of 1999*.

¹⁸¹ 2000 2 SA 98 (C).

mere right to management will not be sufficient to bring a person within the ambit of section 103.¹⁸²

Section 114(1)(a)(i) as amended, refers to 'any duty... incurred under this Act.'

According to section 44A,

...whenever in terms of the Customs and Excise Act liability for duty ... devolves on two or more persons, each such person shall, unless he proves that his relevant liability has ceased in terms of this Act, be jointly and severally liable for such duty or amount, any one paying the other or others to be absolved pro tanto.

It is clear that section 114 will also apply to any liability incurred in terms of section 103.

In the abovementioned matter of *Du Toit*, Brandt J said:

Indien die applikant dus ingevolge artikel 103 vir die beslote korporasie se skuld aanspreeklik is, is sy goedere in terme van artikel 114 vir beslaglegging vatbaar.

What is also important to note in this decision is that a lien was placed over the goods of the 'person having the management', after the liquidation of the closed corporation.

On this Brandt J said in his decision:

Indien die applikant 'n persoon is soos beoog in artikel 103 het hy sy aanspreeklikheid vir die beslote korporasie se skulde opgeloop voordat die beslote korporasie gelikwedeer is. Daarna sou hy uit hoofde van artikel 44A van die Wet, gesamentlik en afsonderlik met die beslote korporasie vir sodanige skulde aanspreeklik wees. Die effek van Millman NO - saak waarop Mej. Fichardt steun is dat respondente nie na likwidasië van die beslote korporasie ingevolge artikel 114 op die bates van die beslote korporasie sou kon beslag lê nie omdat daarop toe 'n concursus van die beslote korporasie se skuldeisers plaasgevind het. Die kardinale punt van onderskeid is egter dat die likwidasië van die

¹⁸² 105 A –C.

beslote korporasie geen effek gehad het op die applikant se persoonlike aanspreeklikheid of op die vatbaarheid vir beslaglegging van die applikant se persoonlike bates ingevolge die bepalings van artikel 114 nie.

Section 114 and section 103 will therefore go hand in hand when collecting a debt due to the state as contemplated in section 114, even now after the enactment of the amended section 114. This would also entail that the Commissioner will also be able to file a statement against such person, which will have the same force and effect as a civil judgement.

5.3.7 Termination of the lien

Contrary to the common law position it appears that the lien is not terminated on production of adequate security and the lien continues statutorily until the debt is paid.¹⁸³ In the matter of *Little Saints (South - Africa) (Pty) Ltd v Commissioner for Customs and Excise*,¹⁸⁴ the court held that it had no discretion to order release of the goods against provision of adequate security. This principle was not considered subsequently and the position might be different since the *Sandton Square Finance (Pty) Ltd* ruling.

5.4 Enforcement

Section 114(1)(b) of the Customs and Excise Act, before the amendment in 2002 provided that the claims of the state could be enforced by sale or other proceedings if the debt is not paid within three months after the date on which it became due.

In the case of *Randbank*, the court per Jansen JA, stated:

Volgens die gewone betekenis van die woorde het die Staat dan die reg om na goeddunke 'by wyse van verkoop of ander stappe' sy eise af te dwing, hetsy die betrokke saak

¹⁸³ Cronje *Customs and Excise* (8th ed) 12-43.

¹⁸⁴ Unreported 1194/1988 (D).

aan die verkoopregpligtige dan wel derde behoort. Ander stappe is dan wel denkbaar. In 'n bepaalde geval kan die Staat verkies om nie die saak te 'verkoop' nie, maar om vonnis te verkry, beslag op die saak te lê en dit dan in eksekusie te laat verkoop¹⁸⁵.

Such sale was previously left in the hands of the Commissioner without any court intervention and usually took place by way of an auction or tender process. The Constitutional Court specifically pointed out that any inconsistency with section 34 of the Constitution would be removed by an amendment of the section to incorporate a provision corresponding with section 40(2)(a) of the VAT Act.

Section 114 now provides that a judgement be obtained by filing a statement with the registrar or clerk of the court, similar to the provision in the VAT¹⁸⁶ and Income Tax Act.¹⁸⁷ The result of filing is that the statement has the effect of an exigible civil judgement lawfully obtained. Thereafter the normal execution process as provided for in the Supreme Court Act¹⁸⁸ and Magistrates' Court Act¹⁸⁹ must be followed, whereby a warrant of execution will have to be obtained in all instances before the goods are sold.

5.4.1 Filing of a statement

The placement of a lien is not a prerequisite for the filing of such a statement, but where a lien has been placed such goods cannot be sold unless a statement is filed and the formal collection process is not followed. Obtaining a civil judgement is also not a condition to the valid imposition of a lien in terms of section 114.

The Commissioner may file a statement for any outstanding amount, in either the High Court or Magistrates' Court, irrespective of the jurisdictional limits of such courts. Such statement filed may also be

¹⁸⁵ 732.

¹⁸⁶ S 40(2) of Value-Added Tax Act 89 of 1991.

¹⁸⁷ S 91(1)(b) of Income Tax Act 58 of 1962.

¹⁸⁸ Supreme Court Act 59 of 1959.

¹⁸⁹ Magistrates' Court Act 32 of 1944.

withdrawn by the Commissioner, whereafter the Commissioner may, if he deems it necessary, file a statement afresh.

Subsection 1(a)(ii) provides that –

'...and such statement shall thereupon have all the legal effects of, and any proceedings may be taken thereon as if it were a civil judgement lawfully given in that court in favour of the Commissioner for debt of the amount specified in the statement'.

This unequivocally includes by reference the whole body of legal rules relating to execution. The filing of the statement accordingly sets in train the ordinary execution process of the particular court and it is competent to obtain a warrant of execution which applies to all the debtor's assets and not only those subject to a lien.

Pending the finalization of any dispute as to the correct amount of duty, penalty, fine, interest or forfeiture payable, the statement filed will be deemed correct.¹⁹⁰ The corresponding provisions in the Income Tax Act¹⁹¹ and VAT Act¹⁹² are commonly known as the pay-now-argue-later rule, and are also echoed in sections 47(9)(b)(i) and 65(4)(c) of the Customs and Excise Act, with regard to tariff and value determinations.¹⁹³

The constitutionality of both the pay-now-argue-later rule and the statement procedure were upheld by the Constitutional Court in *Metcash*. In general the court found that as SARS' decisions to file a statement can be taken on review, the taxpayer's fundamental right of access to courts contained in section 34 of the Constitution was not infringed.¹⁹⁴

¹⁹⁰ S 114 (1)(a)(iii)(cc).

¹⁹¹ S 88 of *Income Tax Act* 58 of 1962.

¹⁹² S 36 of *Value-Added Tax Act* 89 of 1991.

¹⁹³ Olivier 2003 TSAR 382.

¹⁹⁴ Olivier 2001 TSAR 193; [32], [34] and [37].

The filing of the statement now gets rid of the perception of *parate executie* without a court order as found in the Constitutional Court judgement. In section 114 there is also nothing which could be construed as a prohibition against resort to a court.¹⁹⁵ As stated in the *Metcash* matter one now has the intervention of judicial officers and all other procedures are still available to the different parties, for example in the case of attachment by the sheriff of goods belonging to a third party, the normal inter-pleader procedures, as prescribed in both the Magistrates' Court¹⁹⁶ and Supreme Court Act,¹⁹⁷ may be utilized.

5.4.2 Execution process

Once a warrant of execution is obtained, the sheriff is responsible for the execution of the property of the customs debtor. The sheriff is entitled to attach not only goods already under lien, but also assets of which the customs debtor is the owner. In respect of both these categories of goods, the execution process will be governed by the rules of the court in which the statement was filed.

Subsection 114(1)(b)(iii) as amended provides that lien goods attached pursuant to a warrant of execution, if not already detained in the State warehouse, be removed to the State warehouse.¹⁹⁸

Section 114(2)(a) makes provision for use of goods under lien on certain conditions. Such entitlement of use will lapse once the goods are attached pursuant to a warrant of execution, as the goods must now be removed to the State warehouse.

The Supreme Court Act¹⁹⁹ provides that goods attached pursuant to a warrant may be removed to a place of security or can be left upon the premises in the charge and custody of the debtor.²⁰⁰ The impractical

¹⁹⁵ [34] and [37].

¹⁹⁶ S 69.

¹⁹⁷ R 58.

¹⁹⁸ See s 1 for definition of State warehouse.

¹⁹⁹ Supreme court Act 59 of 1959.

²⁰⁰ Rule 45(6) of the Uniform High Court Rules.

situation may arise where the lien goods will be removed to the State warehouse and the remainder be left on the premises of the debtor or be removed to a place of security of the sheriff's choice. The State warehouse will definitely qualify as a place of security and depending on the space available in the State warehouse and the internal policy of the South African Revenue Service. I am of the opinion that all goods should be removed to the State warehouse, but with specific identifying marks to distinguish between the lien and non-lien goods. This will also prevent any problems with the sale of the goods. If the goods are kept separately, it might necessitate two sales or even re-removal of such goods. In my opinion, section 114(1)(b)(iii) should be amended to state that either all goods be removed to the State warehouse, or that the normal process after attachment be followed.

Magistrates' Court Rule 41(8)(a) provides that the property shall be sold for cash by the sheriff or with the approval of the Magistrate, by an auctioneer or other person appointed by the sheriff. The Commissioner will therefore no longer bear the responsibility for the sale of the goods under lien.

Any amount recovered through such sale or even a payment made by the debtor must be utilised to discharge such debt in the order of duty, interest, fine, penalty, forfeiture, expenses incurred and charges due to the Commissioner.²⁰¹ A surplus, if any, will only be paid to the debtor on application.

It is interesting to note that this provision differs from section 105 which provides for the payment of a debt in instalments. Section 105(1)(d) provides that -

any such instalments shall be utilized by the Commissioner to discharge any penalty, forfeiture, interest and duty and any other amounts due, in that order.

²⁰¹ S 114(1)(b)(iv).

In terms of section 105, duty is discharged last, but in terms of section 114 first.²⁰² The mere fact that the first is only applicable to instalments also does not provide an answer for the difference and calls for legislative clarification.

5.4.3 *The filing of a statement and legal rights of the debtor*

When adopting the value-added tax and income tax statement procedure, the case law, criticism and problems were also inherited. One of the issues considered was whether the court and more specifically the Magistrates' Court, has the jurisdiction to rescind a judgement.²⁰³

In the matter of *Tilly and others v The Commissioner for Inland Revenue*,²⁰⁴ it was held that the Magistrates' Court, faced with the provisions of sections 92²⁰⁵ and 94²⁰⁶ of the Income Tax Act, has no authority to question tax liability.

In another unreported judgement in the matter of *OJ Smith v Die Ontvanger van Inkomste*²⁰⁷ van der Walt R pointed out that, when a statement is filed with the clerk of the court, no notice is given to the taxpayer and no proceedings are before the court. A judgement given on the filing of a statement is not given on merit. The court explained the process as follows:

²⁰² S 43(3).

²⁰³ Abelman *The Judicial Officer* 65.

²⁰⁴ Unreported TPD A31/95.

²⁰⁵ S 91 provides that it shall not be competent for any person in any proceedings in connection with any statement filed in terms of paragraph (b) of subsection (1) of section ninety-one to question the correctness of any assessment on which such statement is based, notwithstanding that objection and appeal may have been lodged thereto.

²⁰⁶ S 94 provides that the production of any document under the hand of the Commissioner purporting to be a copy of or an extract from any notice of assessment shall be conclusive evidence of the making of such assessment and, except in the case of proceedings on appeal against the assessment, shall be conclusive evidence that the amount and all the particulars of such assessment appearing in such document are correct.

²⁰⁷ Unreported TPD A905/90.

Die oogmerk van die wetgewer is klaarblyklik om die Onvanger van Inkomste is staat te stel om die verskuldigde bedrag te kan vorder deur die uitreiking van 'n eksekusiebevel.²⁰⁸

The court held that any dispute the taxpayer might have must be adjudicated, according to the process and procedure as set out in sections 81 to 88 of the Income Tax Act.²⁰⁹ The purpose of a rescission of a judgement is to re-open an underlying dispute between the parties. On application for rescission the court has to consider whether the person against whom the judgement was taken has a *bona fide* defence.²¹⁰ Once rescission is granted, the dispute revives, but in the case of income tax the Magistrates' court does not have the jurisdiction to adjudicate such a dispute.

In the Customs and Excise Act there is not a similar objection and appeal process as provided for in the Income Tax Act. The jurisdictional limits under the VAT and Income Tax Act also differ from that under the Customs and Excise Act. Section 95(3) of the Customs and Excise Act provides that the Magistrates' Courts has unlimited jurisdiction.

A more important judgement for customs purposes is that of *Traco Marketing (Pty) Ltd and another v Minister of Finance*²¹¹ handed down by Melunsky J. Here the rescission of a judgement stemming from a statement filed with the registrar of the High Court, for the collection of VAT, was considered. In the court's view there is no reason why the High Court is not entitled to exercise its discretion in terms of the common law to rescind a judgement which was granted against a taxpayer in terms of the VAT Act.²¹² Rescission can be granted provided that sufficient cause therefore can be shown. This includes two essential elements, namely that the party seeking relief must present a

²⁰⁸ 6A.

²⁰⁹ 4B.

²¹⁰ 5A.

²¹¹ 1998(4)SA 74(SE).

²¹² 84 A-F.

reasonable and acceptable explanation for the default and on the merits the party has a *bona fide* defence.²¹³

Section 114(1)(a)(i)(cc) of the Customs and Excise Act provides that pending the conclusion of any proceedings, regarding a dispute as to the debt payable, the statement filed shall for recovery purposes be deemed to be correct. One might have a situation where a tariff determination is made, a letter of demand is issued and a statement is filed with the clerk of the court to collect any unpaid duty and VAT. Nothing prevents the importer to lodge a tariff appeal against such determination but pending the finalization of the appeal the statement filed will be deemed to be correct. This is also confirmed in section 47(9)(b)(i), which provides that any amount due in terms of a tariff determination will, notwithstanding any proceedings instituted, remain payable as long as such determination stay in force.²¹⁴ The section goes further and provides specifically that the Commissioner may, on good cause shown, suspend such payment until the date of any final judgement by the High Court or Supreme Court of Appeal.

A further point to be considered, is the question as to whether a notice of demand must be given before a statement is filed as contemplated in section 114(1)(a)(ii). In a recent judgement in *Singh v Commissioner for South African Revenue Service*,²¹⁵ the taxpayer sought an order setting aside a judgement obtained against him by the Commissioner in terms of the VAT Act. The taxpayer argued that notice of the assessment was not given to him before the statement was filed, which infringed his right to fair administrative action guaranteed under section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act.²¹⁶ The court held that the Commissioner must give notice to the taxpayer where he has made an assessment before he can recover the amount in terms of section 40(2) of the VAT Act.

²¹³ 84I - 85A.

²¹⁴ See S47(9)(b)(ii).

²¹⁵ 2003 (4) SA 520 (SCA).

²¹⁶ Act 3 of 2000.

...no taxpayer (bona fide or dishonest) who is kept in ignorance of the fact of an assessment and its contents can be expected to reconsider his liability and pay what he owes. A judgement is an appropriate remedy for the refusal or neglect of a debtor to pay his creditor when he knows fully well that he owes money.

This judgement is equally applicable to section 114 of the Customs and Excise Act. In practice a letter of intent is first send to the importer or manufacturer, giving them an opportunity to be heard even before the final letter of demand is issued.

The court, in line with the *Traco Marketing (Pty) Ltd v Commissioner for Customs & Excise* judgement, confirmed that the filing of the statement is a mere enforcement procedure and not a levying procedure. It is in my view clear that, although a letter of demand for the payment of a debt under the Customs and Excise Act cannot be handed to the debtor and a statement be filed on the same day, it does not preclude the Commissioner from placing a lien the very same day in order to secure the debt. As the lien serves merely to secure or strengthen an underlying cause of action, the placement of the lien would not preclude the debtor from instituting legal proceedings to dispute the liability of the underlying debt, as provided for in section 96 of the Customs and Excise Act.

The placement of a lien, the filling of statement or even the execution process in practise does not prohibit the debtor from bringing an application for the review of the underlying administrative decisions and action taken by the Commissioner. The pay-now-argue-later principle will entitle the Commissioner to proceed with such steps, irrespective of any other court intervention. It is clear the debtor may approach the Commissioner and request that the execution process be suspended. The debtor may also approach the Commissioner with alternative

security in order to obtain the uplift of the lien or even to stay the execution process pending the finalisation of such dispute.²¹⁷

6 Conclusion

The statutory lien has existed for a number of decades in South African law as a measure to encourage the prompt payment of taxes. It is clear that the placement of a lien today is primarily designed to secure the position of the State pending the outcome of a dispute or pending payment.

On first reading of the amended section 114 it appears very intricate, but I doubt that a court will have the same comments thereon as it had on the new Land and Agricultural Development Bank Act of 2002,²¹⁸ which replaced the since repealed Land Bank Act²¹⁹ of 1944. The latter was repealed in light of the *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others*²²⁰ judgement, which declared the section which, gave the Land Bank power to attach and sell immovable property of a debtor without recourse to a court of law, unconstitutional. In *Land and Agricultural Development Bank of SA t/a The Land Bank v Venter NO and Others*,²²¹ the court remarked that the provisions of the new 2002 Act are 'poorly drafted and difficult to interpret.'

Section 114 in its original form was challenged in the *Wesbank* judgements on two constitutional points. The first being that section 114 infringed the constitutional right to property of third parties, such as *Wesbank's*.²²² The second being that section 114 purported to empower the Commissioner to take the law into his own hands, which denied

²¹⁷ See *Traco Marketing (Pty) Ltd and another v Minister of Finance* 1998 4 SA 74 (SE).

²¹⁸ *Land and Agricultural Development Bank Act* 15 of 2002.

²¹⁹ *Land Bank Act* 13 of 1944.

²²⁰ 2000 3 SA 626 (CC).

²²¹ [2004] 2 All SA 314 (O).

²²² S 25 of the *Constitution of the Republic of South Africa*, 1996.

customs debtors the protection of the adjudicatory process, as well as the supervision exercised by the court over the process of execution.²²³

Since the amendment of section 114, liens may now only be placed on goods belonging to the debtor, or goods in respect of which the debtor entered into a credit agreement as contemplated in the Credit Agreements Act. With regard to the second category of goods, a lien is only placed on the right, title and interest of the Customs debtor on anything subject of a credit agreement. The lien will only serve as security for such, expressed in a liquid amount. The constitutional right to property of the credit grantor will therefore no longer be infringed, and will in my view survive constitutional scrutiny in relation to section 25 of the Constitution.

All goods detained subject to a lien, will also no longer be sold after the lapse of the earlier required three month period. It is clear that a lien is no longer allowed to operate as a collection tool in itself, but merely a discretionary starting block in the collection process now under the watchful eye of the court. Section 114 now provides for judicial intervention before the sale of goods. In this regard the provisions of section 40(2) of the VAT Act was copied and enacted in section 114(1)(a)(ii). In the Constitutional Court judgement this was in fact suggested to remove any inconsistency with section 34 of the Constitution.²²⁴

Section 40(2) of the VAT Act already survived constitutional scrutiny in the *Metcash* matter, where it was held that by providing that the Commissioner's statement, had all the effects of a civil judgement once filed, the section included by reference the whole body of legal rules relating to execution. The ordinary civil process of execution was employed and the Commissioner was not authorised to usurp any judicial functions and resort to self-help.²²⁵ Nothing precludes customs

²²³ S 34 of the *Constitution of the Republic of South Africa*, 1996.

²²⁴ [108].

²²⁵ [49] and [51].

debtors to approach the court for appropriate relief, be it an application for review or appeal on tariff or valuation matters. Section 114 as amended, would now be in compliance with section 34 of the Constitution.

In my view the amended section 114 and more specifically the customs and excise lien, complies with the Constitutional Court judgement and will survive similar constitutional scrutiny.

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ABBREVIATIONS

SA Merc LJ

SA Mercantile Law Journal

TSAR

Tydskrif vir Suid-Afrikaanse Reg