

160/74
76/091

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

{ APPELLANT Provincial Division)
Provinciale Afdeling)

Appeal in Civil Case
Appel in Siviele Saak

SECRETARY FOR CUSTOMS & EXCISE

Appellant,

versus

RAIRIE MILLIKAN E.

Respondent

Appellant's Attorney

Prokureur vir Appellant D.L.S.A. (B.L.S.)

Respondent's Attorney

Prokureur vir Respondent

IN PERSON

Appellant's Advocate

Advokaat vir Appellant

E.M. de la Tour

Respondent's Advocate

Advokaat vir Respondent

No Appearance

Set down for hearing on

Op die rol geplaas vir verhoor op

2-5-1975

346711

Consent: Botha, Holmes, Trottier, /Kudde SS, /A
et Gough et A.T.A.

(W.L.D.) 9.45 am ————— 11.00 am
11.30 am ————— 12.30 pm

C. A. 21

The Court dismisses the said
appeal and, by agreement,
makes no order as to costs

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Judgment per
Botha

Bills taxed—Kosterekenings getaksier

Amount
Bedrag

Initials
Paraaf

[Signature]

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE SECRETARY FOR CUSTOMS AND EXCISE

Appellant

and

RALPH MILLMAN N.O.

Respondent

Coram: Botha, Holmes, Trollip, Muller, JJ.A. et

Galgut, A.J.A.

Heard: 2 May 1975.

Delivered: 19 May 1975.

J U D G M E N T

BOTHA, J.A.:

The appellant is the Secretary for Customs and Excise acting under the Customs and Excise Act 91 of 1964, and the respondent is Ralph Millman in his capacity as the receiver for creditors in terms of a compromise effected with the creditors of Star Bed and Mattress

Manufacturing.../2

Manufacturing Company (Pty) Ltd (hereinafter referred to as the company) which compromise was sanctioned by the Witwatersrand Local Division on 24 April 1973 in terms of section 103 of the Companies Act 46 of 1926.

Until 9 August 1972 the company manufactured goods in the Republic which goods were "sales duty goods" as defined in section 1 of the Customs and Excise Act 1964. As at 9 August 1972 the balance of the amount of sales duty payable under the Customs and Excise Act in respect of the goods manufactured by the company amounted to R6 897-81, which amount constituted a debt due to the State by the company in terms of section 114 of the Customs and Excise Act, 1964.

On 9 August 1972 an "officer" of the Department of Customs and Excise, as defined in section 1 of the Customs and Excise Act, purporting to act in terms of section 114 of the Act, detained certain plant, the property of the company and found in its possession or under its control, by sealing and marking same, apparently in an attempt to establish a lien over the said plant in favour

of the State in terms of the said section 114 until the
aforesaid debt was paid.

On the same date upon which the plant was
detained as aforesaid, the company, being unable to pay
its debts, was placed in provisional liquidation, and it
was common cause in this Court that the liquidation pro-
ceedings commenced and that the provisional order of
liquidation was granted prior to the detention of the said
plant.

In terms of section 115 of the Companies Act
1926 the winding-up of a company is deemed to commence at
the time of the presentation of the petition therefor.

The respondent was appointed provisional
liquidator of the company on 6 September 1972. Thereafter
a compromise was effected with the company's creditors.
After the compromise was sanctioned by the court, the
provisional winding-up order was discharged on 24 April 1973.

On 10 April 1973 the respondent advised
the appellant as follows -

"I refer to your claim of R6 897-81 in the above matter, and advise that it is my contention that you have no security regarding this claim in view of the fact that you established your lien after proceedings were instituted placing this company in provisional liquidation.

Your claim would therefore be regarded as concurrent for purposes of dividend distributions."

The appellant in consequence applied on notice of motion in the Witwatersrand Local Division for an order -

"(a) declaring the plant set out in annexure A to the accompanying affidavit of Jacobus Adriaan Lambrechts to have been validly detained (on 9 August 1972) by the applicant in terms of section 114 of the Customs and Excise Act, 1964 (Act 91 of 1964) and to be subject to the lien envisaged by the said section 114;

(b) declaring the State to be a secured and not a concurrent creditor of Star Bed and Mattress Manufacturing Company (Proprietary) Limited for a debt constituted in terms of the said section 114 in the sum of R6 897-81".

In the court a quo Human, J., concluded that the appellant was -

"an unsecured creditor at the time of the provisional winding-up order and could not thereafter create a valid security for a pre-liquidation debt."

The application was accordingly dismissed and by agreement there was no order as to costs.

By consent of the parties the appellant now appeals direct to this Court against the dismissal of the application.

The relevant provisions of section 114 of the Customs and Excise Act 1964 as amended read as follows -

"(1) (a) The correct amount of duty payable in respect of any goods imported into or exported from the Republic or any goods manufactured in the

Republic and any fine, penalty or forfeiture incurred under this Act shall, from the time that it should have been paid, constitute a debt due to the State by the person concerned, and any goods in a customs and excise warehouse or in the custody of the department (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 goods in respect of which an excise or sales duty is prescribed (whether or not such duty has been paid) and any plant, stills and materials for the manufacture of such goods in the possession or under the control of such person or on any premises in the possession or under the control of such person and any vehicles in the possession or under the control of such person in which fuel, being illicit goods, has been used, may be detained in accordance with the provisions of sub-section (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 such lien 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.

(2) The Secretary or any officer may detain anything referred to in sub-section (1) by sealing, marking, locking fastening or otherwise securing or impounding it on the premises where it is found: Provided that the Secretary may allow any such thing to be used by the owner thereof under such conditions as he may impose in each case."

The court a quo held that a lien under section 114 (1) (a) is established over goods only upon the detention in terms of section 114 (2) of the goods in question and that, in the absence of express provision to that effect in section 114, such a lien cannot be thus established over goods belonging to or in the possession or under the control

of a company after an order for the compulsory winding-up
 of that company has been made.

The first question to be decided, therefore, is whether the lien claimed by the appellant under section 114 (1) (a) in respect of the plant in question could only have been established upon the detention thereof in terms of section 114 (2); in other words, whether such detention was a pre-requisite to the establishment of the lien claimed.

At common law the State or fiscus enjoyed a legal hypothec over the property of its citizens in respect of, inter alia, taxes and dues owing to the State. (Voet 20.2.8 and Grotius 2.48.15). The preference afforded by tacit hypothecs, including the legal hypothecs enjoyed by the State but excluding the landlord's hypothec, was abolished by section 86 of the Insolvency Act 32 of 1916 (now section 85 of the Insolvency Act 24 of 1936). (See The Receiver of Revenue vs. M. Barlinski & Co. Ltd (In Liquidation) 1920 C.P.D. 410).

The preference afforded in favour of the State by the legal hypothecs abovementioned made provisions similar to the provisions of section 114 of the Customs and Excise Act 91 of 1964 largely unnecessary for the protection of the interests of the State, and it is probably because of the existence at the time of the aforesaid legal hypothecs that the Customs Management Act 9 of 1913 contained no such provisions. When the preference afforded by the abovementioned legal hypothecs was abolished in 1916 the position changed, however, and it is probably because of such abolition that section 142 (1) of the Customs Act 35 of 1944 provided that -

"The correct amount of duty payable in respect of any goods imported into or exported from the Union and any fine, penalty or forfeiture incurred under any law relating to customs shall, from the time that it should have been paid, constitute a debt due to the State by the person concerned, and any goods in a bonded warehouse or in the custody of the department and belonging to that person, and any goods afterwards imported

or exported by the person by whom the debt is due, shall, while still under the control of the department, be subject to a lien for such debt and may be detained by the department until such debt is paid, and the claims of the State shall have priority over the claims of all persons upon the said goods of whatever nature, 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."

These provisions were re-enacted in section 146 of the Customs Act 55 of 1955 which replaced the Act of 1944.

Prior to the present Customs and Excise Act of 1964, which deals with matters relating to both customs and excise, matters relating to customs and excise respectively were contained in separate enactments. The last Excise Act was Act 62 of 1956, section 89 of which read as follows -

89. (1) The Commissioner may-

(a) if duty payable by any person is unpaid at the expiry of the period prescribed; or

(b) if, in his opinion, there is danger that payment of duty in respect of.../11

of any article will be evaded by such person,

authorize in writing any person to seize any excisable goods and any materials for the manufacture of such goods in the possession or under the control of the person liable to pay the duty, whether the same belong to him or not, and any stills, vessels, appliances, utensils and materials for the manufacture of such goods upon any premises in his possession or under his control.

- (2) Notice in writing shall forthwith be given to the person liable to pay the duty that the articles so seized will be sold by public auction on a day and at an hour and place specified in the notice, the time specified being not less than seven clear days from the date of the notice.
- (3) At any time before the hour specified for the sale, the said person shall, on payment to the proper officer of the amount payable as duty and of the cost of the seizure and of the preparations for sale be entitled to resume possession of the articles seized.
- (4) If such amount is not paid by the said person before the hour specified for the sale, the articles seized shall be sold by public auction and the proceeds of sale shall, after deduction of the cost of the distress and sale, be applied to the payment of the duty aforesaid

and the balance (if any) shall
~~be paid over to the person entitled~~
 thereto."

Similar provisions were contained in section
 89 of the previous Excise Act 45 of 1942.

There are marked similarities between the
 provisions of section 114 (1) (a) of the Customs and
 Excise Act 91 of 1964 and the provisions of section 146
 of the Customs Act 55 of 1955 and section 89 of the Excise
 Act 62 of 1956. It is true that the latter section did
 not provide for the establishment of a lien, but it did
 provide for the seizure and sale of certain goods where excise
 duty had not been paid; a procedure which serves the same
 purpose as a lien. The section further applied to more
 or less the same categories of goods as does the second
 part of section 114 (1) (a) of the 1964 Act. Between the
 first part of the latter section and section 146 of the
 Customs Act 1955 there are obvious similarities. In the
 circumstances I think it is fair to say that section 114 of

the 1964 Customs and Excise Act is a consolidation and amendment of the provisions of section 89 of the Excise Act 62 of 1956 and section 146 of the Customs Act 55 of 1955.

It will have been observed that section 146 of the 1955 Customs Act did not provide for the detention of the goods in respect of which the lien envisaged by that section was established. That was no doubt due to the fact that the lien was established only in respect of goods belonging to the debtor and in the custody or under the control of the Department of Customs and Excise. The lien envisaged by section 114 (1) of the 1964 Act is established not only in respect of goods belonging to the debtor and in the custody or under the control of the Department, but also in respect of goods in the possession or under the control of the debtor, whether belonging to that debtor or not.

The question is whether the Legislature intended the lien envisaged by section 114 (1) (a) to be automatically established in respect of all such goods without the detention of any such goods by the Secretary for

Customs and Excise in terms of section 114 (2). If such a detention were to be necessary it would, in respect of goods in the custody or under the control of the department be a departure from the provisions of section 146 of the Customs Act 55 of 1955, while if it were to be unnecessary, it would be a departure from the provisions of section 89 of the Excise Act 62 of 1956 in respect of goods in the possession or under the control of the debtor, whether belonging to him or not.

It is not expressly provided in section 114 (1) (a) that detention of goods in terms of section 114 (2) shall be a pre-requisite to the establishment of a lien in respect of those goods such as envisaged by the section. The concluding words of the section "shall be subject to a lien until such debt is paid" apply, as a matter of pure semantics, as much to all the goods mentioned in the section as do the words "may be detained in accordance with the provisions of sub-section (2)". Doubt is, however,

created by the fact that the words "shall be subject to a lien" are preceded by the words "may be detained in accordance with the provisions of sub-section (2)", for the order of the words does suggest that there shall first be a detention of the goods before the lien is established. This suggestion is strengthened by the consideration that a detention of goods in accordance with the provisions of section 114 (2) creates some measure of control by the department over those goods not already in its custody or under its control, without which an effective lien or right of retention is difficult to conceive. Ordinarily a lien in respect of goods confers upon the person in possession of those goods the right to retain possession of those goods until the relevant debt is paid. Loss of possession usually terminates the lien. It is significant that under the goods in respect of which a lien was established under section 146 of the Customs Act 1955 were included "any goods afterwards imported or exported by the person by whom the

debt is due, while still under the control of the department". The same category of goods is included in section 114 (1) (a) of the 1964 Act, but without the qualification "while still under the control of the department". The omission of this qualification in section 114 (1) (a) is explicable only on the hypothesis that detention in accordance with section 114 (2) was contemplated as a necessary pre-requisite to the establishment of the lien, for it is inconceivable that the Legislature would have intended to establish a lien over all goods "afterwards imported or exported" by the debtor, irrespective of where those goods may be.

The lien envisaged by section 114 (1) (a) is far more extensive than the legal hypothec enjoyed by the State at common law in respect of taxes due to it, for whereas the latter extended over the property of the debtor only, the former extends also over property belonging to third persons, including any vehicle in which fuel, being

illicit goods, has been used, apparently by any person, and not necessarily by the debtor or the owner of the vehicle.

It extends moreover over "any goods in respect of which an excise or sales duty is prescribed (whether or not such duty has been paid)", apparently whether such goods are the property^{of} or in the possession or under the control of the debtor or not. It is inconceivable that the legislature could have intended to establish, perhaps in respect of a minor debt, an automatic and largely ineffective lien over all such goods as are mentioned in section 114 (1) (a) without some form of prior appropriation to make the lien effective, such as a detention in accordance with the provisions of section 114 (2), particularly having regard to the provisions of the repealed section 89 of the Excise Act 1956.

It was not contended on behalf of the appellant that a detention in accordance with section 114 (2) was not a pre-requisite to the establishment over those goods of the lien envisaged by section 114 (1) (a).

Indeed, it is clear from the founding affidavits on behalf

of the appellant that the plant in question in this case was detained in terms of section 114 (2) for the very purpose of establishing a lien over the said plant until the debt in question was paid. We were in fact informed from the Bar that the Department of Customs and Excise, by whom the Customs and Excise Act 1964 is administered, does not hold the view that a detention in terms of section 114 (2) is not a condition precedent to the establishment of a lien under section 114 (1) (a).

We do not know for how long this view has been held by the department, but it is a factor which, in view of the ambiguous language of section 114 (1) (a), cannot be overlooked, and it may, together with the considerations I have mentioned, well be invoked to tip the balance where the language of section 114 (1) (a) may fairly be construed in either of two ways. (Dig. 1.3.37 Voet 1.3.19; R. vs. Lloyd, 1920 A D. at p. 485, and R. vs. Detody, 1926 A D 198 at pp. 202/203).

For these reasons the court a quo in my view correctly held that detention of the goods in accordance with section 114 (2) is a condition precedent to the establishment over those goods of the lien envisaged by section 114 (1) (a).

In regard to the question whether a lien under section 114 can be thus established over goods belonging to or in the possession or under the control of a company after an order for the compulsory winding-up of that company has been made, counsel for the appellant contended that section 114 clearly authorises the Secretary for Customs and Excise to establish such a lien over such goods by the detention thereof at any time before or after the provisional winding-up of a company.

The difficulty with this submission is that it leaves uncertain the point of time up to which such a lien may, after the provisional order has been made, be

thus.../20

thus established, and that the winding-up of the company may be thereby seriously disrupted. Counsel suggested that the lien could be so established at any time up to the issue of the final order of liquidation. There is no basis for such a suggestion which was made purely arbitrarily, particularly in view of the fact that the effects of a provisional order of liquidation do not differ from those of a final order, and in view of the fact that section 115 of the Companies Act 1926 provides that "a winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up".

Section 114 of the Customs and Excise Act 1964 is silent as to whether or not the lien envisaged by that section can be established by the detention of the goods of a company after an order for the compulsory winding-up of that company has been made. The language of the section does not expressly preclude it, but if construed in the light of the common law, it does not seem to authorize it.

Section 114 of the Companies Act 1926 provides

that -

"An order for winding-up a company shall operate in favour of all the creditors and of all the contributories of the company as if the petition had been presented by all the creditors and contributories jointly".

In Walker vs. Syfret, N.O. 1911 A.D. 141, Lord de Villiers, C.J. held, at page 160, that -

"The effect of a winding-up order is to establish a concursum creditorum, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors."

At p. 166 Innes, J.A. said-

"The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard

to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

In the light of the common law as thus stated, it is 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 cannot, in my view, be construed as authorizing the establishment of such a 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 124 (3) (b) of the Companies Act, 1926 all the property of a company shall 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."

In view of this special provision in the Companies Act 1926, the property of a company is not, upon its winding-up, by reason of section 182 of the Companies Act 1926, vested in the Master and the liquidator in terms of section 20 of the Insolvency Act 1936 as was supposed in the majority judgments in Cornelissen N.O. vs. Universal Caravan Sales (Pty.) Ltd., 1971 (3) S.A. 158 at pp. 177, 183.

Upon the compulsory winding-up of a company its directors cease to function as such (Attorney-General vs. Blumenthal, 1961 (4) S.A.313 at pp. 314/5), and they are, therefore, deprived of their control on behalf of the company of the property of the company which is then deemed to be in the custody or control of the Master or liquidator. When the plant in question in this case was detained on 9 August 1972 it was no longer "in the possession of or under the control of" the company within the meaning of

that...../24

that expression in section 114 (1) (a) and it could not
therefore have been lawfully detained under that section.

The appeal accordingly fails and is dismissed.

By agreement between the parties there will be no order as
to costs.

D.H. Botha
D.H. BOTHA. J.A.

HOLMES, J.A. }
TROLLIP, J.A. } Concur.
MULLER, J.A. }
GALGUT. A.J.A. }