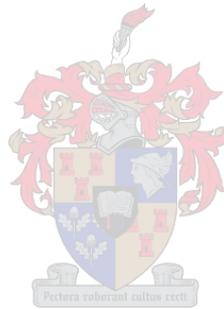


The Lessor's Tacit Hypothec: A Constitutional Analysis

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Supervisor: Prof AJ van der Walt

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Nzumbululo Silas Siphuma

14 August 2013, Stellenbosch

Summary

The lessor's tacit hypothec improves the chances of the lessor to recover rent in arrears. This real security right arises by operation of law and attaches to the lessee's movable property found on the leased premises when rent is due but not paid. The extension of the lessor's tacit hypothec to third parties' property is the remedy's most controversial feature. The extension is supposedly based on one of two theoretical justifications, namely implied consent and the doctrine of estoppel. According to the implied-consent theory, the extension is based on the premise that the third party consented (explicitly or by implication) that his property can serve as security for the payment of the lessee's arrear rent. The basis of the second theory, the doctrine of estoppel, operates as a limitation on the *rei vindicatio* of the third party. Over the years discourse has shown that there are uncertainties surrounding these justifications. Recent debate has also shown that if constitutionally challenged, the extension of the lessor's tacit hypothec could amount to arbitrary deprivation of third parties' property.

The aim of this thesis is to establish whether and how the existing common law principles that provide for the extension of the lessor's tacit hypothec over property belonging to third parties are affected by section 25(1) of the Constitution. Consequently, the thesis describes, analyses and scrutinises the general principles regulating the lessor's tacit hypothec, and more specifically the extension of the lessor's tacit hypothec to third parties' property, in view of section 25(1) of the Constitution.

Taking into considering the recent statutory protection of third parties' property, the thesis concludes that the extension of the lessor's tacit hypothec does not constitute an arbitrary deprivation of third parties' property because correct application of the common law principles that provide for the extension and the statutory protection that has been introduced to exclude a large number of cases from the reach of the extension adequately protect third parties' property interests. Therefore, the requirements of section 25(1) are satisfied.

Opsomming

Die verhuurder se stilswyende hipoteek verbeter sy kanse om agterstallige huur van sy huurder in te vorder. Wanneer die huur opeisbaar word, maar die huurder versuim om tydig te betaal, kom hierdie saaklike sekerheidsreg deur regswerking tot stand en dit dek alle roerende sake wat op die verhuurde perseel gevind word. Die uitbreiding van die stilwyende hipoteek na eiendom wat aan derde partye behoort is die remedie se mees kontroversiële eienskap. Hierdie uitbreiding van die hipoteek se toepassingsveld berus na bewering op een van twee regverdigingsgronde, naamlik die derde se geïmpliseerde toestemming en die leerstuk van estoppel. Volgens die geïmpliseerde toestemming-teorie kan die hipoteek na derdes se bates uitgebrei word op die veronderstelling dat sodanige derde partye toegestem het (uitdruklik of by implikasie) dat hulle eiendom as sekuriteit vir betaling van die huurder se agterstallige huur mag dien. Die tweede teorie steun op die beperking wat die leerstuk van estoppel op die *rei vindicatio* van die derde party plaas. Oor die jare het debatte aangedui dat daar onsekerhede rondom hierdie regverdigingsgronde bestaan. Onlangse debatte het ook aangetoon dat, indien dit grondwetlik getoets word, die uitbreiding van die hipoteek moontlik mag neerkom op 'n arbitrêre ontneming van die derdes se eiendom.

Die doel van hierdie tesis is om vas te stel of en hoe die bestaande gemeenregtelike beginsels wat die stilswyende hipoteek na bates van derdes uitbrei deur artikel 25(1) van die Grondwet beïnvloed word. Die tesis bespreek, analiseer en toets gevolglik die algemene beginsels van die verhuurder se stilswyende hipoteek, en meer spesifiek die uitbreiding van die hipoteek na bates wat aan derdes behoort, in die lig van artikel 25(1) van die Grondwet.

Met inagneming van die beskerming wat derde party se eiendom in terme van onlangse wetgewing geniet, bevind die tesis dat die uitgebreide toepassing van die stilswyende hipoteek nie op 'n arbitrêre ontneming van derde partye se eiendom neerkom nie omdat korrekte toepassing van die gemeenregtelike beginsels wat vir die uitbreiding voorsiening maak, in kombinasie met die wetgewende uitsluiting van 'n groot aantal sake wat aan derdes behoort, voldoende beskerming aan die belange van derdes verleen. Die vereistes van artikel 25(1) word dus bevredig.

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Chapter 1: Introduction

1 1 Introduction

Real security is a limited real right that secures an obligation by entitling the creditor to have the encumbered property attached and sold in execution. Real security also grants the creditor a “right of first preference” regarding the proceeds of sale in execution of the security object against unsecured creditors and holders of subsequent real security rights.¹ Real security rights are accessory in nature. This means that the creation and continued existence of real security rights depend on the existence of a valid underlying principal obligation.² Thus, when the secured obligation ceases to exist, the real right of the secured creditor also comes to an end.³ Unlike personal security that is enforceable only against a specific person, real security rights are enforceable against the world at large.

Modern South African law recognises only one of the original Roman tacit hypothecs, namely the lessor’s tacit hypothec.⁴ The lessor’s tacit hypothec (also known as the landlord’s tacit hypothec) is a real security right created by operation of

¹ See CG van der Merwe “Real security” in F du Bois (ed) *Wille’s Principles of South African law* (9th ed 2007) 630-665 631. See also AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 258; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5th ed 2006) 357; M Kaser *Römisches Privatrecht* (6th ed 1960 trans by R Dannenbring *Roman private law* 2nd ed 1968)126; B Nicholas *An introduction to Roman law* (1962) 150.

² See H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 300; GF Lubbe “Mortgage and pledge” rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 437; CG van der Merwe “Real security” in F du Bois (ed) *Wille’s Principles of South African law* (9th ed 2007) 630-665 631; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5th ed 2006) 358; GJ Pienaar & AJM Steven “Real security” in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2004) 758-786 760; AJM Steven “Accessoriness and security over land” (2009) 13 *Edin LR* 387-426 388.

³ *SA Timber & Joinery Works (Pty) Ltd v The Sherriff* 1955 (4) SA 56 (O). See further H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; GF Lubbe “Mortgage and pledge” rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 438.

⁴ See s 85(1) of the Insolvency Act 24 of 1936; s 2 of the Security by Means of Movable Property Act 57 of 1993; *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 18; *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 514D-E. See further H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; GF Lubbe “Mortgage and pledge” rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440; CG van der Merwe “Real security” in F du Bois (ed) *Wille’s Principles of South African law* (9th ed 2007) 630-665 655; D Smith “The constitutionality of the lessor’s hypothec: Attachment of a third party’s goods” (2011) 27 *SAJHR* 308-330 310.

law to secure the lessor's claim against the lessee for rent in arrears. The ability of the lessor to apply for attachment of the goods belonging to the lessee is the remedy's most salient feature.⁵ This tacit hypothec vests over movables (*invecta et illata*),⁶ including money brought on to the leased premises as well as the fruits of the land, to secure the payment of rent in arrears.⁷ The hypothec comes into existence the moment the lessee falls into arrears and terminates upon payment of the due amount.⁸ The lessor's hypothec is an accessory to the contract of lease and need not be negotiated by the parties.⁹ However, prior to attachment or the lessee's insolvency the hypothec holder (lessor) obtains no real right of security, with the effect that the *invecta et illata* forming the subject matter of the hypothec can simply be removed from the leased premises, thus depriving the lessor of his security.¹⁰

Once the lessor's hypothec has been perfected (by way of court order and attachment), the lessor acquires a real security right. This right entails a preference to the proceeds following a sale in execution of the movable property. In addition, the lessor is entitled to prevent the lessee from removing the *invecta et illata* from the premises or to claim their return if they have been removed. The thesis reviews the general principles of the lessor's tacit hypothec. The main focus of thesis is on the rationale for the extension of the lessor's tacit hypothec to third parties' property.

1 2 Research problems, hypotheses, research aims and methodology

The general principle is that the lessor's tacit hypothec operates against the lessee's movables brought on to the premises for permanent use by the lessee, irrespective

⁵ AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12 *EJCL* 1-18 8.

⁶ *Invecta et illata* are movable goods brought on to the leased premises by the lessee.

⁷ *Woodrow and Co v Rothman* 1884 (4) EDC 201; *Webster v Ellison* 1911 AD 73 79, 86; *Ordermann v Peinke* 1911 EDL 201; *Sugarman and SA Breweries Ltd v Burrows* 1916 WLD 73. See also TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99.

⁸ *Noble v Heatley* 1905 TS 433.

⁹ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 405.

¹⁰ S 32 of Magistrates' Courts Act 32 of 1944; Magistrates' Court rule 56. See also *Timmeman v Le Roux* 2000 (4) SA 59 (W) 65 I; *Halstead v Durant NO* 2002 (1) SA 27 (W) 282 C; *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 514D-G per Van der Walt J (Van der Westhuizen J concurring). The dissenting minority judgment per Preller AJ 514D-G "found the opposite in that *Webster v Ellison* 1911 AD 73 79 was, if correctly read, not authority for the proposition that the perfecting (by attachment) was necessary for the establishment of the landlord's hypothec." See also H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 405; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99.

of whether the lessor was aware of their presence.¹¹ However, in certain circumstances the hypothec operates contrary to the principle,¹² in that it also applies against the property of third parties found on the leased premises.¹³ In these situations, the lessor's tacit hypothec may only extend to the movable goods belonging to third parties if the property of the lessee and sub-lessee proves insufficient to satisfy the lessor's claim for arrear rent.¹⁴ The law with regard to the extension of the lessor's tacit hypothec to a third party's property was laid down by the then Appellate Division of the Supreme Court in *Bloemfontein Municipality v Jacksons Ltd.*¹⁵

“When goods belonging to a third person are brought on to leased premises with the knowledge and consent, express or implied, of the owner of the goods, and with the intention that they shall remain there indefinitely for the use of the tenant, and the owner, being in a position to give notice of his ownership to the landlord fails to do so, and the landlord is unaware that the goods do not belong to the tenant, the owner will thereby be taken to have consented to the goods being subject to the landlord's tacit hypothec and liable to attachment.”¹⁶

The requirements for attaching property belonging to third parties in terms of the lessor's tacit hypothec were set out in *Bloemfontein Municipality v Jacksons Ltd.*¹⁷

- The property must be on the premises with the knowledge of its owner;

¹¹ *Friedlander v Croxford & Rhodes* 1867 (5) Searle 395; *Mackay Bros Ltd v Eaglestone* 1932 TPD 301 305; *Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd* 1933 CPD 550 567.

¹² *Goldinger's Trustee v Whitelaw Son* 1916 TPD 230 235; *Van den Bergh, Melamed & Nathan v Polliack & Co* 1940 TPD 237 238. See also CG van der Merwe “Real security” in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 657.

¹³ *Bushing v Kinnear* 1885 (5) HCG 254 (presumption that *invecta et illata* belong to the person in whose ostensible possession they are found must be rebutted for property to be treated as belonging to a third party). See also AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 275; CG van der Merwe “Real security” in F Du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 657.

¹⁴ *Friedlander v Croxford and Rhodes* 1867 (5) Searle 395 (in case of an invalid sublease, the sub-lessee is in position of a third party whose movables have been brought onto the premises); *Ex parte Aegis Assurance & Trust Co Ltd* 1909 EDC 363; *Ex parte Adler* 1911 EDL 106; *Yost Typewriter Co v Andrew* 1915 (3) NPD 213 (the lessee has a hypothec over the *invecta et illata* of the sub-lessee); *Reinold & Co v Oudtshoorn* 1931 TPD 382; *Odendaal v Van Oudshoorn* 1968 (3) SA 433; *Standard Bank Financial Services Ltd v Tylam (Pty) Ltd* 1972 (2) SA 383 (C); *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T). See also CG van der Merwe “Real security” in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 657; D Smith “The constitutionality of the lessor's hypothec: Attachment of a third party's goods” (2011) 27 SAJHR 308-330 311.

¹⁵ 1929 AD 226 271.

¹⁶ See also *Barclays Western Bank Ltd v Dekker & Another* 1984 (3) SA 220 (D) 222-223; *TR Services (Pty) Ltd v Poynton's Corner Ltd & Others* 1961 (1) SA 773 (D) 775.

¹⁷ 1929 AD 226 227.

- the property must be present with some degree of permanence and not merely temporarily;
- the property must be there for the lessee's own use and benefit; and
- the landlord must be unaware of the fact that the property belongs to someone else and not to the lessee.

These requirements, which serve as the justifications for allowing attachment of third parties' property to secure the lessee arrear rent, have been confirmed by the courts in *Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd*¹⁸ and *Eight Kaya Sands v Valley Irrigation Equipment*.¹⁹ However, in recent years discussions have shown that there is uncertainty concerning these justifications for the extension of the lessor's tacit hypothec to third parties' property for the payment of the arrear rent of the lessee. This uncertainty has recently become more apparent, and in *TR Services (Pty) Ltd v Poynton's Corner Ltd & Others*²⁰ Warner J expressed the following opinion:

“[I]t is very difficult to discover the true basis for the landlord having a hypothec over the goods of third parties in the possession of the tenants ... this ... appears to be a strange approach because I find the greatest difficulty in believing that any owner, if asked the question, would agree to his goods being made subject to such hypothec. He would almost inevitably reply: ‘Of course I do not agree to it; why should I?’”

In *Eight Kaya Sands v Valley Irrigation Equipment*²¹ Van der Walt J in an *obiter dictum* stated that there is no legal relationship between the lessor and a third party whose movables are on the leased premises and therefore, there is no justification to attach the third party's property as security for the debt of the lessee.²²

The main research question in this thesis is whether and how the existing common law principles that provide for the extension of the lessor's tacit hypothec to

¹⁸ 1933 CPD 550.

¹⁹ 2003 (2) SA 495 (T) 500–502.

²⁰ 1961 (1) SA 773 (N) 775D-H.

²¹ 2003 (2) SA 495 (T) 500G-H.

²² See also AJM Steven “Landlord's hypothec in comparative perspective” (2008) 12 *EJCL* 1-18 14; JS McLennan “A lessor's hypothec over the goods of third parties – anomaly and anachronism” (2004) 16 *SA Merc LJ* 121-125 125.

a third party's property provide adequate protection to the third party's constitutional property rights and if not, whether the common law principles need to develop in a different direction under the influence of the Constitution. It is therefore important to carefully scrutinise the justifications for the extension of the lessor's tacit hypothec to third parties' property as laid down in *Bloemfontein Municipality v Jacksons Ltd*.²³

In as far as the lessor's tacit hypothec extends to property belonging to third parties it may be inconsistent with section 25(1) of the Constitution, which protects third parties' property rights against arbitrary deprivation. However, if the existing common law principles protect the interests of affected third parties adequately, the extension of the lessor's tacit hypothec will probably be in line with section 25(1) of the Constitution.

In order to investigate the extension of the lessor's tacit hypothec to a third party's property and to understand how it applies in practice, I will describe and analyse the literature regarding the lessor's tacit hypothec. The purpose for such description and analysis is to enable an understanding of how the lessor's hypothec developed and how it operates with respect to a third party's property. This investigation should also indicate the justifications for the application of the lessor's tacit hypothec to a third party's property and the protection that is available to protect the property rights of third parties. The methodology expounded by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*²⁴ is applied to determine whether the justifications of the extension of the lessor's tacit hypothec and legislative protection of third parties' property rights adequately protect third parties' constitutional property rights. In fact, section 25(1) of the Constitution prohibits arbitrary deprivation of property and requires sufficient reasons for a deprivation. Accordingly, the justification for the extension of the lessor's tacit hypothec would have to provide that sufficient reason to ensure that it does not cause arbitrary deprivation.

²³ 1929 AD 266 227.

²⁴ 2002 (4) SA 768 (CC) para 46.

1 3 Overview of chapters

The thesis starts by exploring the general principles that provide for the lessor's tacit hypothec in Roman-Dutch law. The meaning of real security and the common law forms of real security that existed in Roman law prior to the evolution of the lessor's tacit hypothec are considered briefly to illustrate the need for and importance of the lessor's tacit hypothec. Followed by an analysis of the acceptance of the lessor's tacit hypothec in South African law, Chapter 2 explores the nature and ownership of the property that is bound by the lessor's tacit hypothec, the accrual of the hypothec, attachment and its legal effects, and the lessor's preference upon the lessee's insolvency.

Chapter 3 turns to the extension of the lessor's tacit hypothec to third parties' property. The chapter starts by describing and examining the extension principle and its origins. More specifically, the chapter focuses on setting out the justifications for the extension of the lessor's tacit hypothec to third parties' property as well as the protective measures developed under the common law and recently enacted statutory protection for third parties' property rights against the extension of the lessor's tacit hypothec. Hence, the chapter discusses and analyses the implied consent and estoppel theories that are usually offered as justifications for the extension of the lessor's tacit hypothec with reference to case law prior to 1929, the 1929 case of *Bloemfontein Municipality v Jacksons Ltd*²⁵ and post-1929 case law to create a framework within which the protection of third parties' constitutional property rights is evaluated.

Chapter 4 draws on the research conducted in the previous chapters as a basis for interpreting and understanding justifications for the extension of the lessor's tacit hypothec to property belonging to third parties. The justifications (theories) for the extension of the lessor's tacit hypothec to third parties' property as they are understood and applied in practice are scrutinised in the light of section 25(1) of the Constitution to determine the constitutional validity of the extension of the lessor's tacit hypothec to third parties' property. The methodology set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*²⁶ is followed to establish

²⁵ 1929 AD 266.

²⁶ 2002 (4) SA 768 (CC) para 46.

whether the extension of the lessor's tacit hypothec to third parties' property constitutes arbitrary deprivation of the third parties' property. Taking into consideration the clarification of the justifications for the extension of the lessor's tacit hypothec to third parties' property established in Chapter 3, the extension of the lessor's tacit hypothec to property belonging to a third party is compared to the legislative provision that was at issue in the *FNB* case.

Chapter 5 brings together the conclusions drawn from the analyses in the previous chapters and provides certain recommendation that may assist the courts when applying the extension of the lessor's tacit hypothec to third parties' property.

Chapter 2: General principles

2 1 Introduction

The purpose of this chapter is to describe and analyse the common law principles that provide for the lessor's tacit hypothec, with the aim to enable an understanding of how the lessor's tacit hypothec developed and how it works. My hypothesis is that a clear exposition of the common law principles that provide for the lessor's tacit hypothec in this chapter will lay a good foundation for scrutiny in the next chapter of the extension of the lessor's tacit hypothec to third parties' property.

Since the lessor's tacit hypothec developed in Roman law and Roman-Dutch law and was adopted in South African law, the place to start tracing its origins is in Roman law.¹ In Roman law *fiducia* (also known as *fiducia cum creditore contracta*) and *pignus* were the main forms of real security prior to the evolution of the lessor's tacit hypothec (*hypotheca*). Creating real security by means of *fiducia* meant that ownership of property belonging to the debtor had to be conveyed to the creditor subject to the condition that it would be re-conveyed as soon as the debtor paid the secured debt. In the case of *pignus* the creditor was placed in possession of the security object (property). However, ownership of the property remained with the debtor.² The need for real security without possession and/or transfer of ownership of the security object led to the development of *hypotheca*. Creating real security by means of *hypotheca* meant that the creditor could be protected without being placed in possession of or having ownership of the security object transferred to him. This meant that the debtor remained in possession of the security object as well as that ownership of the security object remained with the debtor. However, the creditor had

¹ See in general R Zimmerman "‘Double cross’: Comparing Scots and South African law" in R Zimmerman, D Visser & KGC Reid (eds) *Mixed legal systems in comparative perspective* (2004) 1-33 4-6; F du Bois "Sources of law: Common law and precedent" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 64-99 67.

² WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 475; R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 156.

a right to take possession of the security object in cases where the debtor failed to pay his debt.³

Originally, *hypotheca* developed in the context of rural leases where its security object was the lessee's fruits and crops, and it was also extended to urban leases where the security object was the lessee's *invecta et illata*. Initially *hypotheca* could only be constituted by agreement.⁴ However, the contractual basis of the *hypotheca* in urban leases was abolished by the emperor Justinian when he spoke of a just or legal presumption with regard to the lessee's *invecta et illata*, and from that time the *hypotheca* no longer arose by agreement but by operation of law.⁵

"We accept that property brought on to an urban leasehold is hypothecated, as if this had been impliedly agreed. The opposite is true of rural tenancies."⁶

Following Roman law, Roman-Dutch law also recognised the lessor's tacit hypothec (*hypothec*) for arrear rent and also applied it to the lessee's *invecta et illata* in the case of urban tenements and to the lessee's fruits and crops of a rural tenement.⁷ The Roman law lessor's tacit hypothec, as developed by Roman-Dutch law, is the only one of the Roman law tacit hypothecs that has been received into South African law⁸ and its value is recognised by the Insolvency Act 24 of 1936.⁹

The second part of this chapter commences with an examination of the meaning of real security. It also provides an overview of the common law forms of real security (*fiducia* and *pignus*), which existed prior to the evolution of the lessor's tacit hypothec in Roman law as well as real security rights recognised in Roman-Dutch law and South African law. My hypothesis is that an overview and analysis of

³ WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 475. See further R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 157.

⁴ WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 475. See further R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167.

⁵ See also R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 166.

⁶ D 20.2.4 (English translation of the Digest referred to in this quote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian* Vol II (1985)). See also R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 166.

⁷ T Berwick *A contribution to an English translation of Voet's commentary on the Pandects* (1902) 311.

⁸ See *Friedlander v Croxford & Rhodes* (1867) 5 Searle 395; *Baker v Hirst & Co* (1880) 2 NLR 55 57; *Longlands v Francken* (1881) Kotzé 256; *Mackay Bros v Cohen* (1884) 1 Off R 342; *Webster v Ellison* 1911 AD 73 79; *Bloemfontein Municipality v Jacksons* 1929 AD 266 271; *Columbia Furnishing Co v Goldblatt* 1929 AD 27 30. See further WE Cooper *Landlord and tenant* (2nd ed 1994) 180.

⁹ See ss 47 and 85 of the Insolvency Act 24 of 1936.

these forms of real security will lay the basis for an understanding of the need for and importance of the lessor's tacit hypothec. The third part of this chapter analyses the development of the lessor's tacit hypothec in Roman law, Roman-Dutch law and its acceptance and operation in South African law. The discussion of the operation of the lessor's tacit hypothec in South African law continues in the fourth part of the chapter, where the nature and ownership of the goods bound by lessor's tacit hypothec are analysed. The fifth part explores the accrual of the hypothec, attachment and its legal effects, and the lessor's preference on the lessee's insolvency. Termination of the lessor's tacit hypothec is discussed in the sixth part of this chapter.

2 2 Real security

2 2 1 Meaning of real security

Van den Bergh¹⁰ states that in ancient Rome the most common form of security was personal security.¹¹ This state of affairs may have resulted from the fact that a large number of relationships were based on fidelity.¹² Nevertheless, despite the propensity to mostly make use of personal security, Roman property law also recognised real security.¹³

¹⁰ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 155.

¹¹ M Kaser *Römisches Privatrecht* (6th ed 1960 trans by R Dannenbring *Roman private law* 2nd ed 1968) 126 states that "the Romans at all times preferred 'personal credit', with giving sureties, over 'real credit'". F Schulz *Classical Roman law* (1951) 402 states that "in the law of the Republic and as well as of the classical period, we have to realise the important fact that the principal form of credit was pure personal credit (with or without sureties) and not real credit". HF Jolowicz *Historical introduction to the study of Roman law* (1932) 309 declares that "personal security appears to have developed at an earlier stage in Roman history than did real security" and the author further states that "even in the law of classical times and later, when security is needed for procedural purposes, it is almost exclusively in the form of suretyship that it is required that was required". WW Buckland *The main institutions of Roman private law* (1931) 320 states that "it is a well evidenced fact that the Romans preferred surety to what is called real security". See further R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 155.

¹² R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 155. F Schulz *Classical Roman law* (1951) 402 emphasises that "in the law of the Republic as well as the classical period, the principal form of credit was personal and not real security: Roman *fides*, Roman pedantic accuracy, honesty, and reliability in business matters were the strong pillars of that credit". F Schulz *Principles of Roman law* (1936) 237 states that "personal security too played a greater part than security by pledge or *hypotheca* and that, in particular, the law relating to mortgages on real property was so poorly developed, is explained by the large number of relationships based on fidelity".

¹³ JAC Thomas *Textbook of Roman law* (1976) 328 states that "in the course of Roman legal development, there were three forms of real security, all – even when created by contract – giving the creditor a right *in rem* in the thing which constituted the security, the *res obligata*". F Schulz *Classical Roman law* (1951) 403 states that "real credit developed but slowly and imperfectly in Roman economic life and the history of the Roman law concerning real security shows the same features".

Schulz defines real security as a right over a thing, movable or immovable, granted to a creditor in order to secure his claim against the debtor.¹⁴ Buckland states that the essence of transactions creating real security is to give the creditor some right, essentially a right *in rem*, over property by way of security for the debt.¹⁵ Lee also states that a real security right is a real right created to secure the performance of an obligation.¹⁶ Furthermore, Thomas describes real security as the situation where the debtor or a third party offers an object over which a real right in favour of the creditor is vested.¹⁷ Therefore, a real security right can be defined as a limited real right that secures an obligation by entitling the creditor with the right to have the encumbered property attached and sold in execution and to use the proceeds to settle the outstanding debt. Real security also entitles the creditor with a “right of first preference” with regard to the proceeds of a sale in execution of the security object against unsecured creditors.¹⁸ Unlike other limited real rights, real security rights secure the obligation and cease to exist as soon as the secured obligation is fulfilled.¹⁹ In other words, real security rights are accessory in nature.²⁰

2.2.2 Real security in Roman and Roman-Dutch law

Having examined the meaning of real security in the preceding section, this section commences by exploring kinds of real security that existed prior to the development of *hypotheca* in Roman law and led to the evolution of the lessor’s tacit hypothec in Roman law. This section further examines the acceptance and development of

See further R van den Bergh “The development of the landlord’s hypothec” (2009) 15 *Fundamina* 155-167 155.

¹⁴ F Schulz *Classical Roman law* (1951) 400. See also R van den Bergh “The development of the landlord’s hypothec” (2009) 15 *Fundamina* 155-167 155.

¹⁵ WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 473. See also R van den Bergh “The development of the landlord’s hypothec” (2009) 15 *Fundamina* 155-167 155.

¹⁶ RW Lee *The elements of Roman law with a translation of the Institutes of Justinian* (4th ed 1956) 175.

¹⁷ PHJ Thomas *Introduction to Roman law* (1986) 67.

¹⁸ See CG van der Merwe “Real security” in F du Bois (ed) *Wille’s Principles of South African law* (9th ed 2007) 630-665 631. See also AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 258; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5th ed 2006) 357; M Kaser *Römisches Privatrecht* (6th ed 1960 trans by R Dannenbring *Roman private law* 2nd ed 1968)126; B Nicholas *An introduction to Roman law* (1962) 150.

¹⁹ H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; GF Lubbe “Mortgage and pledge” rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 437; TJ Scott & S Scott *Wille’s Law of mortgage and pledge in South Africa* (3rd ed 1987) 1.

²⁰ For an explanation of the development of the accessoriness principle in Roman law see M Kaser *Römisches Privatrecht* (6th ed 1960 trans by R Dannenbring *Roman private law* 2nd ed 1968) 130.

pignus and *hypotheca* in Roman-Dutch law. In fact, in the course of Roman legal development there were three forms of real security, namely *fiducia*, *pignus* and *hypotheca*.²¹

Fiducia is the oldest form of real security.²² *Fiducia* consisted of the transfer of ownership of the security object to the creditor.²³ The transfer was done by means of *mancipatio* or *in iure cessio* and it was subject to an agreement of trust (*pacta fiduciae*) that the security object would be re-conveyed to the former owner once the debt was paid.²⁴ Initially a *pacta fiduciae* was not enforceable as such and the debtor relied on the trustworthiness of the creditor.²⁵ *Pacta fiduciae* became enforceable when the praetor granted the parties an *actio fiduciae* (personal action) that was only enforceable between the creditor and the debtor.²⁶ *Pacta fiduciae* usually included a clause (*pactum distrahendi*) that provided that the creditor should be entitled to sell the security object if the debt was not paid the on agreed date.²⁷ However, the creditor did not acquire an *ius in re aliena* (limited real right) in the property, since a *pacta fiduciae* was not a real security right.²⁸ Originally, only *res Mancipi* could be used to constitute *fiducia*.²⁹ Yet, later all corporeal objects could be used to constitute *fiducia*.³⁰

Van den Bergh³¹ points out that the inherent dangers of *fiducia* was that if the creditor turned out to be untrustworthy the debtor would only have a personal action against the creditor, that the debtor took all the risk, and that successive mortgage

²¹ In this regard see PHJ Thomas *Introduction to Roman law* (1986) 67. See also R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 156.

²² WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 434. See also PHJ Thomas *Introduction to Roman law* (1986) 67.

²³ WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 434. See also PHJ Thomas *Introduction to Roman law* (1986) 67.

²⁴ WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 434.

²⁵ See PHJ Thomas *Introduction to Roman law* (1986) 67; R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 156.

²⁶ PHJ Thomas *Introduction to Roman law* (1986) 67.

²⁷ A *pactum distrahendi* entailed that the creditor could use the proceeds of the sale in execution to satisfy his claim. The *pactum distrahendi* developed during the classical period into the *ius distrahendi* (an implied right to sell the security object if the debt was not discharged): See PHJ Thomas *Introduction to Roman law* (1986) 67.

²⁸ PHJ Thomas *Introduction to Roman law* (1986) 67.

²⁹ *Res Mancipi* is the category of property that Romans, in early Rome, viewed to be of particular importance to them.

³⁰ PHJ Thomas *Introduction to Roman law* (1986) 67.

³¹ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 156. See also M Kaser *Römisches Privatrecht* (6th ed 1960 trans by R Dannenbring *Roman private law* 2nd ed 1968) 128.

against the same property was not possible.³² Van den Bergh argues that other types of real security evolved as a result of the abovementioned disadvantages of *fiducia*.³³ Notwithstanding these disadvantages, *fiducia* remained in use throughout the classical period.³⁴ According to Hunter, *fiducia* co-existed with *pignus* and *hypotheca* for a long time and successfully developed up to the time of Constantine.³⁵ Hunter states that *fiducia* began to be ignored in practice after the abolishment of the *lex commissoria*.³⁶ According to Hunter, *fiducia* lost the other pillar on which it rested when the ancient forms of conveyance, *mancipatio* and *cession in jure*, fell into disuse. *Fiducia* fell into complete oblivion during the time of the emperor Justinian (approximately 530 – 533 AD).³⁷

The next form of real security to be introduced in Roman law was *pignus*,³⁸ in which case possession of the security object passed to the creditor but ownership remained with the debtor. *Pignus* was a creation of praetorian law and was only

³² In this context the term mortgage means mortgage in a wide or comprehensive sense. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 357; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 1 for the difference between the narrow and wide meaning of mortgage.

³³ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 156.

³⁴ See P van Warmelo *An introduction to the principles of Roman civil law* (1976) 113-114. See further JAC Thomas *Textbook of Roman law* (1976) 329-330; WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 473-474; B Nicholas *An introduction to Roman law* (1962) 150-151; RW Lee *The elements of Roman law with a translation of the Institutes of Justinian* (4th ed 1956) 171; HF Jolowicz *Historical introduction to the study of Roman law* (1954) 318; F Schulz *Classical Roman law* (1951) 406-407; R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 156.

³⁵ WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 434.

³⁶ The *lex commissoria* was the essential element of the *fiducia* and entailed that if the money borrowed was not repaid on the agreed date, the security object would be forfeited to the creditor: See WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 434.

³⁷ WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 434. See also M Kaser *Römisches Privatrecht* (6th ed 1960 trans by R Dannenbring *Roman private law* 2nd ed 1968) 128. See further PHJ Thomas *Introduction to Roman law* (1986) 67 who states that *fiducia* became obsolete in post-classical law.

³⁸ WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 474-475 states that *pignus* is a term usually used for a pledge delivered to the creditor and that was made possible by the praetor granting protection for the possession. See also P van Warmelo *An introduction to the principles of Roman civil law* (1976) 115-116; JAC Thomas *Textbook of Roman law* (1976) 330-332; RW Lee *The elements of Roman law with a translation of the Institutes of Justinian* (4th ed 1956) 171-172; HF Jolowicz *Historical introduction to the study of Roman law* (1954) 317; F Schulz *Classical Roman law* (1951) 407; R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 156.

regarded as a real right because it could eventually be enforced with an *actio in rem*. Under the word *pignus* the Romans understood the right as well as the thing itself.³⁹

The last form of real security to be introduced in Roman law was *hypotheca*, where the creditor only had a right to take possession of the security object, but without any actual handing over.⁴⁰ It was possible for the parties to agree not to transfer possession of the security object until the debt became due.⁴¹ Since the development of *hypotheca* is discussed in the next section,⁴² it is unnecessary to discuss it here. However, it suffices at this stage to draw the distinction between *hypotheca* and *pignus*. Hunter states that in Roman law there was not much difference between *pignus* and *hypotheca*.⁴³ *Pignus* was usually used in those cases where possession of the security object was transferred to the creditor and *hypotheca* was used in cases where the debtor retained possession of the security object and the creditor had a right to take possession of the security object when the debt was not paid in time.⁴⁴

Roman-Dutch law, as influenced by Roman law, also recognised *pignus* (*pandgeving*) and *hypotheca* (*hypothek*). In early Dutch law an object given as security for the due performance of a contract of exchange was known as *vadium* (*wedde*) and the whole transaction was called the *vadium* contract.⁴⁵ If the promised

³⁹ See in general R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 156.

⁴⁰ *Hypotheca* is a term used for a pledge that was not delivered: See F Schulz *Classical Roman law* (1951) 407-408. See also WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 475- 476; R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 156.

⁴¹ See WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 434; WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 475.

⁴² See section 2 3 below.

⁴³ WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 436.

⁴⁴ *D* 13.7.9.2: "Strictly speaking, we use *pignus* for the pledge which is handed over to the creditor and *hypotheca* for the case in which he does not even get possession." *D* 20.1.5: "The difference between *pignus* and *hypotheca* is purely verbal." (English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian* Vol II (1985)). See also *D* 20.2.4. M Nathan *Common law of South Africa* Vol II (1904) 934-5 states that "tacit hypothecation, according to the Roman law, it forms one of the branches of *pignus necessarium* (necessary hypothec), which is divided into *pignus praetorium*, and *pignus legale*. *Pignus praetorium* or *judiciale* is the hypothecation which takes place in favour of the judgment creditor upon the goods of the judgment debtor, for the satisfaction of the judgment. *Pignus legale*, or legal hypothec, is implied necessarily by law, so that there is no necessity for bargaining for it expressly. Nor will agreement to the contrary, that is, that there shall be no legal hypothec arising out of the transaction, be of any avail, wherefore the hypothec is said to be tacit or implied". See further M Kaser *Römisches Privatrecht* (6th ed 1960 trans by R Dannenbring *Roman private law* 2nd ed 1968) 129; WA Hunter *A systematic and historical exposition of Roman law in order of a code* (4th ed 1885) 436.

⁴⁵ TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 2.

article was forthcoming, the object handed over provisionally could be redeemed. In this sense it was a pledge. However, unlike the South African pledge, it was not an accessory agreement but rather had the nature of an alternative payment.⁴⁶

According to Grotius,⁴⁷ *pignus* is a contract whereby a person places his property in the hands of another as security for his debt. Van Leeuwen in his *Rooms-Hollands recht*⁴⁸ wrote that *pandgeving* is either the giving in pledge of a movable property, or *hypotheca* or *onderzetting* by which immovable property is bonded without actual delivery. Huber⁴⁹ stated that *hypothek* takes place when property remains with the debtor and *pandt* when the property is delivered to the creditor as a security for a debt.⁵⁰ The abovementioned authorities therefore made a distinction between *pignus* and *hypotheca*. The distinction depends either on the method of implementing the security or on the nature of the property secured.⁵¹ In other words, the distinction between *pandt* and *hypothek* is that for the creation of *pandt* the creditor must be placed in possession of the security object whereas to create *hypothek* the creditor need not to be in possession of the security object. Furthermore, *hypothek* is created by operation of law and *pandt* is created by agreement between the debtor and creditor.

2 2 3 Real security in modern South African law

Roman-Dutch law has been an integral part of South African law since the 17th century, and the principles of Roman-Dutch law are still applied in South African courts.⁵² The Roman-Dutch principles of property law, including real security, form a major part of South African property law.⁵³ With their origins in Roman law and as

⁴⁶ TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 2.

⁴⁷ H Grotius *Inleidinge tot de Hollandsche rechtsgeleertheit* (1631 trans by RW Lee *The jurisprudence of Holland* Vol 1 1953, hereafter referred to as Grotius) 3.8.1.

⁴⁸ 4.12.2.

⁴⁹ U Huber *Heedendaagse rechtsgeleertheit* (1686 trans by P Gane *The jurisprudence of my time* 1993) 3 19 1.

⁵⁰ See also TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 4.

⁵¹ See also TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 3.

⁵² See *Lazarus v Dose* (1884) 3 SC 42; *Webster v Ellison* 1911 AD 73; *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012). See also in general F du Bois "Sources of law: Common law and precedent" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 64-99 67; R Zimmerman "Double cross: Comparing Scots and South African law" in R Zimmerman, D Visser & KGC Reid (eds) *Mixed legal systems in comparative perspective* (2004) 1-33 4-6; AJ Kerr "The reception and codification of systems of law in Southern Africa" (1958) 2 *JAL* 82-100 82.

⁵³ See in general M Nathan *Common law of South Africa* Vol II (1904) 934-5.

developed in Roman-Dutch law, *pignus* (pledge) and *hypotheca* (hypothec) also form part of South African property law. Pledge and hypothec are both real security rights that are recognised in modern South African property law.⁵⁴

Similar to Roman-Dutch real security, South African real security rights afford a secured creditor a right to have the security object attached and sold in execution and a right of first preference over the proceeds of the security object.⁵⁵ This means that when a debtor is unwilling or unable to repay the principal debt, the creditor may apply to court for the attachment of the security object and have it sold in execution. If the security object is subject to more than one real security right, the right that was created first takes precedent.⁵⁶ The principal debt relationship between the creditor and debtor is essential and without it there can be no real security.⁵⁷ When the secured obligation ceases to exist, the real right of the secured creditor also comes to an end.⁵⁸ This means that the emergence and continued existence of real security rights depend on the existence of a valid underlying principal obligation.⁵⁹ The accessoriness principle is well developed in South African law and it has been influenced by early Roman-Dutch law.⁶⁰ This principle is recognised both in case law⁶¹ and in the works of modern writers regarding personal and real security.⁶²

⁵⁴ See in general CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665.

⁵⁵ H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 298. See further GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 437.

⁵⁶ See s 2(2) of the Security by Means of Movable Property Act 57 of 1993. For a discussion of the ranking of claims in general see R Sharrock, K van der Linde & A Smith *Hockly's Insolvency law* (9th ed 2012) 186-192; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 638-639. See in general H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 298; L Steyn "Treatment of secured creditors of an insolvent estate: Changing perspectives in South African law" (2002) 11 *Int Insolv Rev* 35-48.

⁵⁷ H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325.

⁵⁸ *SA Timber & Joinery Works (Pty) Ltd v The Sheriff* 1955 (4) SA 56 (O). See further H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 437.

⁵⁹ See H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 300; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 437; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 631; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 358; GJ Pienaar & AJM Steven "Real security" in R Zimmerman, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2004) 637-670 760; AJM Steven "Accessoriness and security over land" (2009) 13 *Edin LR* 387-426 388.

⁶⁰ See AJM Steven "Accessoriness and security over land" (2009) 13 *Edin LR* 387-426 392.

⁶¹ In *African Life Property Holdings v Score Food Holdings* 1995 (2) SA 230 (A) 238F the court held per Nienaber JA that "guaranteeing a non-existent debt is as pointless as multiplying by nought". See also *Kilburn v Estate Kilburn* 1931 AD 501 506; *Lief NO v Dettmann* 1964 (2) SA 252 (A) 259;

Unlike personal security that is enforceable only against a specific person, real security rights are enforceable against the world at large and may arise either by agreement (express real security), by operation of law (tacit real security) or by court order (judicial real security).⁶³ The mortgage, pledge and notarial bond are forms of express real security rights.⁶⁴ The lessor's tacit hypothec, the instalment agreement hypothec, statutory security rights and liens are forms of tacit real security.⁶⁵ Judicial mortgages and judicial pledges are forms of judicial real security.⁶⁶

2 3 General principles of the lessor's tacit hypothec

2 3 1 Historical background

2 3 1 1 Roman law

In Roman law the need for a change in the field of security without possession and/or transfer of ownership of the security object arose fairly early.⁶⁷ The history of the existence of *hypotheca* is attested to in Cato's time (234-149 BC).⁶⁸ The need for the protection of the creditor without possession of the security object started with cases in which a lessor of an agricultural tenement was willing to lease his land.⁶⁹ Van den Bergh states that the lessor wished to collect the rent but in most cases it could not be paid before the harvest and therefore there was a need for credit until

Thienhaus v Metje & Ziegler Ltd 1965 (3) SA 25 (A) 44; AJM Steven "Accessoriness and security over land" (2009) 13 *Edin LR* 387-426 392.

⁶² See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 358-359; CF Forsyth & JT Pretorius *Caney's The law of suretyship* (4th ed 2002) 37; E Kahn (ed) KM Kritzing *Principles of the law of mortgage, pledge and lien* (1999) 8-9; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 4.

⁶³ See in general H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 296-300.

⁶⁴ See in general PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 357-402.

⁶⁵ See in general, PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 403-425.

⁶⁶ See in general, PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 403-425.

⁶⁷ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 157.

⁶⁸ See HF Jolowicz *Historical introduction to the study of Roman law* (1954) 319. B Nicholas *An introduction to Roman law* (1962) 151-152 states that "the existence of pledge without possession is attested to in Cato's time (234-149 BC) by a clause in his form of contract for the sale of olives on a tree, which provides that 'everything that the purchaser brings into the olive grove is to serve as security for payment' (Cato *De Agri Cultura* 146 5) and a similar clause with respect to slaves and cattle in the form of a sale of pasture, there being in the latter case a further clause which provides that any litigation concerning the matter is to take place in Rome (Cato *De Agri Cultura* 149 7-8)".

⁶⁹ F Schulz *Classical Roman law* (1951) 408. See also WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 475; R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 157.

such time as the crop was gathered.⁷⁰ Lessors required some form of security and in most cases the only property an agricultural lessee could pledge was his cattle, slaves and farming equipment – in other words, everything he would require to farm.⁷¹

In the case of both *fiducia* and *pignus* this state of affairs meant that the lessee would lose control of the property pledged and as a result would not be able to farm.⁷² This impossible situation led to the development of a new form of security, namely *hypotheca*.⁷³ The rural lessor's *hypotheca* originally arose by a special agreement between the parties that the lessor would be entitled to take the hypothecated property as well as the harvest if the lessee failed to pay the rent when it became due.⁷⁴ The lessee agreed that whatever was brought on the leased land or produced there should be subject to the *hypotheca*.⁷⁵ The agreement was that the creditor obtained neither ownership nor possession of the pledged property but a bare *ius in re aliena*.⁷⁶ The advantage of *hypotheca* was that the lessee could continue using whatever he needed to farm while it was hypothecated as security for the rent.⁷⁷ The content of the real security at the time of the agreement was that the pledge would come into existence at some time in future if the rent was not duly paid.⁷⁸ In terms of this agreement the lessor had no action *in rem* and had to depend on self-help if the lessee failed to deliver the security object to him. Van den Bergh states that the agreement therefore was not enforceable as such, and

⁷⁰ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.

⁷¹ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 157.

⁷² F Schulz *Classical Roman law* (1951) 408.

⁷³ A Borkowski & P du Plessis *Textbook on Roman law* (2005) 304 refers to the *hypotheca* as a "modified form of *pignus*". B Nicholas *An introduction to Roman law* (1962) 151-152 refers to it as a "variant of *pignus*". JC van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 173-174 calls it a "*vormloos*" pledge and at 177 Van Oven points out that as result of the pledge being "*vormloos*", there was no publicity. However, it may be said that by the time it had become a tacit agreement and even earlier, when the agreement between the lessor and the lessee had become usual, everybody would have been aware that the *invecta et illata* and the crops had been pledged for the rent. In such a case no further publicity seems to have been necessary: See R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 157.

⁷⁴ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.

⁷⁵ See D 20.1.32. See also A Borkowski & P du Plessis *Textbook on Roman law* (2005) 304; P van Warmelo *An introduction to the principles of Roman civil law* (1976) 116; WW Buckland *A textbook of Roman law from Augustus to Justinian* (1975) 475; RW Lee *The elements of Roman law with a translation of the Institutes of Justinian* (4th ed 1956) 172; HF Jolowicz *Historical introduction to the study of Roman law* (1954) 319; F Schulz *Classical Roman law* (1951) 407-408.

⁷⁶ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.

⁷⁷ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.

⁷⁸ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 158.

notwithstanding this disadvantage it was a practical and convenient custom. At first the *hypotheca* only applied in the case of agricultural tenants.⁷⁹

According to Van den Bergh,⁸⁰ as soon as the *hypotheca* was accepted in rural leases it was extended to the lease of urban premises, in which event the rent was secured by the lessee's *invecta et illata*.⁸¹ The urban *hypotheca* attached to all the movable property brought on to the leased premises for the lessee's use. The lessor's knowledge of the presence of the movables was irrelevant.⁸² For example, furniture was tacitly deemed to have been pledged as security for the rent and for any damage caused by the tenant.⁸³ The *hypotheca* was further extended to inns and warehouses, in which case the rent was likewise secured by the *invecta et illata*.⁸⁴ As far as urban premises were concerned the move away from agreement to tacit consent – as a requirement to constitute *hypotheca* – initially appeared in the Digest of Emperor Justinian:

“We accept that property brought on to an urban leasehold is hypothecated, as if this had been impliedly agreed. The opposite is true of rural tenancies.”⁸⁵

⁷⁹ R van den Bergh “The development of the landlord's hypothec” (2009) 15 *Fundamina* 155-167 158.

⁸⁰ R van den Bergh “The development of the landlord's hypothec” (2009) 15 *Fundamina* 155-167 158.

⁸¹ This was the technical term used for animals and slaves (that were chased in) and farm implements (that were carried in). In *D 20.2.4 inducta* is used instead of *invecta*. The distinction between these two words is that *inducta* refer to animals led on to the property and *invecta* refer to things carried on. With regard to authority for the extension of the tacit hypothec to the lessees of urban premises, Neratius wrote in *D 20.2.4*: “We accept that property brought on to urban leasehold is hypothecated, as if this had been impliedly agreed.” In *D 20.2.4.1* Neratius states that this also holds true for stables, although they are not directly adjacent to urban property. In *D 20.2.6* Ulpian states that “[a]lthough it is understood that in urban tenancies properties brought on the premises is impliedly hypothecated as if this had been specifically agreed ...”. Paul in *D 20.14.4* states that “[i]kewise on the ground that even agreements by implication are valid, it is settled that in the letting of urban dwellings, the movables (of the tenant) constitute a pledge for the landlord even though nothing is expressly agreed”. (English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian Vol II* (1985)). See further *D 13.7.11.5*: “[H]ence, if you rent a house and sublet part of it to me and I pay my rent to your lessor, I will have the action on *pignus* against you.” (English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian Vol III* (1985)). See also *Baker v Hirst & Co* (1880) 2 NLR 55 57.

⁸² R van den Bergh “The development of the landlord's hypothec” (2009) 15 *Fundamina* 155-167 158.

⁸³ In *D 13.7.11.5* Ulpian states that “furniture and movables” will be charged and that the “agreement was impliedly taken to have been made”. (English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian Vol III* (1985))

⁸⁴ In *D 20.2.3* Ulpian states: “If a warehouse, hotel or site is leased, Neratius thinks that there is here also an implied agreement for the hypothecation of goods brought in. This is the better view.” (English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian Vol II* (1985))

⁸⁵ *D 20.2.4* (English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian Vol II* (1985)).

Justinian's Digest further states that the tacit *hypotheca* will apply not only in Rome but also in the provinces, so that all the inhabitants can benefit from this "equitable presumption". Therefore, the lessor's right to take possession of the property in urban leases no longer arose by agreement but by operation of law.⁸⁶ However, agreement remained a requirement with regard to the rural lessee's *invecta et illata*.⁸⁷ Van den Bergh suggests that the *invecta et illata* of a rural lessee were too important to be tacitly hypothecated because they were necessary to make a living and without them he could not work or survive.⁸⁸

During the Republic the lessor did not acquire any right (personal or real) in terms of the agreement and therefore it was of little use to him.⁸⁹ Towards the end of the Republic, the praetor Salvius gave the lessor the *interdictum Salvianum* to enforce this agreement. Subsequently, the lessor was granted an *actio in rem*, the *actio Serviana*.⁹⁰ This action constituted a valid pledge. At first, this action *in rem* applied only between the lessor and the lessee but not against third parties in possession of the lessee's property. Subsequent to the introduction of the *actio Serviana*, Hadrian in his Edict⁹¹ extended the *actio Serviana* to the *actio quasi Serviana*, which then allowed the lessor to claim the property from anyone. The lessor therefore obtained an *ius possidendi*.⁹² This development gave the lessor a real right and enabled him to obtain possession of the hypothecated property upon non-payment of the debt and a right to realise the value of the property for the purpose of satisfying his claim.⁹³

The preceding section shows that the lessor's hypothec developed in Rome in approximately 160 BC.⁹⁴ It developed in agricultural leases and could be constituted by agreement between the lessor and the lessee. Conversely, with regard to urban premises the hypothec could also be constituted without agreement between the lessor and lessee. At first the lessor had no action *in rem* but a personal right. The

⁸⁶ RW Lee *The elements of Roman law with a translation of the Institutes of Justinian* (4th ed 1956) 178. See also further R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 160.

⁸⁷ D 20.2.4. See also R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 161.

⁸⁸ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 161.

⁸⁹ AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12 *EJCL* 1-18 2.

⁹⁰ AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12 *EJCL* 1-18 2.

⁹¹ §§ *Edict* 266, 267.

⁹² R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 166.

⁹³ R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167 166.

⁹⁴ 160 BC is the year in which Cato *De Agri Cultura* was published.

significant development of the Roman lessor's hypothec was when Emperor Hadrian⁹⁵ gave the lessor the *actio quasi Serviana*, which allowed the lessor to claim the hypothecated property from everyone.⁹⁶

2 3 1 2 Roman-Dutch law

The Roman-Dutch law lessor's tacit hypothec has a double origin. It is derived from the *pandingsrecht* of old Dutch law, on to which has been grafted the tacit hypothec of Roman law.⁹⁷ Old Dutch law did not recognise the tacit hypothec but the *pandingsrecht*, which was not a security right but merely the right to obtain security by attaching the goods of the debtor.⁹⁸ By virtue of this right the lessor could attach the lessee's *invecta et illata* for the arrear rent (which process was called *pandneming*) and, after due notice to the lessee, have them sold in execution without previously having obtained a judgment against the lessee.⁹⁹ Similar to Roman law, Roman-Dutch law recognised two categories of *hypotheca*, namely the express and the tacit hypothec,¹⁰⁰ each containing several individual hypothecs.¹⁰¹ Unlike express hypothecs (pledges), tacit hypothecs arose by operation of law apart from and without any agreement between the parties.¹⁰² Roman-Dutch law recognised various forms of tacit hypothecs.¹⁰³ To secure the rent due to him, the lessor in Roman law

⁹⁵ 76-138 AD.

⁹⁶ See in general R van den Bergh "The development of the landlord's hypothec" (2009) 15 *Fundamina* 155-167.

⁹⁷ *Webster v Ellison* 1911 AD 73 106. See further G Wille *Landlord and tenant in South Africa* (4th ed 1948) 189.

⁹⁸ G Wille *Landlord and tenant in South Africa* (4th ed 1948) 189.

⁹⁹ *In re Stilwell* (1831) 1 Menz 537; *Webster v Ellison* 1911 AD 73 106. See also G Wille *Landlord and tenant in South Africa* (4th ed 1948) 189.

¹⁰⁰ Express (conventional) hypothecs arise by agreement between the parties whereas tacit hypothecs arise by operation of law.

¹⁰¹ T Berwick *A contribution to an English translation of Voet's commentary on the Pandects* (1902) 308. See also TJ Roos & H Reitz *Principles of Roman-Dutch law* (1909) 89, 93; M Nathan *Common law of South Africa Vol II* (1904) 936; AFS Maasdrorp *The introduction to Dutch jurisprudence of Hugo Grotius* (3rd ed 1903) 3-5.

¹⁰² RW Lee *Introduction to Roman-Dutch law* (3rd ed 1931) 189.

¹⁰³ The following is a list of tacit hypothecs as stated by GT Morice *English and Roman-Dutch law* (2nd ed 1905) 54, that were recognised in Roman-Dutch law and that were also imported to South African law: (a) the tacit hypothec on land subject to a census as security for such a census; (b) as security for the costs of maintaining dikes; (c) that of masons, carpenters or other workmen as security for materials supplied or labour bestowed in the repair of any building (but not in its ornamentation or improvement); (d) that of the state over the property receivers or controllers of public revenues; (e) that of minors over the property of their guardians as security for deficiencies through maladministration; (f) that of the lessors of houses and lands over all goods brought on the leased premises (*omnia illata et invecta*) as well as growing crops; (g) that of bleachers of linen and clothes as security for payment of their charges; (h) that of towns, villages and churches over the receivers or controllers of their revenues; (i) that of a captain over the ship and merchandise as security for his

had a tacit hypothec over *invecta et illata* brought on to the urban leased premises,¹⁰⁴ and in the case of an agricultural tenancy over the fruits and crops of the land.¹⁰⁵ Roman-Dutch law incorporated the Roman law lessor's tacit hypothec and extended it to apply to *invecta et illata* of the lessee of the agricultural tenancy.¹⁰⁶ As a result, no distinction was drawn between urban and rural leases and therefore every lessor had a tacit hypothec over the *invecta et illata* of his lessee found on the leased property when the lessee failed to pay the rent.¹⁰⁷

2 3 2 South African law

The Roman law lessor's tacit hypothec, as developed in Roman-Dutch law, has been accepted by the courts as part of South African law.¹⁰⁸ In South African law the lessor has a tacit hypothec over the *invecta et illata* on the leased premises for arrear rent.¹⁰⁹ The lessor's tacit hypothec operates against movables brought on to the leased premises for permanent use by the lessee, whether or not the lessor was aware of their presence.¹¹⁰ The lessor's tacit hypothec constitutes an exception to

freight; (j) that of a merchant on a ship belonging to the captain, as security for compensation for goods of the merchant sold by the captain when in straits through want of money; (k) that of a factor or commissioner over goods sent to him on commission as security for money that he has advanced to the owner of the goods; (l) that of a woman married under an antenuptial contract over the property of her husband as security for the recovery of the property held by her on marriage or acquired during the marriage; (m) that of the legatee over the property of the testator as security for the payment of their legacies.

¹⁰⁴ D 20.2.4.

¹⁰⁵ D 20.2.7.

¹⁰⁶ See Grotius 2.48.17; Voet 20.2.2. See further RW Lee *Introduction to Roman-Dutch law* (5th ed 1953) 188.

¹⁰⁷ WE Cooper *Landlord and tenant* (2nd ed 1994) 179.

¹⁰⁸ See *Friedlander v Croxford & Rhodes* (1867) 5 Searle 395; *Baker v Hirst & Co* (1880) 2 NLR 55 57; *Longlands v Francken* 1881 Kotzé 256; *Webster v Ellison* 1911 AD 73; *Bloemfontein Municipality v Jacksons* 1929 AD 266; *Columbia Furnishing Co v Goldblatt* 1929 AD 27. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 180.

¹⁰⁹ See *Isaacs v Hart & Henochsberg* (1887) 8 NLR 18; *Webster v Ellison* 1911 AD 73. See further H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; E Kahn, M Havenga, P Havenga & J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 90; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 656; P Havenga, M Havenga, R Kelbrick, M McGregor, H Schulze, K van der Linde *General principles of commercial law* (6th ed 2007) 178; JTR Gibson, C Visser, JT Pretorius, R Sharrock & M van Jaarsveld (eds) *South African mercantile and company law* (8th ed 2003) 182; WE Cooper *Landlord and tenant* (2nd ed 1994) 180; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99; MA Diemont, RM Marais, PJ Aronstam *The law of hire-purchase in South Africa* (4th ed 1978) 208; RW Lee *Introduction to Roman-Dutch law* (5th ed 1953) 189; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 189; THR Roos & H Reitz *Principles of Roman-Dutch law* (1909) 94; M Nathan *Common law of South Africa Vol II* (1904) 936.

¹¹⁰ *Friedlander v Croxford & Rhodes* (1867) 5 Searle 395 396. See also *Mackay Bros Ltd v Eaglestone* 1932 TPD 301 305-306; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 657.

the principle that provides that to satisfy his debt a creditor is only entitled to execute against his debtor's property, since in certain circumstances it may extend to third parties' property.¹¹¹

The lessor's tacit hypothec is the only one of the old tacit hypothecs that has any value for purposes of the Insolvency Act 24 of 1936.¹¹² While it abolished the preference formerly conferred by other tacit hypothecs over the estate of insolvent persons, the Insolvency Act expressly preserves the preference conferred by the lessor's tacit hypothec.¹¹³ The Insolvency Act also limits the amount for which the preference is claimable.¹¹⁴

In *Woodrow & Co v Rothman*¹¹⁵ the court had to decide whether the lessor's tacit hypothec covers the lessee's arrear rent as well as the damage or deterioration caused by him. The court held that the lessor's tacit hypothec covered rent only and not a debt due by the lessee for repairs that he had failed to make.¹¹⁶ More recently, in *New Life Communal Property Association v Draigri Boerdery Bpk*¹¹⁷ Froneman J found in favour of the respondents and held that the hypothec only secures outstanding rent. Further, section 85(2) of the Insolvency Act confers a preference on the lessor (for purposes of the lessee's insolvency) in respect of rent only.

South African writers are divided in their views. On one hand, there are those who argue that the lessor's tacit hypothec only secures payment of arrear rent,¹¹⁸

¹¹¹ *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230 235; *Van den Bergh, Melamed & Nathan v Polliack & Co* 1940 TPD 237 238; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 439.

¹¹² GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 437.

¹¹³ S 85 of the Insolvency Act 24 of 1936.

¹¹⁴ For a discussion of claimable amount, see section 2.5.2 below.

¹¹⁵ (1884) 4 EDC 11.

¹¹⁶ See also *Wavely Trust & Trading Co v Depaux* 1902 TH 73; *Webster v Ellison* 1911 AD 73 86; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 438.

¹¹⁷ [2007] ZAECHC 101 15.

¹¹⁸ See AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 275; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 438; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 656; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 404; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 190; AFS Maasdoorp *The institutes of Cape law Book II* (1903) 256. WE Cooper *Landlord and tenant* (2nd ed 1994) 180 considers that "in the rest of the country the extension of the hypothec beyond rent, if existed, was abrogated by disuse".

while on the other hand, there are those who argue that the lessor's tacit hypothec is not limited to the arrear rent but that it also covers damage caused by the lessee.¹¹⁹

2 4 Nature and ownership of the property bound

2 4 1 Nature of the goods

When it is invoked, the lessor's tacit hypothec only attaches to movable property present on the leased premises or movables attached while in transit to a new destination subsequent to removal from the premises.¹²⁰ Movable property that is subject to the lessor's tacit hypothec is divided into two classes, namely the *invecta et illata* and the fruits and crops of the leased property.¹²¹

The first class of applicable movables, *invecta et illata*, consists of corporeal movable goods driven or carried on to the leased property,¹²² and they are subject to the lessor's tacit hypothec.¹²³ For instance, animals, furniture and ornaments, jewels, arms, implements, tools, gold and silver of the lessee found on the leased premises are subject to the lessor's tacit hypothec. In Roman-Dutch law merchandise in a shop was said to be free from the hypothec on the ground that it is not brought on the premises by the lessee for his own service and use.¹²⁴ This view has not been adopted in South African law.¹²⁵ The position in modern South African law is that all stock belonging to the lessee that is found in the shop at the time of attachment is subject to the hypothec.¹²⁶ In *Harris v Tomlison*¹²⁷ it was held that the lessor who

¹¹⁹ E Kahn, M Havenga, P Havenga, J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 90-91 state that "the confinement of the hypothec to rent by the s 85 of the Insolvency Act, relates only to the preference on insolvency". AJ Kerr *The law of sale and lease* (3rd ed 2004) 347 is of the view that "the Roman-Dutch legal authorities did not confine the hypothec to rent but applied it to due fulfilment of the lessee's obligations generally".

¹²⁰ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 439.

¹²¹ *WG Baker v Ellison & Co* (1880) 2 NLR 55. See also GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 439; WE Cooper *Landlord and tenant* (2nd ed 1994) 181.

¹²² See *Webster v Ellison* 1911 AD 73 86; *Reinhold & Co v Van Oudtshoorn* 1931 TPD 382 383; *Elliot Bros (EL) (Pty) Ltd v Smith* 1958 (3) SA 11 (E) 861.

¹²³ See E Kahn, M Havenga, P Havenga & J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 90; H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 656; WE Cooper *Landlord and tenant* (2nd ed 1994) 181; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 191.

¹²⁴ G Wille *Landlord and tenant in South Africa* (4th ed 1948) 191.

¹²⁵ G Wille *Landlord and tenant in South Africa* (4th ed 1948) 191.

¹²⁶ *Webster v Ellison* 1911 AD 86 100, 101.

ejected his lessee and exercised his hypothec over the property of the lessee was entitled to remain in possession of such property until the arrear rent was paid. In *Goldinger's Trustee v Whitelaw & Sons* the court expressed the view that the only possibility of excluding movable property found on the leased premises is when it belongs to a third party.¹²⁸

The second class of movables, fruits and crops of the leased property, are also subject to the lessor's tacit hypothec.¹²⁹ In *Orderman v Peincke* it was held that fruits and crops are subject to the hypothec whether still growing or after they have been separated from the soil.¹³⁰ In *MacDonald v Radin & the Potchefstroom Dairies & Industries Co*¹³¹ it was held that the lessor is the owner of *fructus naturales*.¹³² The court expressed the view that when the lessee collects the *fructus naturales* of the property, he does so with the lessor's implied consent, which must be taken to be given without prejudice to his hypothec for rent.¹³³ Incorporeal property is not subject to the lessor's tacit hypothec.¹³⁴ In *Insolvent Estate Dunn*¹³⁵ the court had to decide whether money in the lessee's hands was subject to the lessor's tacit hypothec. The court held that the hypothec could not extend to a "totally incorporeal thing" such as the lessee's right, title and interest in a liquor licence. In *Sugarman & SA Breweries Ltd v Burrows*¹³⁶ it was held that the lessor's tacit hypothec does not attach to the proceeds of a sale of property that was subject to the hypothec. Wille is of the view that these cases are sufficient authority for the proposition that money in the lessee's hands is not subject to the hypothec.¹³⁷ Cooper argues that money found on the leased premises is subject to the lessor's tacit hypothec but not the proceeds of the sale of *invecta et illata* that has been deposited in the lessee's banking account or that had not been paid to him yet.¹³⁸

¹²⁷ 1912 CPD 821.

¹²⁸ *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230 236.

¹²⁹ CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 656. See further G Wille *Landlord and tenant in South Africa* (4th ed 1948) 192.

¹³⁰ *Orderman v Peincke* 1911 EDL 201.

¹³¹ *MacDonald v Radin & the Potchefstroom Dairies & Industries Co* 1915 AD 454 268.

¹³² See also WE Cooper *Landlord and tenant* (2nd ed 1994) 182.

¹³³ WE Cooper *Landlord and tenant* (2nd ed 1994) 182.

¹³⁴ *Insolvent Estate Dunn* (1911) 32 NPD 539.

¹³⁵ *Insolvent Estate Dunn* (1911) 32 NPD 539 541.

¹³⁶ 1916 WLD 73.

¹³⁷ G Wille *Landlord and tenant in South Africa* (4th ed 1948) 192.

¹³⁸ WE Cooper *Landlord and tenant* (2nd ed 1994) 181.

2 4 2 Ownership of the property

Ownership of property can never be absolute and it may be limited in the interest of the community, neighbours and other holders of rights.¹³⁹ A lessor's tacit hypothec is an example of the way in which the rights of an owner of property may be limited by operation of law.¹⁴⁰ Classes of persons whose property may be subject to the hypothec are the lessee, the sub-lessee and third parties.¹⁴¹ In what follows I discuss the situations in which the lessee' and sub-lessee's property may be subject to the lessor's tacit hypothec. The situation in which a third party's property found on the leased property may be subject to the lessor's tacit hypothec forms an essential part of this thesis and therefore it is discussed in the next chapter.

Generally the lessor's tacit hypothec attaches to all goods that belong to the lessee that are brought on to the leased premises with the intention that it remains there indefinitely.¹⁴² In *Bushing v Kinnear*¹⁴³ it was held that there is a presumption that movable property belongs to the person in whose ostensible possession it is found.¹⁴⁴ Further, a person who claims ownership of property found on the leased premises has the onus to prove his ownership.¹⁴⁵ In *Cholwich v Penny* it was held that the lessor's tacit hypothec cannot be defeated by a simulated transaction between the lessee and a third party purporting to give the latter real rights in the goods, whereas the former remains owner of such goods.¹⁴⁶

¹³⁹ *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 (2) SA 589 (N) 610. See further H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 345. DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 39 indicates that "absoluteness of ownership is based on misunderstanding of the civilian principles that underpin South African property law". P Birks "The Roman law concepts of *dominium* and the idea of absolute ownership" 1985 *Acta Juridica* 1-37 31 indicates that "to describe the content of ownership as an absolute is inappropriate since this suggest a degree of immunity". See as well GJ Pienaar *Sectional titles and other fragmented property schemes* (2010) 414; AJ van der Walt & DG Kleyn "*Duplex dominium: the history and significance of the concepts of divided ownership*" in DP Visser (ed) *Essays on the history of law* (1989) 213-260 214.

¹⁴⁰ For examples of limitations imposed on ownership, see in Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 94-132.

¹⁴¹ See GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440.

¹⁴² *Leech v Gardner* (1898) 15 CLJ 206 208. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 181; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440.

¹⁴³ *Bushing v Kinnear* (1888) 5 HCG 254.

¹⁴⁴ *Bushing v Kinnear* (1888) 5 HCG 254 257.

¹⁴⁵ *Bushing v Kinnear* (1888) 5 HCG 254 257.

¹⁴⁶ *Cholwich v Penny* (1887) 5 EDC 270.

If the lessee's *invecta et illata* prove insufficient to satisfy the lessor's claim for arrear rent, the *invecta et illata* found on the premises belonging to a *bona fide* sub-lessee may be subjected to the lessor's tacit hypothec, but only for such an amount as the sub-lessee owes the lessee for rent.¹⁴⁷ In *Friedlander v Croxford & Rhodes* it was held that if a sub-lessee had not obtained consent from the lessor, his sub-lease is not *bona fide* and therefore the *invecta et illata* are subject to the lessor's tacit hypothec as if they belonged to the lessee.¹⁴⁸ In *Du Preez v Mkwambi*¹⁴⁹ the lessee had subleased a rural tenement without his lessor's consent. The court held that the sub-lessee's property was subject to the lessor's tacit hypothec. However, the court in *Ex parte Aegis Assurance & Trust Co Ltd* expressed the view that in the case of a lease with a clause against sub-leasing, and if there is nothing to show that the sub-lessee is aware of the clause, it should be assumed that the sub-lessee is *bona fide*.¹⁵⁰ Cooper's view is that a sub-lessee derives all his rights to a sub-leased property from the lessee and the latter therefore cannot give the sub-lessee greater rights than he has.¹⁵¹ Conversely, as there is no link between the lessor and the sub-lessee, the lessor's rights in his property cannot be weaker than in the case of the lessee.¹⁵² Cooper contends that rent is *fructus civiles* to which the owner of the land is entitled.¹⁵³ Therefore, a sub-lessee's *invecta et illata* are subject to the lessor's tacit hypothec to the extent that the sub-lessee owes the lessee rent. If a sub-lease is invalid, the sub-lessee is in the same position as any other third party whose property is on the premises let to the lessee and therefore it is not subject to the lessor's tacit hypothec unless it is intended for the lessee's use.¹⁵⁴ Accordingly, Cooper argues that *Friedlander v Croxford & Rhodes*¹⁵⁵ and *Du Preez v Mkwambi*¹⁵⁶ were wrongly decided, since the sub-lessees did not bring their properties on to the

¹⁴⁷ See *Friedlander v Croxford & Rhodes* (1867) 5 Searle 395 397; *Smith v Dierks* (1884) 3 SC 142; *Ex parte Aegis Assurance & Trust Co Ltd* (1909) 23 EDC 363; *Ex parte Adler* 1911 EDL 106; *Reinhold & Co v van Oudtshoorn* 1931 TPD 382 383. In *Yost Typewriter Co v Andrew* 1915 NPD 21 it was held that the lessee is also entitled to a hypothec over goods of the sub-lessee.

¹⁴⁸ (1867) 5 Searle 395 397.

¹⁴⁹ 1929 EDL 90.

¹⁵⁰ *Ex parte Aegis Assurance & Trust Co Ltd* (1909) 23 EDC 364.

¹⁵¹ WE Cooper *Landlord and tenant* (2nd ed 1994) 182.

¹⁵² WE Cooper *Landlord and tenant* (2nd ed 1994) 182.

¹⁵³ WE Cooper *Landlord and tenant* (2nd ed 1994) 182-183.

¹⁵⁴ See *Friedlander v Croxford & Rhodes* (1867) 5 Searle 395; *Du Preez v Mkwambi* 1929 EDL 90; *Reinhold & Co v van Oudtshoorn* 1931 TPD 382 383. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 182-183.

¹⁵⁵ (1867) 5 Searle 395.

¹⁵⁶ 1929 EDL 90.

leased premises for the use by the lessees but for their own use.¹⁵⁷ Cooper's argument seems plausible, since the extension of the lessor's tacit hypothec to the unlawful sub-lessee's property in almost all situations will not meet all the requirements of the extension of the lessor's tacit hypothec to the third party's property, especially the requirement that the third party's property should have been brought on to the leased premises for the lessee's use.¹⁵⁸

2.5 Accrual of the lessor's tacit hypothec, attachment and the lessor's preference on the lessee's insolvency

2.5.1 Accrual of the lessor's tacit hypothec and attachment (and its legal effect)

The lessor's tacit hypothec originates directly and immediately from the contract of lease.¹⁵⁹ However, it is operative only when and as long as the rent is in arrears and not paid.¹⁶⁰ As a result, if rent is payable on the first day of the month but it is not paid on that day, the lessor's tacit hypothec accrues on the second day.¹⁶¹ Since the lessor's tacit hypothec is accessory to an obligation to pay rent, the lessor has no hypothec if no rent is due.¹⁶² The lessor's tacit hypothec relates only to movables that are present on the leased premises on the day that rent becomes due.¹⁶³

Apart from the preference enjoyed by the lessor on the lessee's insolvency,¹⁶⁴ the accrual of the hypothec does not afford the lessor a real security right.¹⁶⁵ As a

¹⁵⁷ WE Cooper *Landlord and tenant* (2nd ed 1994) 182-183.

¹⁵⁸ For the requirements of the extension of the lessor's tacit hypothec to the third party's property, see chapter three section 3.3 below.

¹⁵⁹ See *Webster v Ellison* 1911 AD 73 86.

¹⁶⁰ See *Pinn v Elliot* (1904) 21 SC 366; *Noble v Heatley* 1905 TS 433; *Frank v Van Zyl* [1957] 2 All SA 149 (C); *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 514E–G. See further H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; E Kahn, M Havenga, P Havenga, J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 90; AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 275; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 405. TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99 states that the lessee cannot be prevented from dealing with and disposing of his movables so as long as he is not in arrears with the rent.

¹⁶¹ G Wille *Landlord and tenant in South Africa* (4th ed 1948) 201.

¹⁶² See *Pinn v Elliott* (1904) 21 SC 366; *Waverly Trust Co v De Paux* 1902 TH 75; *In re Prince; Ex parte Cloete* (1884) 3 SC 139; WE Cooper *Landlord and tenant* (2nd ed 1994) 193.

¹⁶³ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 441; E Bertelsmann *et al* (ed C Nagel) *Mars: The insolvency law of South Africa* (9th ed 2008) 445.

¹⁶⁴ In terms of s 85(2) of the Insolvency Act 24 of 1936.

¹⁶⁵ See *Webster v Ellison* 1911 AD 73 88. See further TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99; WE Cooper *Landlord and tenant* (2nd ed 1994) 193; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 202.

result, there is nothing to prevent third parties from acquiring rights in the same property, which may nullify the lessor's tacit hypothec.¹⁶⁶ It follows that without attachment the hypothec does not prevent a concurrent creditor from attaching property subject to the lessor's tacit hypothec to satisfy his claim.¹⁶⁷ To acquire a real security right, the lessor must seek the assistance of the court,¹⁶⁸ and thus have the sheriff of the court attach property on the premises or apply for an interim interdict to prevent removal of property from the leased premises.¹⁶⁹ In *Webster v Ellison*,¹⁷⁰ Innes J remarked that the fact that the hypothec attaches and operates only as long as the goods are on the leased premises renders the lessor's tacit hypothec of little practical value.¹⁷¹ Consequently, in the absence of an interdict or attachment, the lessor's tacit hypothec is lost as soon as the goods are removed from the premises.¹⁷² The judge emphasised that the lessor is not entitled to prevent the lessee from removing the property from the leased premises; rather, his remedy is to seek the assistance of the court and obtain an interdict or an attachment order.¹⁷³ It does not matter who removes the property from the leased premises or whether such a person knew or was ignorant of the existence of the hypothec over the property.¹⁷⁴ As a result, the hypothec is lost if the lessee, a *bona fide* purchaser of the property, a creditor, or the messenger acting on behalf of a third party removes property subject to the lessor's tacit hypothec from the premises before attachment.¹⁷⁵ Removal of the property from the leased premises before perfection (attachment) defeats the lessor's tacit hypothec, since the lessor has no real security right over the property but only a personal right to acquire a real security right over the *invecta et illacta* belonging to the lessee.¹⁷⁶ However, the lessor's tacit hypothec

¹⁶⁶ *Webster v Ellison* 1911 AD 73 88.

¹⁶⁷ See *Alexander v Burger* 1905 TS 80 82; *Symons v The Messenger* 1909 TS 749 750.

¹⁶⁸ *Webster v Ellison* 1911 AD 73 94. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 405.

¹⁶⁹ In terms of s 31(1) or s 32 of the Magistrates' Courts Act 32 of 1944.

¹⁷⁰ 1911 AD 73 88.

¹⁷¹ See also G Wille *Landlord and tenant in South Africa* (4th ed 1948) 202.

¹⁷² *Webster v Ellison* 1911 AD 73 88.

¹⁷³ *Webster v Ellison* 1911 AD 73 88.

¹⁷⁴ *Webster v Ellison* 1911 AD 73 94.

¹⁷⁵ *Webster v Ellison* 1911 AD 73 94.

¹⁷⁶ This is the position in which the lessor finds himself before the attachment or perfection of his hypothec. After the lessor has obtained the attachment order, his personal right is converted into a real security right and he therefore may claim the property from everyone or order any person who took it after attachment to return it: *Leech v Gardner* (1898) 15 CLJ 206; *Webster v Ellison* 1911 AD 73 94. See also GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 442; H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 326.

is not lost if the property is removed from the leased premises by the sheriff or messenger under a writ of execution taken out by the lessor for the very purpose of giving effect to the hypothec.¹⁷⁷

Roman-Dutch law recognised the lessor's right to seize property removed from the leased premises but only while it is in transit to its new destination,¹⁷⁸ since the lessor's tacit hypothec operates against property found on the leased premises and is lost as soon as it is removed from the leased premises.¹⁷⁹ South African courts have accepted this principle¹⁸⁰ but have rejected to grant an attachment order relating to the *invecta et illata* once it has reached its destination.¹⁸¹ South African courts have expressed the view that although the lessor may make an application expeditiously, it will not order the attachment and return of the property to the leased premises once it has reached its destination.¹⁸²

In South African law the machinery to assist the lessor to protect and enforce his hypothec takes various forms. The Magistrates' Courts Act 32 of 1944 and the High Court Rules contain special procedures that enable the lessor to have the movable property found on the leased premises attached as security for his claim for arrear rent. The Magistrates' Courts Act provides two remedies for the protection of the lessor's tacit hypothec. The first remedy is in terms of section 31 of the Act, which provides that an automatic rent interdict may be obtained when summons claiming rent is issued. This entails attaching to the summons a notice that prohibits any person from removing any of the furniture or other effects that are subject to the

¹⁷⁷ See *Goldberg v Lubbe's Trustee* 1911 TPD 254; *Columbia Furnishing Co. v Goldblatt* 1929 AD 31. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 198; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 203.

¹⁷⁸ T Berwick *A contribution to an English translation of Voet's commentary on the Pandects* (1902) 311.

¹⁷⁹ WE Cooper *Landlord and tenant* (2nd ed 1994) 197. See further G Wille *Landlord and tenant in South Africa* (4th ed 1948) 208-209.

¹⁸⁰ See *McLelland and Stokes v London and South Africa Exploration Co* (1899) 9 HCG 22 31; *Webster v Ellison* 1911 AD 73 81; *Reddy v Johnson* 1923 NPD 190; *Frank v Van Zyl* 1957 (2) SA 207 (C). See also WE Cooper *Landlord and tenant* (2nd ed 1994) 197.

¹⁸¹ See *Badock & Co v Trustees Skeen's Assigned Est* (1884) 5 NRL 192; *Hall v Welkom* (1885) 6 NRL 73; *Stranack & Co v East Welch* (1888) 9 NRL 137; *Walker v Funwayo* (1888) 9 NRL 206; *Houghting v Lloyd* (1906) 27 NLR 94. See further H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 441; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 405; WE Cooper *Landlord and tenant* (2nd ed 1994) 197; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 208.

¹⁸² See *Webster v Ellison* 1911 AD 73 74; *Frank v Van Zyl* [1957] 2 SA 207 (C).

lessor's tacit hypothec from the leased property, until the court has made an order.¹⁸³ Such a notice serves as an interdict against any person who knows about the notice not to remove any of the specified property.¹⁸⁴ Confirmation by the court of such an interdict operates as an extension of the interdict until execution of a further order of the court.¹⁸⁵ The second remedy is in terms of section 32 of the Magistrates' Courts Act, as amended by section 25 of the Magistrates' Courts Amendment Act 120 of 1993. In essence, section 32(1) of the Act provides for the issue of an attachment order on application by the lessor or his agent on affidavit alleging as follows: the premises is situated within the jurisdiction of the court; an amount of rent not exceeding the court's jurisdiction is due and in arrears; rent has been demanded in writing for the space of seven days and more; and that the lessee is about to remove the movable property from the premises in order to avoid payment of the rent.¹⁸⁶ These allegations are regarded as grounds for attachment of the lessee's property.¹⁸⁷

In *Timmerman v Le Roux*¹⁸⁸ it was held that the application must expressly make an allegation that the lessee intends removing the movables in the immediate future, and that the reason for the removal is specifically to avoid payment of rent.¹⁸⁹ The court expressed the view that a magistrate is not permitted to authorise the removal of the goods when granting an attachment order and that removal may only take place pursuant to the execution procedure laid down in the Magistrates' Courts Act.¹⁹⁰ Upon security being given to the satisfaction of the clerk of the court to pay all damages, costs and charges that the lessee or any other person may sustain or incur by reason of the attachment if it is set aside, the court may issue an attachment order. The order is carried out by the sheriff of the court. The sheriff can attach so much of the movable property on the premises subject to the lessor's tacit hypothec for the rent as may be sufficient to satisfy the amount of such rent, together with the

¹⁸³ S 31(1) of the Magistrates' Courts Act 32 of 1944.

¹⁸⁴ S 31(3) of the Magistrates' Courts Act 32 of 1944.

¹⁸⁵ S 30(2) of the Magistrates' Courts Act 32 of 1944.

¹⁸⁶ S 32(1) of the Magistrates' Courts Act 32 of 1944.

¹⁸⁷ In *Webster v Ellison* 1911 AD 73 87 the court expressed the view that the lessor is entitled to an interdict or attachment as of right as soon as the rent is in arrears and without alleging any apprehension of removal.

¹⁸⁸ 2000 (4) SA 59 (W).

¹⁸⁹ *Timmerman v Le Roux* 2000 (4) SA 59 (W) 66E.

¹⁹⁰ *Timmerman v Le Roux* 2000 (4) SA 59 (W) 66E.

costs of the application and any action for the rent.¹⁹¹ Generally, any person affected by an interim interdict may apply to the court to have the notice set aside.¹⁹² However, in *Halstead v Durrant*¹⁹³ it was held that there can be no appeal against interlocutory orders such as an interim interdict confirming the lessor's tacit hypothec.¹⁹⁴ This principle also applies to actions brought in terms of section 32(2) of the Magistrates' Courts Act, which provides that any affected person (namely, the lessee or other persons affected by the order) can apply to have the attachment set aside, provided that he offer security pending the final decision of the court.¹⁹⁵ An application to vary or rescind the attachment order can also be made under section 36(d) of the Magistrates' Courts Act.¹⁹⁶

In cases where the high court has jurisdiction, an interdict *pendente lite* (interim interdict) would seem to afford adequate protection.¹⁹⁷ The general principle with regard to obtaining an interdict *pendente lite* is that the lessor must establish the following: a clear right; an injury actually committed or reasonably apprehended; and the absence of similar or adequate protection by any other ordinary remedy.¹⁹⁸ An application for an interim interdict will succeed if the applicant is able to satisfy the abovementioned requirements. However, the court has discretion to grant an interim interdict even when a clear right has not been proven. The court may only grant an interim interdict in the following circumstances: the right the applicant seeks to protect is *prima facie* established, even though open to some doubt; there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted, and he ultimately succeeds in establishing the right; the balance of

¹⁹¹ S 31(1) of the Magistrates' Courts Act 32 of 1944; WE Cooper *Landlord and tenant* (2nd ed 1994) 197.

¹⁹² S 31(4) of the Magistrates' Courts Act 32 of 1944.

¹⁹³ 2002 (1) SA 277 (W) 238F-H.

¹⁹⁴ The reason is to protect a lessor from losing the security enjoyed by virtue of the hypothec, thereby protecting the *status quo* until a judgment could be obtained for rental arrears. See *Halstead v Durrant* 2002 (1) SA 277 (W).

¹⁹⁵ *Halstead v Durrant* 2002 (1) SA 277 (W) 238F-H.

¹⁹⁶ *Halstead v Durrant* 2002 (1) SA 277 (W) 285A-B. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 405.

¹⁹⁷ See *Lieberman v Guadian Assurance and Trust Co of Port Elizabeth* 1909 TS 1050; *Salisbury Municipality v Partington and Another* 1961 (3) SA 218 (SR). See further TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 100.

¹⁹⁸ See *Setlogelo v Setlogelo* 1914 AD 221 227. See further AC Cillers, C Loots & HC Nel *Herbstein and Van Winsen: The civil procedure of the High Courts and the Supreme Court of Appeal of South Africa* Vol 2 (5th ed 2009) 1456-1457.

convenience favours the granting of interim relief; and the applicant has no other satisfactory remedy.¹⁹⁹

The effect of the abovementioned remedies is either to prohibit anyone with knowledge of the order in question to remove movable property from the premises or to enable the sheriff of the court to attach sufficient movable property, even before final judgment has been obtained. In all these cases a final attachment order can be obtained after the lessor has successfully applied in court for arrear rent. The accrual and nature of attachment to perfect the lessor's tacit hypothec are discussed above and the legal effect of attachment is discussed below.

In *Leech v Gardner*²⁰⁰ Hertzog J expressed the opinion that what the lessor had before attachment was only a right to have the goods hypothecated to him. He pointed out that it was called a potential right in the *invecta at illata* and that the hypothec was only completely constituted after arrest.²⁰¹ In *Webster v Ellison*²⁰² Innes J pointed out that the lessor's tacit hypothec would be of little practical value without some special machinery to enforce it and that the machinery provided by the Roman-Dutch law for this purpose is attachment.²⁰³ In *Reddy v Johnson*²⁰⁴ it was held that attachment is necessary to create a limited real right and consequently that a lessor cannot prevent removal of the goods from the premises without first seeking an attachment order.²⁰⁵ In *Eight Kaya Sands v Valley Irrigation Equipment*²⁰⁶ the central issue was whether attachment of the movable property on the leased premises was necessary to perfect the lessor's tacit hypothec. Van der Walt J answered this question in the affirmative, while Preller AJ disagreed. Van der Walt J, relying on *Webster v Ellison*,²⁰⁷ stated that as a general rule the lessor's tacit hypothec takes effect once the movables are attached and therefore lapses if the movables are removed and not attached. According to Van der Walt J, the lessor's

¹⁹⁹ See *Setlogelo v Setlogelo* 1914 AD 221 227; AC Cillers, C Loots & HC Nel *Herbstein and Van Winsen: The civil procedure of the High Courts and the Supreme Court of Appeal of South Africa* Vol 2 (5th ed 2009) 1456-157.

²⁰⁰ (1898) 15 CLJ 206.

²⁰¹ *Leech v Gardner* (1898) 5 CLJ 206.

²⁰² 1911 AD 73 87. See further the recent case of *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 34.

²⁰³ *Webster v Ellison* 1911 AD 73 79. See also G Wille *Landlord and tenant in South Africa* (4th ed 1948) 204.

²⁰⁴ 1923 NPD 190 192.

²⁰⁵ *Reddy v Johnson* 1923 NPD 190 192.

²⁰⁶ 2003 (2) SA 495 (T).

²⁰⁷ 1911 AD 73.

tacit hypothec grants the lessor a right to attachment in order to vest a real security right over the movable property of the lessee as security for the payment of the rental arrears.²⁰⁸ Without attachment, no complete real right comes into existence.²⁰⁹ The minority judgment of Preller AJ, on the other hand, approached the legal principles differently. His view was that a limited real right comes into existence as soon as rent is in arrears.²¹⁰ According to Preller AJ, attachment is not necessary for the hypothec to operate as a real security right. However, the lessee could frustrate the right by removing the property from the leased premises, even in the presence of the lessor. The lessor can only prevent this from happening by obtaining an interdict or an attachment order.²¹¹ More recently, the court in *Holderness NO and Others v Maxwell and Others*²¹² confirmed the majority judgment in *Eight Kaya Sands v Valley Irrigation Equipment*,²¹³ and held that the lessor's tacit hypothec without attachment by means of a court order does not vest the lessor with a real security right.²¹⁴

Knobel²¹⁵ questions Van der Walt J's construction as to whether attachment is necessary.²¹⁶ Her question concerns the nature of the right that comes into existence once a lessee falls into rental arrears, but before attachment has taken place.²¹⁷ Knobel points out that some authors²¹⁸ and judges²¹⁹ argue that the hypothec becomes a real right only upon attachment or the acquisition of effective control in another way, such as the automatic rent interdict.²²⁰ By contrast, other authors²²¹ and one judge²²² contend that the lessor's tacit hypothec comes into existence as soon as rent is in arrears. In order to vest, perfect or secure the hypothec, the lessor has certain rights that he may exercise in respect of the movable things on the

²⁰⁸ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 501G.

²⁰⁹ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 502C.

²¹⁰ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 514E.

²¹¹ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 514F-G.

²¹² *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 30.

²¹³ 2003 (2) SA 495 (T).

²¹⁴ [2012] ZAKZPHC 49 (31 July 2012) 34.

²¹⁵ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 691.

²¹⁶ See *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 502C.

²¹⁷ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 691. Preller AJ also posed this question in *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 513F-G.

²¹⁸ WE Cooper *Landlord and tenant* (2nd ed 1994) 192-193; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99.

²¹⁹ Innes J in *Webster v Ellison* 1911 AD 73 87; Van der Walt J in *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 502C.

²²⁰ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 691.

²²¹ FJ van Zyl & JD van der Vyver *Inleiding tot die regs wetenskap* (2nd ed 1982) 412; LM du Plessis & AG du Plessis *An introduction to law* (3rd ed 1999) 145.

²²² Preller AJ in *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).

leased premises, such as the entitlement to attach the movables.²²³ Knobel argues that none of the authors and judges referred to above explains the nature of the lessor's tacit hypothec or the right (or entitlement, as she prefers) that the lessor has before perfection. According to Knobel there is authority for the view that these entitlements arise *ex lege*.²²⁴ She is of the opinion that the hypothec is best construed as one of the *naturalia* of the contract of lease, a term that is implied *ex lege* into a contract complying with the requirements of a contract of lease.²²⁵ It is not clear whether or not Knobel agrees with the sources she refers to. Knobel concludes that Van der Walt J's decision is more equitable in terms of its practical effect on the position of a third person. She prefers the majority decision of Van der Walt J because attachment provides unambiguous compliance with the publicity principle and promotes legal certainty.²²⁶

I conclude that the court in *Webster v Ellison*²²⁷ interpreted Voet²²⁸ to the effect that the hypothec, before attachment, has no force against third parties. In other words, the lessor's tacit hypothec is only effective between the parties.²²⁹ I suggest that the right that the lessor has before attachment is a personal right to acquire a real security right.²³⁰ Therefore, attachment is necessary to establish a real security right. This construction is supported by case law,²³¹ academic views,²³² and legislation.²³³ The effect of attachment is that the lessor's right against the property is rendered effective against the whole world.²³⁴ This result follows from the fact that as

²²³ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 692.

²²⁴ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 692.

²²⁵ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 692-693.

²²⁶ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 691-692.

²²⁷ 1911 AD 73 86.

²²⁸ 20.2.3.

²²⁹ See also *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T); *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 34.

²³⁰ See *Leech v Gardner* (1898) 5 CLJ 206.

²³¹ *Leech v Gardner* (1898) 15 CLJ 206; *Webster v Ellison* 1911 AD 73 86; *Reddy v Johnson* 1923 NPD 190 192 193; *Timmerman v Le Roux* 2000 (4) SA 59 (W); *Halstead v Durant* 2002 (1) SA 27 (W); *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T); *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 30.

²³² H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; E Kahn, M Havenga, P Havenga, J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 90, 92; AJ van der Walt & GJ Pienaar *Introduction to law of property* (6th ed 2009) 275; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 405; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 204; I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 691.

²³³ Ss 31 and 32 of the Magistrates' Courts Act 32 of 1944.

²³⁴ *Webster v Ellison* 1911 AD 73 86.

soon as attachment is made, the subsequent removal of goods from the premises is prohibited. This means that a personal right conferred on the lessor by the hypothec is converted by attachment into a real security right.²³⁵ The lessor becomes a secured creditor,²³⁶ both prior to and upon the insolvency of the lessee.²³⁷

2 5 2 Lessor's preference on the lessee's insolvency

Upon the lessee's insolvency attachment is not necessary in order to obtain a preference in favour of the lessor.²³⁸ The lessor automatically obtains a right of first preference over the proceeds of the goods that are subject to his hypothec. Regarding the lessor's preference for rent upon the lessee's insolvency, the following points should be considered: the amount of the preference claimable; property subject to the preference; and the order of preference.

The amount claimable by the lessor upon the lessee's insolvency is set out in section 85(2) of the Insolvency Act 24 of 1936, which provides that:

"A landlord's legal hypothec shall confer a preference with regard to any article subject to that hypothec for any rent calculated in respect of any period immediately prior to and up to the date of sequestration but not exceeding (a) three months, if the rent is payable monthly or at shorter intervals than one month; (b) six months, if the rent is payable at intervals exceeding one month but not exceeding three months; (c) nine months, if the rent is payable at intervals exceeding three months but not exceeding six months; (d) fifteen months in any other case".

The lessor enjoys a preference only over *invecta et illata* that were on the premises at the date of sequestration²³⁹ but he does not lose his preference when the *invecta et illata* are removed from the leased premises for the very purpose of being sold in

²³⁵ TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 100.

²³⁶ *Webster v Ellison* 1911 AD 73 86; E Kahn, M Havenga, P Havenga, J Lotz *Principles of the law sale and lease* (2nd ed 2010) 92.

²³⁷ See *Timmerman v Le Roux* 2000 (4) SA 59 (W); *Halstead v Durant* 2002 (1) SA 27 (W).

²³⁸ *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 20; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 100.

²³⁹ *In re BSA Asphalte and Manufacturing Co* (1906) 23 SC 624; *Sercombe v Colonial Motors Ltd (Natal) Ltd* (1929) 50 NLR 58; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 209; WE Cooper *Landlord and tenant* (2nd ed 1994) 199. See also H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325.

execution.²⁴⁰ This additional preference for the lessor is provided for in section 47 of the Insolvency Act:

“If a creditor of an insolvent estate who is in possession of any property belonging to that estate, to which he has a right of retention, or over which he has the landlord’s legal hypothec, delivers that property to the trustee of that estate, at the latter’s request, he shall not thereby lose the security afforded by his right of retention or lose his legal hypothec, if when delivering the property, he notifies the trustee in writing of his rights and in due course proves his claim against the estate”.²⁴¹

A lessor whose claim exceeds the amount for which he has a preferent claim becomes a concurrent creditor in the free residue of the insolvent lessee’s estate for the balance of his claim.²⁴² For example, if the rent is payable monthly and five months’ rent is in arrears when the lessee is sequestrated and sufficient movables belonging to the lessee are found on the leased premises to pay the arrear rent for five months, the lessor will have a secured claim for only three months’ rent. His claim for rent in arrears for the other two months is unsecured and he will merely have a concurrent claim for it.²⁴³ For the purpose of calculating the amount of rent for which the lessor has a secured claim it was held in *Sercombe v Colonial Motors (Natal) Ltd*²⁴⁴ that the date of sequestration is the date of the provisional order of sequestration.

A perfected lessor’s tacit hypothec and an instalment agreement hypothec²⁴⁵ may compete in a claim against a lessee’s (debtor’s) insolvent estate.²⁴⁶ The question whether the lessor’s tacit hypothec that has been perfected or an instalment

²⁴⁰ See *Goldberg v Lubbe’s Trustee* 1911 TPD 254; *Columbia Furnishing Co v Goldblatt* 1929 AD 27; WE Cooper *Landlord and tenant* (2nd ed 1994) 199. See further G Wille *Landlord and tenant in South Africa* (4th ed 1948) 209.

²⁴¹ *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 21.

²⁴² See *Dommissie v Theart* (1885) 4 SC 92. See further E Kahn, M Havenga, P Havenga & J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 93; E Bertelsmann *et al* (ed C Nagel) *Mars: The insolvency law of South Africa* (9th ed 2008) 447; WE Cooper *Landlord and tenant* (2nd ed 1994) 199; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 211.

²⁴³ See E Bertelsmann *et al* (ed C Nagel) *Mars: The insolvency law of South Africa* (9th ed 2008) 447.

²⁴⁴ 1929 NLR 58.

²⁴⁵ Instalment agreement hypothec is a real security right with regard to movables, and it secures the credit grantor’s claim for outstanding payments in terms of a credit agreement in cases where the credit receiver becomes insolvent before payment of the last instalment, see AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 277.

²⁴⁶ See E Kahn, M Havenga, P Havenga & J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 93; AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 277.

agreement hypothec²⁴⁷ should prevail in a claim on an insolvent estate has not yet been decided in South African courts. The following paragraphs discuss the order of preference between the perfected lessor's tacit hypothec and the instalment agreement hypothec. The question whether the property belonging to the third party is subject to the lessor's hypothec is dealt with in the next chapter.

Scott and Scott²⁴⁸ are of the view that where the property forming the subject matter of the lessor's tacit hypothec is also subject to other real security rights, the *prior in tempore potior in iure* rule applies. Therefore, the lessor's tacit hypothec over certain *invecta et illata* ranks prior to that of the credit grantor (instalment agreement seller) over the same movables, as the latter only comes into existence upon the debtor's insolvency.²⁴⁹ Scott and Scott further argue that the lessor's claim is preferent because his hypothec vested earlier than that of the credit grantor, and the lessor can successfully oppose delivery of the property to the credit grantor because of the credit grantor's express or implied consent to the lessor's tacit hypothec.²⁵⁰

Cooper²⁵¹ is of the view that where there is a competition upon insolvency between the lessor's tacit hypothec and an instalment agreement hypothec, the lessor's tacit hypothec is stronger than the rights of the instalment agreement seller.²⁵² According to Cooper, this position follows from the circumstance that prior to the lessee's insolvency the instalment agreement seller was the owner and that upon the lessee's insolvency the instalment agreement seller loses his ownership and acquires a hypothec as a surrogate of the ownership.²⁵³ Cooper argues that this surrogate cannot be stronger than the ownership for which it was substituted.²⁵⁴ Cooper further argues that the lessor's tacit hypothec is preferent to the claim of the holder of a special notarial bond over the movables, since such a bond operates over the free residue only.²⁵⁵ However, Cooper's view predated the Security by Means of Movable Property Act, which had the effect of excluding the property over

²⁴⁷ Conferred by s 84 of the Insolvency Act 24 of 1936.

²⁴⁸ TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 101.

²⁴⁹ TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 101. This is the position before the National Credit Act 34 of 2005 came into operation on 15 March 2006.

²⁵⁰ TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 264.

²⁵¹ WE Cooper *Landlord and tenant* (2nd ed 1994) 199.

²⁵² WE Cooper *Landlord and tenant* (2nd ed 1994) 199; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 100.

²⁵³ WE Cooper *Landlord and tenant* (2nd ed 1994) 199.

²⁵⁴ WE Cooper *Landlord and tenant* (2nd ed 1994) 199.

²⁵⁵ WE Cooper *Landlord and tenant* (2nd ed 1994) 190; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 101.

which a special notarial bond is registered before the perfection of the lessor's tacit hypothec.²⁵⁶

Kerr²⁵⁷ suggests that on the lessee's insolvency, when there is competition between the lessor's tacit hypothec and an instalment agreement hypothec, the better view appears to be that the creditor of the hypothec that originated prior in time (in normal cases the lessor's tacit hypothec) has preference.

Van der Walt and Pienaar²⁵⁸ are of the view that where there is a clash between the lessor's tacit hypothec and the hypothec of the credit grantor over the same movable property upon the lessee's (debtor's) insolvency, which hypothec should prevail is dependent on whether the credit grantor was informed that his property is on the leased premises. They argue that if the credit grantor was not informed that the property was on the leased premises, the lessor's tacit hypothec should not include the property belonging to the credit grantor. However, if the credit grantor was informed, and if all requirements of the *Bloemfontein Municipality v Jackson's*²⁵⁹ case have been met,²⁶⁰ the lessor's tacit hypothec may include that property. In such a case the lessor's tacit hypothec can be stronger than that of the credit grantor but only if the lessor's tacit hypothec accrued and was perfected before insolvency.²⁶¹

Notwithstanding the above analysis of academic views, in light of section 2(1) of the Security by Means of Movable Property Act 57 of 1993, I conclude that on the lessee's insolvency the instalment agreement hypothec trumps the lessor's tacit hypothec, since section 2(1)(b) of the Act expressly excludes the movable property sold in terms of the instalment agreement from being subject to the lessor's tacit hypothec. One may also conclude that the exclusion in section 2(1) of the Act only applies before the lessee's insolvency, since the Security by Means of Movable Property Act does not actually refer to the instalment agreement hypothec but only to the instalment agreement itself.

²⁵⁶ See s 2(1) of the Security by Means of Movable Property Act 57 of 1993.

²⁵⁷ AJ Kerr *The law of sale and lease* (3rd 2004) 405.

²⁵⁸ AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 277.

²⁵⁹ 1929 AD 266.

²⁶⁰ For a discussion of the requirements, see chapter three section 3 3 2 below.

²⁶¹ AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 278.

2 6 Termination of the lessor's tacit hypothec

The lessor's tacit hypothec is discharged as soon as the lessee pays the arrear rent,²⁶² but if the payment is invalid, for example if it is made by means of a cheque that is subsequently dishonoured, the hypothec is not discharged.²⁶³ In *Koenigsberg, Hopkins & Co v Robinson Gold Mining Co Ltd*²⁶⁴ it was held that if the amount of the arrear rent is paid to the lessor by a third party, the hypothec is discharged, even though such person receives a cession from the lessor of his rights and action against the lessee, for since the hypothec is discharged by the fact of payment, there is nothing left to be ceded.²⁶⁵

According to Lubbe,²⁶⁶ termination of the lease contract does not terminate the lessor's tacit hypothec.²⁶⁷ The author argues that there is also authority for the proposition that the termination of the lease contract terminates the lessor's tacit hypothec.²⁶⁸ In *Oliver & Havenga v Moyer*²⁶⁹ the contention was raised that on the expiration of a lease the lessor's tacit hypothec was *ipso facto* discharged, since there no longer is any leased premises. However, the court held that the expiration of the contract of lease does not discharge the lessee of the duty to pay the rent in arrears. In *Rajah v Pillay*²⁷⁰ the court interdicted the lessee from removing the *invecta et illata* if the lease was cancelled but arrear rent was not paid. Further, in *Spayile v Bower*²⁷¹ a new lessee took possession on termination of the lease and the property belonging to the previous lessee subject to the hypothec remained on the leased premises. The court held that the hypothec remained in force. In *Laingsburg*

²⁶² See *Koenigsberg, Hopkins & Co v Robinson Gold Mining Co Ltd* 1905 TH 90 95-96; *Hamp-Adams v Loubser* 1911 CPD 564 568. See further AJ van der Walt & GJ Pienaar *Introduction to the law of property* (6th ed 2009) 275; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 407; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 443; WE Cooper *Landlord and tenant* (2nd ed 1994) 199; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 211.

²⁶³ See *Table Bay Harbour Board v Carrol* (1908) 25 SC 45. See also *Spayile v Bower* 1911 CPD 65; *Windermere v Mitre* 1970 (1) SA 152 (R); WE Cooper *Landlord and tenant* (2nd ed 1994) 199; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 211.

²⁶⁴ 1905 TH 90.

²⁶⁵ See E Kahn, M Havenga, P Havenga & J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 94; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 211.

²⁶⁶ See GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 443.

²⁶⁷ *Spayile v Bower* 1911 CPD 65; *Oliver & Havenga v Moyes* 1916 OPD 40; E Kahn, M Havenga, P Havenga & J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 94.

²⁶⁸ See GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 443.

²⁶⁹ 1916 OPD 40.

²⁷⁰ 1966 (2) SA 222 (N).

²⁷¹ 1911 CPD 65.

*School Board v Logan*²⁷² it was held that a lessor cannot charge rent for storage of property that he retains against the will of the lessee in the exercise of his rights after the lease has come to an end. Removal of property before attachment terminates the lessor's tacit hypothec against such property.²⁷³

2 7 Conclusion

Considering the significance and usefulness of real security rights in the modern economy, as a point of departure this chapter examines the meaning of real security rights and also discusses the forms of real security that existed in Roman law prior to the evolution of the lessor's tacit hypothec. The chapter concludes that the lessor's tacit hypothec developed in cases of rural leases as an alternative form of real security to the two oldest forms of real security rights (*fiducia* and *pignus*), which had the effect of transferring ownership or possession of the security object to the creditor. The discussion of the historical background of the lessor's tacit hypothec in this chapter indicates that in the early stages of development, the lessor's hypothec could only be constituted by agreement between the parties and that the agreement between the parties, specifically with regard to urban leases, disappeared during the reign of Emperor Justinian. The analysis of the evolution of the lessor's tacit hypothec indicates that major developments of the lessor's tacit hypothec took place in sixteenth and seventeenth-century Roman-Dutch law. The lessor's tacit hypothec is the only remaining common law tacit hypothec that exists in South African law and its significance is recognised by South African statutes.²⁷⁴

The South African legal position regarding the lessor's tacit hypothec can be summarised as follows: the lessor's tacit hypothec accrues as soon as the rent is due but not paid. It vests over movable property brought on to the leased premises as well as the fruits of the leased land to secure the payment of rent stipulated in the lease agreement.²⁷⁵ The lessor's tacit hypothec entails that the lessor may have the encumbered thing attached by the sheriff of the court, and that he may keep the attached property until the rent in arrear is paid in full. However, in case of the

²⁷² (1910) 27 SC 240.

²⁷³ *Webster v Ellison* 1911 AD 73 86. See further GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 443.

²⁷⁴ S 85(2) of the Insolvency Act 24 of 1936; S 2(2) of the Security by Means of Movable Property Act 57 of 1993.

²⁷⁵ See TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99.

lessee's insolvency the lessor acquires "a right of first preference" with regard to the proceeds of the sale in execution of the security property.

The chapter also illustrates that there is an on-going debate between judges and academics with regard to whether attachment is necessary for the lessor's hypothec to constitute a real right.²⁷⁶ On the one hand are authors who argue that attachment constitutes a real security right. On the other hand are authors who argue that attachment only strengthens the real security right. Taking into consideration case law and academic views, one may conclude that attachment constitutes a real security right.

Considering the controversy amongst academics²⁷⁷ with respect to the scope of obligation secured by the lessor's tacit hypothec, relying on legislation,²⁷⁸ and case law,²⁷⁹ I conclude that the lessor's tacit hypothec only secures the rent in arrears.²⁸⁰ I furthermore conclude that unlike other real security rights that attach only to the property belonging to the debtor, the lessor's tacit hypothec also affects the property rights of sub-lessees and third parties. Consequently, in cases where the lessee's property proves insufficient to settle the debt, the sub-lessee's movable property found on the leased premises may be attached but only to the extent that the sub-lessee owes rent.²⁸¹ In cases where both the lessee's and sub-lessee's movable property is insufficient to secure the lessor's claim, a third party's property that has been brought on to the premises may be subject to the lessor's hypothec, but only if the requirements set in *Bloemfontein Municipality v Jacksons Ltd*²⁸² – as confirmed in *Paradise Lost Properties v Standard Bank of Southern Africa (Pty) Ltd*²⁸³ – have been met.

²⁷⁶ See section 2.5.1 above.

²⁷⁷ WE Cooper *Landlord and tenant* (2nd ed 1994) 190 suggests that the decision in *Woodrow & Co v Rothman* (1884) 4 EDC on this point is sufficient to conclude that in modern law the hypothec covers only overdue rent and no other debts. By contrast, AJ Kerr *The law of sale and lease* (3rd 2004) 390-392 holds the opinion that the hypothec is not so limited.

²⁷⁸ Ss 31 and 32 Magistrates' Courts Act 32 of 1944; S 85(2) of the Insolvency Act 24 of 1936.

²⁷⁹ *Woodrow & Co v Rothman* (1884) 4 EDC 9; *New Life Communal Property Association v Draigri Boerdery Bpk* [2007] ZAECHC 101 15.

²⁸⁰ See also *Wavely Trust & Trading Co v Depaux* 1902 TH 73; *Webster v Ellison* 1911 AD 73 86; GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 438.

²⁸¹ TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99.

²⁸² 1929 AD 226 271.

²⁸³ 1997 (2) SA 815 (D).

Although the question whether the perfected lessor's tacit hypothec or the instalment agreement hypothec should prevail on the lessee's insolvency has not yet been dealt with by South African courts, I conclude that the instalment agreement hypothec should prevail, since section 2(1)(b) of the Security by Means of Movable Property Act excludes the movable property sold in terms of the instalment agreement from being subject to the lessor's tacit hypothec.

The general aim of this chapter is to describe and analyse the common law principles that provide for the lessor's tacit hypothec. The chapter gives an overview of the historical background of the lessor's tacit hypothec in Roman law and Roman-Dutch law, and describes the general principles regulating the lessor's tacit hypothec in South African law. The description and analysis of the principles that provides for the lessor's tacit hypothec has laid the foundation for the scrutiny of the extension of the lessor's tacit hypothec to the third party's property, which issue is examined in the next chapter.

Chapter 3:

Extension of the lessor's tacit hypothec to third parties' property

3 1 Introduction

The lessor's tacit hypothec developed in Roman law¹ and Roman-Dutch law,² and was adopted in South African law.³ The principle that provides for the extension of the lessor's tacit hypothec to property belonging to third parties developed in seventeenth century Roman-Dutch law⁴ and was accepted in South African law.⁵

In *Hollandsche consultatien* Grotius explained the extension principle as follows:

"If things have been carried into leased premises with the knowledge and also the consent of the owner in order to remain there for the duration of the lease, and to be used by the tenants they are subject to the landlord's hypothec, but it is otherwise if the owner was ignorant."⁶

The justifications for the principle that provides for the extension of the lessor's tacit hypothec to third parties' property were set out in *Bloemfontein Municipality v Jacksons Ltd*⁷ as follows:

"When goods belonging to a third person are brought on to leased premises with the knowledge and consent, express or implied, of the owner of the goods, and

¹ See chapter two, section 2 3 1 1 above.

² See chapter two, section 2 3 1 2 above.

³ See chapter two, section 2 3 2 above.

⁴ See DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advijsen* (1894) 186; J Voet *Commentarius ad Pandectas* (1829 trans by P Gane *Commentary on the Pandect* 1958, hereafter referred as Voet) 20.2.5.

⁵ See *Lazarus v Dose* (1884) 3 SC 42 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342 344; *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 320; *Collins v Whittock* (1899) 9 HCG 182; *Noble v Heatley* 1905 TS 433; *Turpin v Wagstaff & Sons* 1906 TS 597 ; *Russell v Savory* (1906) 20 EDC 100 103; *Ncora v Untiedt* 1916 EDL 328; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 235; *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187 189; *Bradlow & Co v Lucas* 1917 TPD 310; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282 284; *Sercombe v Colonial Motors (Natal) Ltd* 1929 NPD 58 65; *Bradlow v Ward* 1929 TPD 313.

⁶ DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advijsen* (1894) 186. See also G Wille *Landlord and tenant in South Africa* (4th ed 1948) 195.

⁷ 1929 AD 266.

with the intention that they shall remain there indefinitely for the use of the tenant, and the owner, being in a position to give notice of his ownership to the landlord fails to do so, and the landlord is unaware that the goods do not belong to the tenant, the owner will thereby be taken to have consented to the goods being subject to the landlord's tacit hypothec and liable to attachment."⁸

The common law position regarding the extension of the lessor's tacit hypothec to third parties' property has been amended by the Security by Means of Movable Property Act⁹ to provide more protection to third parties. However, despite a degree of legislative protection, recent discussions have cast doubt on the justifications for the extension of the lessor's tacit hypothec to third parties' property that is not covered by the Act.¹⁰

The aim of the chapter is to describe the common law principle that provides for the extension of the lessor's tacit hypothec to third parties' property. More specifically, the chapter focuses on setting out the justifications for the extension principle as well as the protective measures developed under the common law and recently enacted statutory protection for third parties' property. The second part of the chapter explores the origins of the principle that provides for the extension of the lessor's tacit hypothec to third parties' property. The third part explains the rationale for the extension of the lessor's tacit hypothec to third parties' property. The fourth part sets out and analyses recently enacted statutory protection for certain third parties against the lessor's tacit hypothec.

3 2 The extension principle and its origins

The general principle is that the lessor has a tacit hypothec over *invecta et illata* on the leased premises to secure the rent due to him by the lessee.¹¹ Accordingly, the

⁸ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271.

⁹ 57 of 1993, s 2.

¹⁰ See AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12 *EJCL* 1-18 14; JS McLennan "A lessor's hypothec over the goods of third parties – anomaly and anachronism" (2004) 16 *SA Merc LJ* 121-125 125; I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 694.

¹¹ For the application of the principle see *Lazarus v Dose* (1884) 3 SC 43; *Isaacs v Hart & Henochsberg* (1887) 8 NLR 18; *Webster v Ellison* 1911 AD 73. See also H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325; E Kahn, M Havenga, P Havenga & J Lotz *Principles of the law of sale and lease* (2nd ed 2010) 90; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 656; P Havenga, M Havenga, R Kelbrick, M McGregor, H Schulze & K van der Linde *General principles of commercial*

lessee's movable property brought on to the leased premises with the intention to remain there indefinitely is subject to the lessor's tacit hypothec.¹² Whether or not the lessor was aware of the presence of the lessee's property on the leased premises is irrelevant.¹³ A sub-lessee's property is also subject to the lessor's tacit hypothec, but only to the extent that the sub-lessee owes rent.¹⁴ Property of a third party found on the leased premises may only be subject to the lessor's tacit hypothec if the lessee's and/or the sub-lessee's property found on the leased premises proves insufficient to secure the lessor's claim for arrear rent.¹⁵ The extension of the lessor's tacit hypothec to third parties' property is the most salient feature of the lessor's remedy and constitutes an exception to the principle that the creditor can only execute against his debtor's property in order to satisfy his claim.¹⁶

The origins of the principle that provides for the extension of the lessor's tacit hypothec to third parties' property can be traced back to the customary laws of France and Holland.¹⁷ The extension principle as applied in South African law originated from customary laws of mid-seventeenth century Holland.¹⁸ The extension principle is founded on various Roman-Dutch authorities and it combines the most

law (6th ed 2007) 178; AJ Kerr *The law of sale and lease* (3rd ed 2004) 389; JTR Gibson, C Visser, JT Pretorius, R Sharrock & M van Jaarsveld (eds) *South African mercantile and company law* (8th ed 2003) 182; WE Cooper *Landlord and tenant* (2nd ed 1994) 180; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99; MA Diemont, RM Marais & PJ Aronstam *The law of hire-purchase in South Africa* (4th ed 1978) 208; AFS Maasdorp *Maasdorp's Institutes of South African law* Vol II (8th ed 1960) 193; RW Lee *Introduction to Roman-Dutch law* (5th ed 1953) 189; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 189; THR Roos & H Reitz *Principles of Roman-Dutch law* (1909) 94; M Nathan *Common law of South Africa* Vol II (1904) 936; AFS Maasdorp *The institutes of Cape law* Book II (1903) 255.

¹² Voet 20.2.5; *Leech v Gardner* (1898) 15 CLJ 206; *Bourne & Co v Lindsay* 1912 TPD 144; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230.

¹³ See *Friedlander v Croxford & Rhodes* (1867) 5 Searle 395 396; *Mackay Bros Ltd v Eaglestone* 1932 TPD 301 305-306. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 181; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 657.

¹⁴ See *Friedlander v Croxford & Rhodes* (1867) 5 Searle 395; *Smith v Dierks* (1884) 3 SC 142; *Ex parte Aegis Ass and Trust Co* 1909 EDC 363.

¹⁵ *Longlands v Francken* 1881 Kotzé 256; *Lazarus v Dose* (1884) 3 SC 43; *Border and Allen v Gowlett* 1911 OPD 29. See also AJ Kerr *The law of sale and lease* (3rd ed 2004) 394.

¹⁶ See *Lazarus v Dose* (1884) 3 SC 43; *Isaacs v Hart & Henochsberg* (1887) 8 NLR 18; *Webster v Ellison* 1911 AD 73; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230 236; *Van den Bergh, Melamed & Nathan v Polliack & Co* 1940 TPD 237 238. See also GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA* Vol 17 Part 2 (2nd ed 2008) para 440.

¹⁷ *Bourne & Co v Lindsay* 1912 TPD 142 144.

¹⁸ See DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advijsen* (1894) 186; Voet 20.2.5; *Bourne & Co v Lindsay* 1912 TPD 142 144. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 183; AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12 *EJCL* 1-18 14-15.

practical elements appearing in the principles expressed by various Roman-Dutch jurists.¹⁹

Roman law does not directly deal with the extension of the lessor's tacit hypothec. However, there are two texts in the Digest that are generally quoted as bearing on the matter. The first text is that of Scaevola,²⁰ who states that a special agreement by the debtor and the creditor (owner of the land) that anything brought on to the land shall be included in the mortgage of the land and should cover slaves brought on to the land by the debtor to remain there permanently but not slaves brought there for temporary purposes.²¹ However, in *Leech v Gardner*²² Hertzog J held that the example referred to by Scaevola is neither a case of the lessor's tacit hypothec nor of one person's property being bound for another person's debt. Regarding the second Roman law text, in *Lazarus v Dose*²³ De Villiers CJ stated that the earliest reference to the subject in the civil law is that of Pomponius. Pomponius stated that "we must see whether everything brought on to premises is hypothecated or only what is brought on so as to remain there".²⁴ Pomponius's view is that only property brought on to the leased premises with the intention to remain there should be subject to the hypothec.²⁵ Wille²⁶ argues that the authority cited in *Lazarus v Dose*²⁷ refers to the lessor's tacit hypothec but there is no reference to the application of the lessor's tacit hypothec to the third party's property. In *Goldinger's Trustee v Whitelaw & Sons*²⁸ Mason J stated that the Digest provides in general terms that *invecta et illata* brought on to the leased premises are liable to the lessor's tacit hypothec.²⁹ Yet, there is no passage that explicitly or implicitly imposes this

¹⁹ G Wille *Landlord and tenant in South Africa* (4th ed 1948) 194-195.

²⁰ D 20.1.32 (English translation of the *Digest* referred to in this thesis is from T Mommsen, P Kruger & A Watson *The Digest of Justinian Vol II* (1985)). See also G Wille *Landlord and tenant in South Africa* (4th ed 1948) 195.

²¹ The original Digest text in D 20.2.32 states that "[a] debtor agreed that whatever was brought on the mortgaged land or there arose or was produced should be subject to mortgage. Part of the land was untenanted, and the debtor handed it to his managing slave to farm, assigning him slaves needed for that purpose. The question was whether the managing slave, the other slave sent to farm, and the manager's *vicarii* were subject to the mortgage. Scaevola replied that only those who were brought on their owners as permanent, not those lent temporarily, were mortgaged".

²² (1898) 15 CLJ 208.

²³ (1884) 3 SC 44.

²⁴ D 20.2.7.

²⁵ D 20.2.7 reads as follows: "We must see whether everything brought on to premises is hypothecated or only what is brought on so as to remain there. The latter is the better view."

²⁶ See G Wille *Landlord and tenant in South Africa* (4th ed 1948) 194.

²⁷ (1884) 3 SC 44.

²⁸ 1916 TPD 230 235.

²⁹ D 20.1.22.

liability on the property of a third person.³⁰ One can therefore conclude that the Roman law lessor's tacit hypothec probably did not extend to third parties' property.³¹

Roman-Dutch law regarding the extension of the lessor's tacit hypothec to third parties' property is more explicit.³² In an opinion that was collected in the *Hollandsche consultatien* Grotius argues as follows:

"If things have been carried into leased premises with the knowledge and also the consent of the owner in order to remain there for the duration of the lease and to be used by the tenants they are subject to the landlord's hypothec, but it is otherwise if the owner was ignorant".³³

Grotius's view is that a third party's property brought on to the leased premises to remain there for the service and use by the lessee is only bound by the lessor's tacit hypothec if it was brought on to the leased premises with the knowledge and consent of the third party (owner). Grotius further states that a third party's property may be subject to the lessor's tacit hypothec if, with the knowledge that his property is used on the leased premises, the third party fails to inform the lessor of his ownership of the property.³⁴ Groenewegen³⁵ and Van Leeuwen³⁶ support this view.

Voet collected the chief authorities on this subject and states the law in the following manner:

"Only such *invecta et illata*, however are bound by tacit mortgage as are the tenant's own property; unless they have been taken into the hired premises with the consent of their owner with a view to be kept there permanently, or for the use of the tenant, such for example as beds, chairs and instruments of the art which the tenant exercises in the house, for their owner has thereby tacitly consented to this tacit mortgage of his property, at least in *subsidium* of any deficiency in the *illata* of the tenant himself, nor can he be considered clear of

³⁰ See *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230 235.

³¹ See *D 20.1.22*; *Leech v Gardner* (1898) 15 CLJ 208; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230 235. See also G Wille *Landlord and tenant in South Africa* (4th ed 1948) 194.

³² G Wille *Landlord and tenant in South Africa* (4th ed 1948) 195.

³³ DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advijsen* (1894) 186. See also G Wille *Landlord and tenant in South Africa* (4th ed 1948) 195.

³⁴ DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advijsen collated* (1894) 186.

³⁵ 2.48.17.

³⁶ 1.4.9.3.

fraud when with the full knowledge of the facts, he dissembled and did not inform the lessor [of his ownership]".³⁷

Voet's view is that, if the lessee's property found on the leased premises proves insufficient, the lessor may attach property found on the premises belonging to a third party to satisfy his claim for arrear rent.³⁸ However, a third party's property is subject to the lessor's tacit hypothec only if such a third party had knowledge of and consented to it being there and if the property was brought on to the leased premises with the intention to remain there for permanent use by the lessee. A third party's property may also be subject to the lessor's tacit hypothec if the third party knows that his property is stored on the leased premises and fails to inform the lessor of his ownership.³⁹

The Roman-Dutch law principle that provides for the extension of the lessor's tacit hypothec to third parties' property was accepted in South African law⁴⁰ and was at issue in several South African cases decided before 1929. 1929 is an important year for this thesis because it is the year in which the Appellate Division settled the law regarding the extension of the lessor's tacit hypothec to third parties' property in the case of *Bloemfontein Municipality v Jacksons Ltd.*⁴¹

Grotius's view as stated in the *Hollandsche consultatien*⁴² was accepted in South African law in *Longlands v Francken*,⁴³ where it was held that a third party's property brought on to the leased premises with the third party's consent and for permanent use by the lessee was subject to the lessor's tacit hypothec.⁴⁴ The earliest reference in South African case law to Voet's⁴⁵ view to the same effect is *Ulrich v Ulrich's Trustee*,⁴⁶ where it was held that the lessee's daughter's property

³⁷ Voet *Commentarius ad Pandectas* (1829 trans by P Gane *Commentary on the Pandect* 1958, hereafter referred as Voet) 20.2.5.

³⁸ Voet 20.2.5.

³⁹ Voet 20.2.5. See also M Nathan *Common law of South Africa* Vol II (1904) 936.

⁴⁰ See *Longlands v Francken* 1881 Kotzé 256; *Ulrich v Ulrich's Trustee* (1883) 2 SC 319; *Lazarus v Dose* (1884) 3 SC 42 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342 344; *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 320; *Leech v Gardner* (1898) 15 CLJ 208; *Collins v Whittock* (1899) 9 HCG 182.

⁴¹ 1929 AD 266.

⁴² DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advijsen* (1894) 186.

⁴³ 1881 Kotzé 256.

⁴⁴ 1881 Kotzé 256.

⁴⁵ Voet 20.2.5.

⁴⁶ (1883) 2 SC 319.

brought on to the leased premises to remain there permanently for the daughter's and the lessee's use was subject to the lessor's tacit hypothec to satisfy the lessor's claim for rent in arrears.⁴⁷

Accordingly, the South African legal position is that the lessor's tacit hypothec may extend to third parties' property only if it was brought on to the leased premises with the knowledge and consent of its owner, and to remain on the leased premises indefinitely for the use by the lessee. Otherwise, it is subject to the lessor's tacit hypothec if the third party knows that his property is on the leased premises and fails to inform the lessor of his ownership over the property before the hypothec is perfected.⁴⁸

3 3 Rationale for the extension

3 3 1 Introduction

Even though the extension principle has been accepted and applied in South African law,⁴⁹ the rationale for the extension of the lessor's tacit hypothec to third parties' property remains unclear.⁵⁰ In recent years discourse has shown that there is

⁴⁷ See also *Russell v Savory* (1906) 20 EDC 100, where the lessee of a house and garden had the right to keep four horses and two cows on the adjoining farm. Only one cow was kept on the leased land. The cow was the property of the lessee's son, who lived with him and paid no rent. No notice was given to the lessor that the cow was not the property of the lessee. The lessee fell in arrears and the cow was attached. In an interpleader action the lessee's son claimed ownership of the cow. The court held that the cow was kept on the farm under the lease and was there permanently (in the sense of indefinitely) and presumably for the benefit of the lessee. Consequently, the cow was subject to the lessor's tacit hypothec.

⁴⁸ See *Longlands v Francken* 1881 Kotzé 256; *Ulrich v Ulrich's Trustee* (1883) 2 SC 319; *Russell v Savory* (1906) 20 EDC 100; *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271.

⁴⁹ For acceptance of the extension principle see *Longlands v Francken* 1881 Kotzé 256; *Ulrich v Ulrich's Trustee* (1883) 2 SC 319. For the application of the extension principle, see *Lazarus v Dose* (1884) 3 SC 42 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342 344; *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 320; *Collins v Whittock* (1899) 9 HCG 182; *Noble v Heatley* 1905 TS 433; *Turpin v Wagstaff & Sons* 1906 TS 597; *Russell v Savory* (1906) 20 EDC 100 103; *Ncora v Untiedt* 1916 EDL 328; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 235; *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187 189; *Bradlow & Co v Lucas* 1917 TPD 310; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282 284; *Sercombe v Colonial Motors (Natal) Ltd* 1929 NPD 58 65; *Bradlow v Ward* 1929 TPD 313; *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271; *Rand Furnishing Co v Hydenrych* 1929 TPD 583; *Mackay Bros Ltd v Eaglestone* 1932 TPD 301 303; *Hilson & Taylor Ltd v Teukolskin* 1933 TPD 83 88; *Fresh Meat Supply Co v Standard Trading Co (Pty)* 1933 CPD 550 555; *Van den Bergh, Melamed & Nathan v Polliack & Co* 1940 TPD 237 238; *TR Services (Pty) Ltd v Poynton's Corner Ltd & Others* 1961 (1) SA 773 (N); *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T); *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 34.

⁵⁰ See JS McLennan "A lessor's hypothec over the goods of third parties – anomaly and anachronism" (2004) 16 SA Merc LJ 121-125 125; I Knobel "The tacit hypothec of the lessor" (2004) 67 THRHR 687-697 694; AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12

uncertainty regarding the justifications of the extension of the lessor's tacit hypothec to third parties' property to satisfy the lessor's claim for arrear rent by the lessee. This uncertainty has recently become more apparent, and in *TR Services (Pty) Ltd v Poynton's Corner Ltd & Others*⁵¹ Warner J expressed the following opinion:

“[I]t is very difficult to discover the true basis for the landlord having a hypothec over the goods of third parties in the possession of the tenants ... this ... appears to be a strange approach because I find the greatest difficulty in believing that any owner, if asked the question, would agree to his goods being made subject to such hypothec. He would almost inevitably reply: ‘Of course I do not agree to it; why should I?’”⁵²

In *Eight Kaya Sands v Valley Irrigation Equipment*⁵³ Van der Walt J in an *obiter dictum* stated that there is no legal relationship between the lessor and a third party whose movables are on the leased premises. Therefore, there is no justification to attach the third party's property as security for the debt of the lessee. Cooper argues that the justifications advanced for the extension of the lessor's tacit hypothec to third parties' property are unsound.⁵⁴ McLennan argues that implied consent, fault and appearance are all hopeless explanations for the extension of the lessor's tacit hypothec to third parties' property to satisfy the lessor's claim for arrear rent against the lessee.⁵⁵ Steven argues that implied consent is a fiction whereby the owner is taken to have accepted to the lessor's tacit hypothec.⁵⁶ He further argues that as a result of implied consent being a fiction, an alternative theory that the consent is inferred from the owner being negligent in asserting his ownership should be dismissed.⁵⁷ Smith argues that there is no legal nexus or contract between the lessor

EJCL 1-18 14; D Smith “The constitutionality of the lessor's hypothec: Attachment of a third party's goods” (2011) 27 *SAJHR* 308-330 330.

⁵¹ 1961 (1) SA 773 (N) 775D-H.

⁵² AJM Steven “Landlord's hypothec in comparative perspective” (2008) 12 *EJCL* 1-18 14 concurs with this view.

⁵³ 2003 (2) SA 495 (T) 500G-H.

⁵⁴ WE Cooper *Landlord and tenant* (2nd ed 1994) 183.

⁵⁵ JS McLennan “A lessor's hypothec over the goods of third parties – anomaly and anachronism” (2004) 16 *SA Merc LJ* 121-125 123.

⁵⁶ AJM Steven “Landlord's hypothec in comparative perspective” (2008) 12 *EJCL* 1-18 14-15.

⁵⁷ AJM Steven “Landlord's hypothec in comparative perspective” (2008) 12 *EJCL* 1-18 14-15.

and the third party, and therefore the lessor's tacit hypothec should not extend to the third party's property.⁵⁸

There are two theories (views) regarding the basis for the extension of the lessor's tacit hypothec to third parties' property.⁵⁹ In terms of the first theory the extension of the lessor's tacit hypothec to third parties' property is based on the premise that the third party consented (explicitly or by implication) that his property can serve as security for the payment of the lessee's arrear rent.⁶⁰ The second theory relies on the doctrine of estoppel that operates as a limitation on the *rei vindicatio* of the third party.⁶¹ According to both theories it is necessary that the attached property should have been brought on to the leased premises not merely for temporary but for perpetual (indefinite) use by the lessee. To qualify as perpetual, the use must be for an indefinite period or for the entire period of the lease.⁶²

In what follows I analyse the two theories (implied consent and estoppel) with reference to case law prior to 1929, the 1929 case of *Bloemfontein Municipality v Jacksons Ltd*⁶³ and post-1929 case law in order to identify the essential requirements of each theory. The main aim of this analysis is to examine how each of the two doctrines has developed and is applied in South African law.

⁵⁸ D Smith "The constitutionality of the lessor's hypothec: Attachment of a third party's goods" (2011) 27 SAJHR 308-330 330. See also I Knobel "The tacit hypothec of the lessor" (2004) 67 THRHR 687-697 694, who argues that the third party's property should not serve as security for the debts of a lessee.

⁵⁹ *TR Services (Pty) Ltd v Poynton's Corner Ltd & Others* 1961 (1) SA 773 (D) 775-776; *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 28. See also GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440.

⁶⁰ For application of this approach, see *Longlands v Francken* 1881 Kotzé 256; *Ulrich v Ulrich's Trustee* (1883) 2 SC 319; *Lazarus v Dose* (1884) 3 SC 42; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342; *Heugh's Trustee v Heydenrych* (1895) 12 SC 318; *Collins v Whittock* (1899) 9 HCG 182; *Noble v Heatley* 1905 TS 433; *Turpin v Wagstaff & Sons* 1906 TS 597; *Russell v Savory* (1906) 20 EDC 100; *Ncora v Untiedt* 1916 EDL 32; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 235; *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282; *Sercombe v Colonial Motors (Natal) Ltd* 1929 NPD 58; *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266; *Bradlow v Ward* 1929 TPD 313; *Rand Furnishing Co v Hydenrych* 1929 TPD 583; *Mackay Bros Ltd v Eaglestone* 1932 TPD 301; *Hilson & Taylor Ltd v Teukolskin* 1933 TPD 83; *Fresh Meat Supply Co v Standard Trading Co (Pty)* 1933 CPD 550; *Philips v Hearne & Co* 1937 CPD 61; *Van den Bergh, Melamed & Nathan v Polliack & Co* 1940 TPD 237.

⁶¹ For application of this approach, see *Lazarus v Dose* (1884) 3 SC 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342; *Heugh's Trustee v Hydenrych* (1895) 12 SC 320; *Turpin v Wagstaff & Sons* 1906 TS 599; *Ncora v Untiedt* 1916 EDL 329; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD; *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271.

⁶² M Nathan *Common law of South Africa Vol II* (1904) 937.

⁶³ 1929 AD 266.

3 3 2 Implied consent

3 3 2 1 Introduction

According to the first theory the extension principle is based on the third party's consent that his property can be utilised as security for payment of arrear rent by the lessee. It is argued that the third party's consent may be express or implied from his conduct.⁶⁴ It appears that no problem arises in cases where the third party gave express consent for his property to be subject to the lessor's tacit hypothec.⁶⁵ However, implied consent seems to be more problematic.⁶⁶ Hence, this section focuses on the third party's implied consent and not his express consent. The circumstances under which the third party's consent to the lessor's tacit hypothec may be implied have been carefully analysed by South African courts.⁶⁷ In *Lazarus v Dose*⁶⁸ De Villiers CJ expressed the view that a third party's consent to the lessor's tacit hypothec could be presumed from the third party's conduct in leaving his property in the lessee's possession under such a circumstance as would necessarily lead the lessor to believe that the property belongs to the lessee.

In *Bloemfontein Municipality v Jacksons Ltd*⁶⁹ Curlewis JA explained the implied consent principle as follows:

"When goods belonging to a third person are brought on to leased premises with the knowledge and consent, express or implied, of the owner of the goods, and with the intention that they shall remain there indefinitely for the use of the tenant, and the owner, being in a position to give notice of his ownership to the landlord fails to do so, and the landlord is unaware that the goods do not belong

⁶⁴ See *Lazarus v Dose* (1884) 3 SC 44; *Collins v Whittock* (1899) 9 HCG 182; *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187; *Bradlow & Co v Lucas* 1917 TPD 310; *Bradlow v Ward* 1929 TPD 313. See also G Wille *Landlord and tenant in South Africa* (4th ed 1948) 194; TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99.

⁶⁵ See TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 99. See also AJ Kerr *The law of sale and lease* (3rd ed 2004) 394; I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 94.

⁶⁶ See also I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 94.

⁶⁷ See *Baker v Hirst & Co* (1880) 2 NLR 55; *Longlands v Francken* 1881 Kotzé 256; *Noble v Heatley* 1905 TS 433; *Turpin v Wagstaff & Sons* 1906 TS 597; *Carstens v Basson* 1912 CPD 170; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 236.

⁶⁸ (1884) 3 SC 42.

⁶⁹ 1929 AD 266 271.

to the tenant, the owner will thereby be taken to have consented to the goods being subject to the landlord's tacit hypothec and liable to attachment."⁷⁰

In *Barclays Western Bank Ltd v Dekker & Another*⁷¹ Kumbleben J expressed the view that "implied consent" is inferred when an owner has failed to inform the lessor of his ownership of property on the leased premises when he could reasonably be expected to have done so. Disputes regarding third parties' property usually occur when the owner seeks to reclaim his property and the lessor relies on his alleged hypothec.⁷² In such circumstances the onus is on the lessor to prove that the hypothec exists and also attaches to the third party's property on the leased premises.⁷³ The lessor can discharge this onus only by proving the four requirements that follow from *Bloemfontein Municipality v Jacksons Ltd*,⁷⁴ namely:

- The property must be on the premises with the knowledge and consent of its owner;
- the lessor must be unaware of the fact that the property belongs to someone other than the lessee;
- the property must be present with some degree of permanence and not merely temporarily; and
- the property must be there for the lessee's own use and benefit.

These requirements are discussed below with reference to their application in case law prior to 1929, in *Bloemfontein Municipality v Jacksons Ltd*⁷⁵ and in post-1929 case law. Although these requirements already developed in seventeenth century Roman-Dutch law, the decision in *Bloemfontein Municipality v Jacksons Ltd* was a pivotal moment in the development of the principle of the extension of the lessor's tacit hypothec in modern South African law. This case is significant because, as I explain below, the court in *Bloemfontein Municipality v Jacksons Ltd* developed or

⁷⁰ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271.

⁷¹ 1984 (3) SA 220 (D) 222-223.

⁷² AJ Kerr *The law of sale and lease* (3rd ed 2004) 394.

⁷³ See *Ncora v Untiedt* 1916 EDL 32; *TR Services (Pty) Ltd v Poynton's Corner Ltd & Others* 1961 (1) SA 773 (D) 775C-D; *Barclays Western Bank Ltd v Dekker and Another* 1984 (3) SA 22 (D) 222C-D. See also M Nathan *Common law of South Africa* Vol II (1904) 938; G Wille *Landlord and tenant in South Africa* (4th ed 1948) 196; AJ Kerr *The law of sale and lease* (3rd ed 2004) 394.

⁷⁴ 1929 AD 266 271.

⁷⁵ 1929 AD 266.

extended the third party's knowledge and consent requirement further than it was applied before.

3 3 2 2 *Third parties' knowledge and consent*

Roman-Dutch law provided for the extension of the lessor's tacit hypothec to third parties' property only if the third party had knowledge of and consented to his property being on the leased premises.⁷⁶ This was also the position in South African law prior the decision in *Bloemfontein Municipality v Jacksons Ltd.*⁷⁷

For instance, in *Heugh's Trustee v Heydenrych*⁷⁸ the owner had let the furniture to the lessee (the insolvent) of certain leased premises who later moved the furniture to new premises without the respondent's knowledge and consent. The court held that it was impossible to hold the owner responsible for the new lessor's belief that the furniture belonged to the insolvent. De Villiers CJ reasoned that the owner of the furniture, being unaware of the removal, could not have given notice of his ownership to the new lessor and therefore the lessor's tacit hypothec did not apply to such furniture.⁷⁹

In *Collins v Whittock*⁸⁰ the facts corresponded to those in *Heugh's Trustee v Hydenrych*.⁸¹ However, in *Collins v Whittock* the owner of the property gave consent to the first removal of the property to the premises owned by his debtor's relatives. Yet, without the owner's knowledge and consent, the debtor moved once again to the leased premises owned by the defendant. The court held that the plaintiff knew

⁷⁶ See DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advijsen* (1894) 186; Voet 20.2.5.

⁷⁷ 1929 AD 266. For the South African position before 1929 see *Lazarus v Dose* (1884) 3 SC 42 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342 344; *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 320; *Collins v Whittock* (1899) 9 HCG 182; *Noble v Heatley* 1905 TS 433; *Turpin v Wagstaff & Sons* 1906 TS 597; *Russell v Savory* (1906) 20 EDC 100 103; *Ncora v Untiedt* 1916 EDL 328; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 235; *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187 189; *Bradlow & Co v Lucas* 1917 TPD 310; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282 284; *Sercombe v Colonial Motors (Natal) Ltd* 1929 NPD 58 65; *Bradlow v Ward* 1929 TPD 313.

⁷⁸ (1895) 12 SC 318.

⁷⁹ In *Heugh's Trustee v Heydenrych* (1895) 12 SC 320 De Villiers CJ stated that it was always a prudent course for a person who lets movables to the lessee of land to give notice to the lessor that the movables do not belong to the lessee. According to De Villiers CJ such notice protects the owner of the property against the lessor's tacit hypothec and if the owner of property fails to give notice to the lessor, the court will not require much evidence to hold that he impliedly consented to the lessor's tacit hypothec.

⁸⁰ (1899) 9 HCG 181.

⁸¹ (1895) 12 SC 318.

nothing of the removal of his property to the lessor's (defendant's) premises until the liability for rent had been incurred and therefore the lessor's tacit hypothec could not extend to the plaintiff's property.⁸²

In *Bradlow & Co v Lucas*⁸³ B sold furniture to W in terms of a hire-purchase agreement subject to a reservation of ownership clause, and informed W's lessor of the hire-purchase agreement. Thereafter the lessor transferred ownership of the premises to his son and no notification of change of ownership was given to B. When W fell in arrears with the rent, the new lessor attached the movable assets found on the leased premises including B's furniture.⁸⁴ The court held that inasmuch as B had done everything in its power to show that it did not consent to the furniture being subject to the lessor's tacit hypothec, its furniture could not be subject to the lessor's tacit hypothec.⁸⁵

In *Bradlow v Ward*⁸⁶ B sold furniture to F in terms of a hire-purchase agreement and informed F's lessor of the hire-purchase agreement. F agreed not to remove the furniture from the leased premises without B's written consent and that, in case F decided to remove the furniture to other premises, he should inform and provide B with the name and address of his new lessor. F moved the furniture to premises belonging to Ward and did not inform B of the move. As soon as B became aware of F's move, he obtained the name and address of F's new lessor and informed him of the hire-purchase agreement. However, by the time the new lessor was informed of the hire-purchase agreement, he had already issued summons for rental arrears and had obtained a rent interdict. On appeal the court held that the lessor's tacit hypothec could not extend to the furniture belonging to B because B had taken all reasonable steps to protect his property against the hypothec.⁸⁷

⁸² *Collins v Whittock* (1899) 9 HCG 183.

⁸³ 1917 TPD 314.

⁸⁴ *Bradlow & Co v Lucas* 1917 TPD 310 312.

⁸⁵ *Bradlow & Co v Lucas* 1917 TPD 310 314.

⁸⁶ 1929 TPD 313.

⁸⁷ *Bradlow v Ward* 1929 TPD 313 317. In contrast, see *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282, in which C sold furniture to V under a hire-purchase agreement and notified V's lessor of the hire-purchase agreement. V informed C of his move to W's premises. Subsequently, C wrote a letter to W informing him of the hire-purchase agreement. However, W refused to accept the letter in the belief that it was not for him. The letter was returned to C, and C took no further steps to inform W of the hire-purchase agreement. When V fell in arrears with rent W attached property found on the leased premises, including C's furniture, to satisfy his claim for arrear rent. The court held that C's furniture was subject to the lessor's tacit hypothec, since C failed to take steps to protect himself. See

In three of the four cases discussed above,⁸⁸ third parties lacked knowledge that their properties were on the leased premises. Consequently, consent to their property being subject to the lessor's tacit hypothec could not be inferred. However, in *Bradlow & Co v Lucas*⁸⁹ the court was influenced by the fact that the third party had taken reasonable steps to notify the lessor that it did not wish its property to be subject to the lessor's tacit hypothec.

In light of the preceding overview of case law I conclude that prior to 1929 South African courts accepted that the lessor's tacit hypothec could only extend to third parties' property if the third party had knowledge that his property was on the leased premises.⁹⁰ Consequently, the third party's property was not subject to the lessor's tacit hypothec if he was unaware that his property was on the leased premises.⁹¹ The operation of the extension of the lessor's tacit hypothec to third parties' property in this context corresponds to the principle that provides that the property of a legal subject may not be alienated or burdened without his consent (express or implied).⁹²

also *Rand Furnishing Co v Heydenrych* 1929 TPD 588, where De Waal JP elaborated on this *dictum* as follows:

"[I]t is clear from those authorities that the owner of movables must not be guilty of any dilatory or negligent conduct in the matter of notice. He must take such steps as are reasonable in the circumstances to protect his property, steps that would negative any intention on his part to subject his goods to the operation of the landlord's lien. It is not enough, for the owner merely to say: 'I do not consent to my goods being subject to the landlord's lien'. He must give some reasonable expression of his intention not to consent, either to the landlord or his agent; he must do something that appeals to reasonable men as being entirely inconsistent with his having so consented."

In this case the court emphasised how essential it is for a third party who knows that his property is on the leased premises to notify the lessor of his ownership. The above *dictum* also focused on the conduct of a third party who does not know his property is on the hired premises but fails to ascertain the whereabouts of his property.

⁸⁸ *Heugh's Trustee v Heydenrych* (1895) 12 SC 318; *Collins v Whittock* (1899) 9 HCG 182; *Bradlow v Ward* 1929 TPD 313.

⁸⁹ 1917 TPD 310 313.

⁹⁰ See *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 320; *Collins v Whittock* (1899) 9 HCG 182; *Bradlow & Co v Lucas* 1917 TPD 310; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282 284; *Bradlow v Ward* 1929 TPD 313. See also *Lazarus v Dose* (1884) 3 SC 42 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342 344; *Noble v Heatley* 1905 TS 433; *Turpin v Wagstaff & Sons* 1906 TS 597; *Russell v Savory* (1906) 20 EDC 100 103; *Ncora v Untiedt* 1916 EDL 328; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 235; *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187 189; *Sercombe v Colonial Motors (Natal) Ltd* 1929 NPD 58 65; *Rand Furnishing Co v Heydenrych* 1929 TPD 583.

⁹¹ See *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 320; *Collins v Whittock* (1899) 9 HCG 182; *Ncora v Untiedt* 1916 EDL 328; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282 284; *Bradlow v Ward* 1929 TPD 313. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 185.

⁹² See *Lazarus v Dose* (1884) 3 SC 42; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342 344; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 23.

However, in 1929 a major development took place with the Appellate Division's decision in *Bloemfontein Municipality v Jacksons Ltd*.⁹³ In May 1925 the respondents (Jacksons Ltd) sold furniture in terms of a hire-purchase agreement to Smit, who was then living on the leased premises situated in Shannon Valley. The respondent informed Smit's lessor of the hire-purchase agreement. In May 1926 Smit moved from Shannon Valley to 205 Monument Road in Bloemfontein where he rented a house from Bloemfontein Municipality (the appellant). No notice was given to the respondents of Smit's change of address. When Smit fell in arrears with his instalments, the respondents issued summons against him but the messenger was unable to serve Smit with summons at Shannon Valley. However, with the assistance of the respondent's attorneys the messenger successfully served Smit with summons at 205 Monument Road. Subsequent to Smit's failure to pay the due instalments the respondents repossessed the furniture. Smit then paid the due instalments and the furniture was returned to him at 205 Monument Road.

The appellant attached the furniture under a judgment for arrear rent and in the interpleader action the respondents (Jacksons Ltd) claimed that the furniture was not subject to the lessor's tacit hypothec because it belonged to them. By the time the furniture was attached, it had been stored at 205 Monument Road for eighteen months. The court had to decide whether the respondents' property was subject to the lessor's tacit hypothec.⁹⁴ The court rejected the respondents' argument that the knowledge of its attorneys could not be imputed to it because the attorneys were only its agents for the purpose of issuing summons for recovery of the due instalments.

The court held that ordinary prudence demands that an owner of goods supplied under a hire-purchase agreement should protect itself in some way.⁹⁵ The court emphasised that although the hire-purchase agreement contained the name and address of the lessor in Shannon Valley, it contained no prohibition against Smit removing the furniture without first obtaining the consent of the respondents or a clause binding Smit to give notice to the respondents in case he moves to a new premises. The court per Curlewis JA held that the respondents were in a position to find out where Smit was living but failed to do so and/or to take reasonable

⁹³ 1929 AD 266.

⁹⁴ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 226 271.

⁹⁵ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 273.

measures to protect itself.⁹⁶ As a result, the court was compelled to infer from the respondents' conduct that the respondents impliedly consented to its furniture being subject to the lessor's tacit hypothec.⁹⁷

Prior to *Bloemfontein Municipality v Jacksons Ltd*⁹⁸ South African courts interpreted the third party's knowledge and consent requirement to mean that a third party's property could not be subject to the lessor's tacit hypothec if the third party was not aware that his property was on the leased premises. *Bloemfontein Municipality v Jacksons Ltd*⁹⁹ developed the third party's knowledge and consent requirement and it now entails that a third party's property can be subject to the lessor's tacit hypothec even if the third party has no knowledge that his goods is on the leased premises. However, the third party should have been in position to ascertain the whereabouts of his property but failed to protect himself.¹⁰⁰

Cooper accepts the premise of the court in *Bloemfontein Municipality v Jacksons Ltd*¹⁰¹ that Jacksons Ltd was not entitled to assume that Smit would continue to live in Shannon Valley and that Jacksons Ltd had the means of knowing that Smit was no longer residing there.¹⁰² The author also agrees with the court's view that it did not follow that Jacksons Ltd knew that Smit was either no longer residing in Shannon Valley or was residing in 205 Monument Road.¹⁰³ Cooper further agrees with the court that by its failure to take steps to protect itself Jacksons Ltd led the appellant to believe that the furniture was the lessee's property and hence subject to the hypothec.¹⁰⁴ However, Cooper criticises the court's failure to apply the third party's knowledge and consent requirement.¹⁰⁵ Cooper argues that unless the third party's knowledge of its property being stored at 205 Monument Road was established, the court was not entitled to infer that Jacksons Ltd had

⁹⁶ De Villiers ACJ, Wessels JA and Stratford JA wrote separate judgments but concurred with the judgment of Curlewis JA. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 186-185.

⁹⁷ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 272-278.

⁹⁸ 1929 AD 266.

⁹⁹ 1929 AD 266.

¹⁰⁰ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 226 271.

¹⁰¹ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 272-278.

¹⁰² WE Cooper *Landlord and tenant* (2nd ed 1994) 188. Cooper argues that although the Appellate Division in *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 did not refer to *Rand Furnishing Co v Hydenrych* 1929 TPD 588, it was aware of this decision. Cooper further contends that the *dictum* in *Rand Furnishing Co v Hydenrych* by De Waal JP led to the formulation of the law by the Appellate Division in *Bloemfontein Municipality v Jacksons Ltd*.

¹⁰³ WE Cooper *Landlord and tenant* (2nd ed 1994) 188.

¹⁰⁴ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.

¹⁰⁵ WE Cooper *Landlord and tenant* (2nd ed 1994) 188.

impliedly consented to its furniture being subject to the lessor's tacit hypothec.¹⁰⁶ Yet, Cooper suggests that the decision in *Bloemfontein Municipality v Jacksons Ltd*¹⁰⁷ can be supported on the basis that Smit was not prohibited under the hire-purchase agreement from removing the furniture from the hired premises in Shannon Valley and therefore Smit was under no obligation to notify Jacksons Ltd of his move.¹⁰⁸ Cooper's view can be interpreted to mean that *Bloemfontein Municipality v Jacksons Ltd*¹⁰⁹ should have been decided on estoppel rather than implied consent.

In *Fresh Meat Supply Co v Standard Trading Co*¹¹⁰ Standard Trading Co (the respondents) sold electric appliances to Birke (the lessee) in terms of a hire-purchase agreement, with a clause that states that the articles shall be kept in Birke's possession. The agreement further obliged Birke to notify the respondents of his new lessor's name and address in case he moves to another leased premises.¹¹¹ The hire-purchase agreement was not completely filled in and Birke did not indicate whether or not he was living on the leased premises. The Standard Trading Co accepted the incomplete agreement and had no knowledge that Birke kept its furniture on the leased premises owned by Fresh Meat Supply Co.

Subsequent to Birke's failure to pay rent the furniture was attached by the appellant in terms of a judgment for arrear rent. The respondent claimed that the furniture was not subject to the lessor's tacit hypothec. The court relied on *Bloemfontein Municipality v Jacksons Ltd*¹¹² as authority for the view that consent to the lessor's tacit hypothec may be implied even when the owner does not know that his property had been kept on the leased premises.¹¹³ The court held that the clause that imposed an obligation on the purchaser to notify the respondent (seller) of his move and the new address was not sufficient to protect the respondent against the lessor's tacit hypothec.¹¹⁴ The court concluded that the respondent had not taken

¹⁰⁶ WE Cooper *Landlord and tenant* (2nd ed 1994) 188-189. See also TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 102-103.

¹⁰⁷ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.

¹⁰⁸ WE Cooper *Landlord and tenant* (2nd ed 1994) 188.

¹⁰⁹ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.

¹¹⁰ 1933 CPD 550.

¹¹¹ *Fresh Meat Supply Co v Standard Trading Co* 1933 CPD 555.

¹¹² 1929 AD 266.

¹¹³ *Fresh Meat Supply Co v Standard Trading Co* 1933 CPD 558-560.

¹¹⁴ *Fresh Meat Supply Co v Standard Trading Co* 1933 CPD 555-566. See also WE Cooper *Landlord and tenant* (2nd ed 1994) 188.

reasonable steps to protect itself and therefore the respondent had impliedly consented that its property could be subject to the lessor's tacit hypothec.¹¹⁵

Cooper also criticises the decision in *Fresh Meat Supply Co v Standard Trading Co*¹¹⁶ and states that the court was not entitled to assume the respondent's knowledge and consent as to whether Birke resided on the leased premises.¹¹⁷ Cooper argues that, unless the third party's knowledge was established, the court was not entitled to infer that Standard Trading Co had impliedly consented to its furniture being subject to the lessor's tacit hypothec.¹¹⁸ However, Cooper contends that *Fresh Meat Supply Co v Standard Trading Co*¹¹⁹ can be justified on the basis that the hire-purchase agreement did not prohibit Birke from removing the property to another leased premises without the consent of *Standard Trading Co*.¹²⁰

In light of the above discussion, the Appellate Division in *Bloemfontein Municipality v Jacksons Ltd*¹²¹ developed or extended the third party knowledge and consent requirement to also apply in cases where a third party has no knowledge that his property is on the leased premises but failed to take reasonable steps to protect himself.¹²² According to the court in *Bloemfontein Municipality v Jacksons Ltd* such steps would include a clause in the hire-purchase agreement that prohibits the lessee from removing the property without the owner's consent or a clause binding the debtor to inform the creditor of his change of address.¹²³

I agree with Cooper that the courts in *Bloemfontein Municipality v Jacksons Ltd*¹²⁴ and *Fresh Meat Supply Co v Standard Trading Co*¹²⁵ were not entitled to infer the third party's consent because the owner's knowledge that his property was on the leased premises was not established. In my view, if the court in *Bloemfontein Municipality v Jacksons Ltd*¹²⁶ strictly applied the third party's knowledge and

¹¹⁵ *Fresh Meat Supply Co v Standard Trading Co* 1933 CPD 560.

¹¹⁶ 1933 CPD 550.

¹¹⁷ WE Cooper *Landlord and tenant* (2nd ed 1994)188.

¹¹⁸ WE Cooper *Landlord and tenant* (2nd ed 1994) 188-189.

¹¹⁹ 1933 CPD 550.

¹²⁰ WE Cooper *Landlord and tenant* (2nd ed 1994)189.

¹²¹ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.

¹²² *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 277.

¹²³ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 273.

¹²⁴ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.

¹²⁵ 1933 CPD 560.

¹²⁶ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.

consent requirement as it was applied in earlier cases¹²⁷ the result would have been different, since it appears that there was no evidence to prove that Jacksons Ltd knew that Smit had moved to 205 Monument Road. Therefore, the court was in actual fact not entitled to assume the knowledge and consent of Jacksons Ltd.

3 3 2 3 *The lessor's knowledge of ownership*

The second requirement that the lessor must prove to be successful with his hypothec against a third party's property is that he was not aware that the property belonged to a third party.¹²⁸ Hence, the extension of the lessor's tacit hypothec cannot operate if the lessor is aware of the true position.¹²⁹ The third party has a duty to notify the lessor of his ownership of the movable property.¹³⁰ For example, in *Mackay Brothers v Cohen*¹³¹ M sold a piano to C's lessee in terms of a hire-purchase agreement and informed C of the hire-purchase agreement, after which C attached the piano to satisfy his claim for arrear rent against his lessee. The court held that the hypothec is founded on a presumption of the tacit consent of the owner of the goods, which can be rebutted by a clear expression of its will. Therefore, the piano was not subject to the lessor's tacit hypothec because M notified the lessor that the piano was its property.¹³²

In *Goldinger's Trustee v Whitelaw & Sons*¹³³ it was held that to be effective such a notice should reach the lessor before the lessee is in arrears with rent. Also, in *Bloemfontein Municipality v Jacksons Ltd* it was stated that the lessor's tacit hypothec is inoperative if the lessor is aware of the fact that movables on the leased premises are not the lessee's property.¹³⁴ In *TR Services (Pty) Ltd v Poynton's Corner Ltd & Others*¹³⁵ it was held that knowledge of ownership may be inferred if

¹²⁷ See *Heugh's Trustee v Heydenrych* (1895) 12 SC 318; *Collins v Whittock* (1899) 9 HCG 182; *Bradlow & Co v Lucas* 1917 TPD 310 314; *Bradlow v Ward* 1929 TPD 313.

¹²⁸ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 273.

¹²⁹ *Heugh's Trustee v Heydenrych* (1895) 12 SC 318; *Collins v Whittock* (1899) 9 HCG 182; *Bradlow & Co v Lucas* 1917 TPD 310 314; *Bradlow v Ward* 1929 TPD 313; *Rand Furnishing Co v Heydenrych* 1929 TPD 583 591. See also AJ Kerr *The law of sale and lease* (3rd ed 2004) 397.

¹³⁰ *Heugh's Trustee v Heydenrych* (1895) 12 SC 320.

¹³¹ (1894) 1 Off Rep 342.

¹³² See also *Noble v Heatley* 1905 TS 433.

¹³³ 1916 TPD 230.

¹³⁴ 1929 AD 266 271.

¹³⁵ 1961 (1) SA 773 (D) 776C-D.

the property bears a notice that it is the property of a third party. Knowledge can also be inferred from the nature of the lessee's business or occupation.¹³⁶

In *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*¹³⁷ the court elaborated on the lessor's knowledge requirement. Standard Bank sold but reserved ownership of a business and its assets until the full purchase price was paid. The applicant obtained default judgment against the lessee (debtor) for arrear rent. Consequently, they attached the movable property found in the debtor's possession. The trial court held that, if the lessor knew that the property belonged to a third party, the property could not be subject to the lessor's tacit hypothec.¹³⁸ On appeal the appellant argued that it did not have knowledge of the fact that the property belonged to a third party. The court held that, since the lessor received a copy of the hire-purchase agreement (instalment agreement), it could not heedlessly ignore the facts that were before it and accordingly the court dismissed the appeal.¹³⁹

In *Eight Kaya Sands v Valley Irrigation Equipment*¹⁴⁰ the respondent leased property to the lessee who stored it on the leased premises belonging to the appellant (lessor). Neither the lessee nor the owner of the property (Valley Irrigation Equipment) had informed the lessor that the property belonged to the respondents. The appellant claimed that the property found on the leased premises, including those of the respondent, was subject to the lessor's tacit hypothec for arrear rent. The court held that the third person's property found on the leased premises may be subject to the lessor's tacit hypothec. However, if the lessor has knowledge that the property belongs to the third party, such property is not subject to the lessor's tacit hypothec. Therefore, because the lessor was informed that the property belonged to the respondent before it perfected its hypothec, the respondents' property could not be attached.¹⁴¹ The decisions in *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*¹⁴² and *Eight Kaya Sands v Valley Irrigation Equipment*¹⁴³ were

¹³⁶ See further *Henderson v Waldron* (1885) 6 NLR 89; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342 344; *Fresh Meat Supply Co v Standard Trading Co (Pty)* 1933 CPD 550 556; *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd* 1997 (2) SA 815 (D).

¹³⁷ 1997 (2) SA 815 (D).

¹³⁸ *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd* 1997 (2) SA 815 (D) 823B.

¹³⁹ *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd* 1997 (2) SA 815 (D) 823B.

¹⁴⁰ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 499.

¹⁴¹ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).

¹⁴² 1997 (2) SA 815 (D).

recently confirmed in *Holderness NO and Others v Maxwell and Others*.¹⁴⁴ In this case it was held that, if the lessor becomes aware that the property belongs to a third party before perfection, his hypothec cannot extend to such property.¹⁴⁵

Sher¹⁴⁶ argues that as a result of the judgment in *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*,¹⁴⁷ the lessor's position has been weakened, since actual knowledge of the fact that the property in the leased premises belongs to a third party is no longer a deciding requirement. Sher argues that the subjective standard of the lessor's actual knowledge has been replaced by the objective standard of whether the lessor, by exercising reasonable care, could have established that the property did not belong to the lessee.¹⁴⁸ Sher further argues that the move from a subjective to an objective standard may result in the exclusion of more movables from the lessor's tacit hypothec, which undermines the lessor's security.¹⁴⁹

It is arguable that the courts are moving away from the actual-knowledge requirement of the lessor regarding the true ownership of the property to an imputed knowledge. This is apparent from *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*,¹⁵⁰ where the court held that the lessor could not argue that he was not aware of the true position if, by taking certain steps, he could have known the true state of affairs. One can accordingly conclude that *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*¹⁵¹ has strengthened third parties' protection against the extension of the lessor's tacit hypothec because, as a result of this judgment, the lessor cannot ignore the facts regarding the true ownership of the movables and proceed to attach such property.

3 3 2 4 Degree of permanence

The third requirement for the extension of the lessor's tacit hypothec to third parties' property is that the property should have been brought on to the leased premises

¹⁴³ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).

¹⁴⁴ [2012] ZAKZPHC 49 (31 July 2012) 28.

¹⁴⁵ *Holderness NO and Others v Maxwell and Others* [2012] ZAKZPHC 49 (31 July 2012) 34, 35.

¹⁴⁶ H Sher "The lessor's security for payment of the rent" (1997) 5 *JBL* 114-117 116.

¹⁴⁷ 1997 (2) SA 815 (D).

¹⁴⁸ H Sher "The lessor's security for payment of the rent" (1997) 5 *JBL* 114-117 116.

¹⁴⁹ H Sher "The lessor's security for payment of the rent" (1997) 5 *JBL* 114-117 116.

¹⁵⁰ 1997 (2) SA 815 (D).

¹⁵¹ 1997 (2) SA 815 (D).

with the intention to remain there indefinitely.¹⁵² For example, in *Lazarus v Dose*¹⁵³ it was held that this requirement is not met if the goods are leased to the lessee on a monthly basis and only a few months have passed. In *Mangold Bros Ltd v Hirschman Bros*¹⁵⁴ the court held that a vehicle supplied by an employer to an employee to be used solely in the course of his employment was not subject to the lessor's tacit hypothec because in such cases the element of permanence is absent, since the employer can at any time take his vehicle back. In *Goldinger's Trustee v Whitelaw & Sons*¹⁵⁵ it was held that the merchandise that forms part of the lessee-shopkeeper's stock-in-trade was not subject to the lessor's hypothec either.¹⁵⁶

In *The Standard and Diggers' News Company v Esterhuizen*¹⁵⁷ A sold a piano to B in terms of a hire-purchase agreement. The terms of the agreement was that the lessor of any premises on which the piano might be used or stored would not have a tacit hypothec over it. The lessor of B was not informed about the hire-purchase agreement and in execution of a judgment for rental arrears he attached the piano along with other furniture. The court held that the piano was on the leased premises for permanent use by the lessee and therefore subject to the lessee's tacit hypothec.¹⁵⁸ In *Bloemfontein Municipality v Jacksons Ltd*¹⁵⁹ it was held that property sold on the hire-purchase system is subject to the lessor's tacit hypothec because it is brought on to the leased premises with the intention to remain there for some time and for the use by the lessee.¹⁶⁰ In *TR Services (Pty) Ltd v Poynton's Corner Ltd and Others*¹⁶¹ Warner AJ expressed the view that it is difficult to know what is required under the time factor but, according to the judge, if leased property is on the premises for a period of fifteen years, the requirement of permanence is met.¹⁶²

¹⁵² *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271. See also AJ Kerr *The law of sale and lease* (3rd ed 2004) 396.

¹⁵³ (1884) 3 SC 42.

¹⁵⁴ 1917 TPD 187.

¹⁵⁵ 1916 TPD 230 241.

¹⁵⁶ See in contrast *Ordemann v Peinke* 1911 EDL 201.

¹⁵⁷ 1893 H 22.

¹⁵⁸ 1893 H 24.

¹⁵⁹ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 278.

¹⁶⁰ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271. However, see also *Spayile v Bower* 1911 CPD 65 68; *Leech v Gardner* (1898) 15 CLJ 208, where the respective courts held that the requirement of permanency means no more than that the goods should not be on the premises merely temporarily.

¹⁶¹ 1961 (1) SA 733 (D) 776H.

¹⁶² *TR Services (Pty) Ltd v Poynton's Corner Ltd and Others* 1961 (1) SA 733 (D) 776H.

In summary, third parties' property is only subject to the lessor's tacit hypothec if it was brought on to the leased premises with the intention to remain there indefinitely for the lessee's use. Furthermore, the traditional South African common law position is that movable property sold in terms of the hire-purchase agreement is presumed to be brought on to the leased premises for the permanent use by the lessee, since the agreement entails that the lessee becomes the owner upon payment of the full purchase price.¹⁶³ Hence, property sold in terms of a hire-purchase agreement can be subject to the lessor's tacit hypothec. However, the owner of movable property may rebut such a presumption by giving notice to the lessor of his intention.¹⁶⁴ Conversely, a third party's property leased to the lessee in terms of a general lease agreement is not subject to the lessor's tacit hypothec, since it is there for temporary use only.¹⁶⁵

3 3 2 5 For use by the lessee

The last requirement that the lessor must prove in order to be successful with his hypothec against third parties' property is that the movable property was on the leased premises for use by the lessee,¹⁶⁶ which fact can be inferred from the nature of the goods or from the circumstances.¹⁶⁷ For example, in *Crowley v Domony*¹⁶⁸ the lessee's wife brought some furniture into the house rented by her husband. The lessee's wife claimed that the furniture was not subject to the lessor's tacit hypothec. However, the court held that the property was there for permanent use by the lessee and his wife and therefore subject to the lessor's tacit hypothec. Scott and Scott argue that this case was wrongly decided because the requirement is that the property should be destined for the use by the lessee and that the marriage

¹⁶³ *The Standard and Diggers' News Company v Esterhuizen* 1893 H 22; *Noble v Heatley* 1905 TS 433.

¹⁶⁴ See *The Standard and Diggers' News Company v Esterhuizen* 1893 H 22; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342 344; *Noble v Heatley* 1905 TS 433. See section 3 4 below for statutory amendments to the common law position.

¹⁶⁵ See *Lazarus v Dose* (1884) 3 SC 42; *Turpin v Wagstaff & Sons* 1906 TS 597. See also TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 104.

¹⁶⁶ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271. This requirement developed from the following series of cases: *Baker v Hirst & Co* (1880) 2 NLR 55; *Longlands v Francken* 1881 Kotzé 256; *Lazarus v Dose* (1884) 3 SC 42; *Noble v Heatley* 1905 TS 433; *Turpin v Wagstaff & Sons* 1906 TS 597; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 236.

¹⁶⁷ See G Wille *Landlord and tenant in South Africa* (4th ed 1948) 198. See also TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 104.

¹⁶⁸ (1869) Buch 205.

relationship in this case did not imply that the property was for the use of the lessee as well.¹⁶⁹

In *Longlands v Francken*¹⁷⁰ a piano that was used exclusively by the lessee's daughter was held not to be subject to the lessor's tacit hypothec. In *Bloemfontein Municipality v Jacksons Ltd*¹⁷¹ the court found that if a third party's property was brought on to the leased premises for the lessee's use, it is subject to the hypothec. In *Reinhold & Co v Van Oudtshoorn*¹⁷² the *bona fide* sub-lessee's property was attached for arrear rent owed by the lessee. The court held that the sub-lessee's property was not subject to the lessor's tacit hypothec because it was not brought on to the premises for the use of the lessee. Further, in *Van den Bergh, Melamed & Nathan v Polliack & Co*¹⁷³ it was held that a radiogram that was bought in terms of a hire-purchase agreement by the lessee's son for his use was not subject to the lessor's tacit hypothec. Therefore, the third parties' property may only be subject to the lessor's tacit hypothec if it was taken on to the leased premises for the use of the lessee.

3 3 2 6 Conclusion

Against the backdrop of the application of the implied-consent theory, it is apparent that what is meant by the third party's consent is not implied consent as meant in contract law because there is no contract between the third party and the lessor. My view is that consent in cases of the extension of the lessor's tacit hypothec means that the law may ascribe (impute) consent to the third party, provided that certain requirements are met. Furthermore, the requirements that the lessor must prove to be succeed with a hypothec over third parties' property serve as protection for such third parties. Accordingly, failure to prove one of the requirements implies that the lessor's tacit hypothec cannot operate against third parties' property.

As argued above, the court in *Bloemfontein Municipality v Jacksons Ltd*¹⁷⁴ developed the knowledge and consent requirement to mean that a third party's consent may be "implied" even if the third party has no knowledge that his property is

¹⁶⁹ TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 104.

¹⁷⁰ 1881 Kotzé 256.

¹⁷¹ 1929 AD 266 278.

¹⁷² 1931 TPD 382.

¹⁷³ 1940 TPD 237.

¹⁷⁴ 1929 AD 266 278.

stored on the leased premises but, by exercising reasonable care, he should have known where his property was stored. Taking into consideration my explanation of what should be understood by the third party's consent in the extension of the lessor's tacit hypothec, it has become necessary to clarify the effect of the development of the consent requirement in *Bloemfontein Municipality v Jacksons Ltd*.¹⁷⁵

Does the development in *Bloemfontein Municipality v Jacksons Ltd* mean that the law may ascribe knowledge and consent to a third party even if the third party is not aware that his property is stored in the leased premises or has done everything to protect himself against the lessor's tacit hypothec, as happened in *Heugh's Trustee v Heydenrych*,¹⁷⁶ *Collins v Whittock*,¹⁷⁷ *Bradlow v Ward*¹⁷⁸ and *Bradlow & Co v Lucas*?¹⁷⁹ Or, does it mean that consent should be imputed to a third party only in circumstances where the third party is in a position to find out the whereabouts of his property but fails to do so, as was the case in *Bloemfontein Municipality v Jacksons Ltd* and *Fresh Meat Supply Co v Standard Trading Co*?¹⁸⁰ To my mind, the later view is more plausible because it would be unreasonable to expect a third party who is not aware or not in a position to find out that his property is stored on the leased premises to give notice of his ownership to the lessor. Hence, my argument is that the extension of the lessor's tacit hypothec should not apply in cases where the third parties had no knowledge of their property being on the leased premises or cases where the third parties have done everything to protect themselves against the extension of the lessor's tacit hypothec.

Analysis of the imputed consent (implied consent) theory indicates that the lessor must prove certain requirements in order to be successful with the attachment of third parties' property. Accordingly, he must prove that the movable property was brought on to the leased premises for indefinite use by the lessee and not for temporary use. Furthermore, the extension of lessor's tacit hypothec to third parties' property does not apply to cases where the lessor became aware of the true ownership of the property before perfection of the hypothec. The analysis of the

¹⁷⁵ 1929 AD 266 278.

¹⁷⁶ (1895) 12 SC 318.

¹⁷⁷ (1899) 9 HCG 182.

¹⁷⁸ 1929 TPD 313.

¹⁷⁹ 1917 TPD 314.

¹⁸⁰ 1933 CPD 550.

requirements illustrates that movable property leased in terms of a contract of lease cannot be subject to the lessor's tacit hypothec, since it is brought on to the leased premises for temporary use only.

In what follows I describe the doctrine of estoppel, which is also presented as a justification for the extension of the lessor's tacit hypothec to third parties' property.

3 3 3 Estoppel

There is judicial support for the view that the doctrine of estoppel,¹⁸¹ which operates as a limitation on the *rei vindicatio* of the owner of property, also serves as a basis for the extension of the operation of the lessor's tacit hypothec to third parties' property.¹⁸² Estoppel entails that a party (the representor) who has by means of a representation wilfully or negligently misled another (the representee) to reasonably believe in the existence of a state of affairs and thereby induced that person to act to his detriment, will in litigation between the parties be precluded from denying that the facts were as represented, provided that to uphold the representation would not be contrary to public policy.¹⁸³

The requirements for estoppel are as follows: a misrepresentation; reliance by the estoppel asserter on the misrepresentation; prejudice; causation; and fault.¹⁸⁴ Although there is some indication that fault is not required in all cases of estoppel,¹⁸⁵ there is authority for the proposition that it is indeed still a requirement in all cases.¹⁸⁶ The majority of authority supports the view that fault (*dolus* or *culpa*) is required in

¹⁸¹ The doctrine of estoppel originated in English law and was adopted in South African law in *In re Reynolds Vehicle & Harness Factory Ltd* (1906) 23 SC 703, where De Villiers CJ stated as follows:

“[U]nder English law the company is said to be ‘estopped’ from claiming such payment, and it is difficult to find another English word to express the operation of our own law in a case of this kind. Unfortunately, the use of the English law term ‘estoppel’ at once leads to the belief that the whole law of estoppel has been imported from England just as the use of ‘valuable consideration’ instead of ‘*redelijke oorzaak*’ has led to the supposition that it was intended to introduce the whole of the English law relating to consideration.”

¹⁸² For an explanation of the possibility of applying estoppel in lessor's tacit hypothec cases see *Lazarus v Dose* (1884) 3 SC 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342; *Heugh's Trustee v Hydenrych* (1895) 12 SC 320; *Turpin v Wagstaff & Sons* 1906 TS 599; *Ncora v Untiedt* 1916 EDL 329; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282; *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266; *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).

¹⁸³ JC Sonnekus *The law of estoppel in South Africa* (2000) 31.

¹⁸⁴ JC Sonnekus *The law of estoppel in South Africa* (2000) 31.

¹⁸⁵ *Sonday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 (2) SA 521 (C) 534. See also JC Sonnekus *The law of estoppel in South Africa* (2000) 135-136; I Knobel “The tacit hypothec of the lessor” (2004) 67 *THRHR* 687-697 694.

¹⁸⁶ See JC Sonnekus *The law of estoppel in South Africa* (2000) 136.

cases where estoppel is used as a limitation against the *rei vindicatio*.¹⁸⁷ Requiring fault in these instances strengthens the protection of the owner, and in cases of the lessor's tacit hypothec it strengthens the protection of third parties whose property may be subject to the extension of the hypothec.

The doctrine of estoppel was formally adopted in South African law in *In re Reynolds Vehicle & Harness Factory Ltd*.¹⁸⁸ However, its recognition as a limitation of the *rei vindicatio* of the third party received attention from cases regarding the lessor's tacit hypothec as early as 1884.¹⁸⁹ In *Lazarus v Dose*¹⁹⁰ De Villiers CJ expressed the view that the owner of the goods would be estopped from denying that he intended them to become bound as security to the lessor if he had failed to inform the lessor that the property belonged to him.¹⁹¹ In *Bloemfontein Municipality v Jacksons Ltd*¹⁹² it was held that if the owner is in a position to inform the lessor of his ownership but fails to do so, the owner should thereby be taken to have consented to the goods being subject to the lessor's tacit hypothec.¹⁹³

In *Eight Kaya Sands v Valley Irrigation Equipment*¹⁹⁴ Van der Walt J expressed the view that there could be no justification for the property of a third person serving as security for the debt of the lessee unless a misrepresentation (*skyn*) that the property belonged to the lessee existed at the time of attachment.¹⁹⁵ One can deduce from this emphasis that Van der Walt J preferred the doctrine of estoppel as the justification for the extension of the lessor's tacit hypothec to a third party's property.¹⁹⁶ In the same case Preller AJ stated that the estoppel approach justifies

¹⁸⁷ *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A); *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A); *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 (3) SA 188 (A); *Konstanz Properties v WM Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A).

¹⁸⁸ (1906) 23 SC 703 712.

¹⁸⁹ *Lazarus v Dose* (1884) 3 SC 44.

¹⁹⁰ (1884) 3 SC 44. See also I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 694-695.

¹⁹¹ See also *Turpin v Wagstaff & Sons* 1906 TS 599, where Innes CJ stated that there may be cases in which estoppel would operate. See further *Rand Furnishing Co v Hydenrych* 1929 TPD 588; *Fresh Meat Supply Co v Standard Trading Co (Pty)* 1933 CPD 560, where the courts held that the seller (third party), by failing to insist on a reply from the buyer (lessee) to fill in a blank space in their credit agreement as to whether the buyer was a lessee or the owner of the premises on which the goods will be stored, could be held to have consented to the goods being subject to the lessor's tacit hypothec.

¹⁹² 1929 AD 266.

¹⁹³ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271.

¹⁹⁴ 2003 (2) SA 495 (T) 501I-502A.

¹⁹⁵ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).

¹⁹⁶ In this regard see also GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440.

the extension of the lessor's tacit hypothec to a third party's property on the basis of the appearance that the owner generates.¹⁹⁷ Lubbe argues that the court in *Eight Kaya Sands v Valley Irrigation Equipment*¹⁹⁸ favoured the estoppel approach by its emphasis on the element of a culpable misrepresentation by the third party.¹⁹⁹

De Wet and Van Wyk argue that the owner has a duty to ensure that others are not misled by the impression that the property belongs to the lessee. According to them, if the third party fails to inform the lessor of his ownership, he must be held to have consented to the lessor's tacit hypothec.²⁰⁰ Cooper also states that estoppel justifies the subjection of a third party's to the lessor's tacit hypothec.²⁰¹

Knobel argues that the property of a third party can only be attached if a third party who is in a position to give notice to the lessor fails to do so.²⁰² The author also contends that estoppel provides a ground for a third party's property being subject to the lessor's tacit hypothec that is more equitable and has a greater foundation in reality. Knobel argues that attachment can be justified if at least negligence is required on the part of the third person.²⁰³ She further suggests that legal certainty will be served and equitable results obtained more consistently if there is express recognition of the value judgment performed in respect of the third person's conduct. Therefore, Knobel is of the view that legal certainty and equitable results will be facilitated by an unambiguous adoption of the estoppel approach, inclusive of a fault requirement in the form of at least negligence.²⁰⁴

McLennan argues that it is difficult to find how a third party's carelessness or negligence can constitute consent with respect to the lessor's tacit hypothec.²⁰⁵ The author argues that in terms of estoppel, the estoppel assertor (lessor) should be aware of the presence of the property on his premises and that this is not a

¹⁹⁷ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 507A.

¹⁹⁸ 2003 (2) SA 495 (T) 501B 501H.

¹⁹⁹ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440. See also JS McLennan "A lessor's hypothec over the goods of third parties – Anomaly and anachronism" (2004) 16 *SA Merc LJ* 121-125 123, who states that the court in *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 501B adopted the *skyn* concept and that the explanation of the court has some resemblance to estoppel.

²⁰⁰ JC de Wet & AH van Wyk *Die Suid-Afrikaanse kontrakreg en handelsreg* (5th ed 1992) 269-270.

²⁰¹ WE Cooper *Landlord and tenant* (2nd ed 1994) 185.

²⁰² I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 695.

²⁰³ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 695.

²⁰⁴ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 695.

²⁰⁵ JS McLennan "A lessor's hypothec over the goods of third parties – anomaly and anachronism" (2004) 16 *SA Merc LJ* 121-125 122.

requirement for the lessor's tacit hypothec, since the lessor does not need to know about the presence of such goods on the premises before the rent is in arrears.²⁰⁶ The author argues that there is no rational legal basis for the extension of the lessor's tacit hypothec to a third party's property. Accordingly, McLennan's view is that implied consent, fault and appearance are hopeless explanations for the extension of the lessor's tacit hypothec to third parties' property.²⁰⁷ Hence, the author argues that neither implied consent nor the doctrine of estoppel provides justification for the extension of the lessor's tacit hypothec to third parties' property, since there is neither contractual privity between the lessor and the third party nor a delict.²⁰⁸ McLennan argues that the extension of the lessor's tacit hypothec is an arbitrary and anomalous rule of ancient law that existed in a certain socio-economic environment. McLennan's view is that without actual consent, a third party's property should not be used as security for the debt of the lessee.

Steven states that implied consent is a fiction whereby the owner is taken to have accepted his property's being subject to the lessor's tacit hypothec. The author is also of the view that because implied consent is a fiction, the estoppel approach should also be dismissed as an alternative to the implied-consent approach.²⁰⁹ Therefore, Steven is also of the view that neither implied consent nor estoppel provides justification for the extension of the lessor's tacit hypothec to third parties' property.²¹⁰

With the exception of two authors,²¹¹ the discussion of literature above shows that the estoppel approach, inclusive of the fault requirement, is accepted as a justification for the extension of the lessor's tacit hypothec. However, our courts have not yet decided any case concerning the extension of the lessor's tacit hypothec on the doctrine of estoppel.

²⁰⁶ JS McLennan "A lessor's hypothec over the goods of third parties – anomaly and anachronism" (2004) 16 *SA Merc LJ* 121-125 123.

²⁰⁷ JS McLennan "A lessor's hypothec over the goods of third parties – anomaly and anachronism" (2004) 16 *SA Merc LJ* 121-125 123.

²⁰⁸ JS McLennan "A lessor's hypothec over the goods of third parties – anomaly and anachronism" (2004) 16 *SA Merc LJ* 121-125 123.

²⁰⁹ AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12 *EJCL* 1-18 14-15.

²¹⁰ AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12 *EJCL* 1-18 14-15.

²¹¹ AJM Steven "Landlord's hypothec in comparative perspective" (2008) 12 *EJCL* 1-18 14-15; JS McLennan "A lessor's hypothec over the goods of third parties – anomaly and anachronism" (2004) 16 *SA Merc LJ* 121-125 123.

3 3 4 Concluding remarks

In light of the analysis of the justifications of the extension of the lessor's tacit hypothec, it is apparent that the majority of case law favours the implied consent approach as a justification for the extension of the lessor's tacit hypothec to third parties' property.²¹² However, in some cases the courts seemed to have accepted the doctrine of estoppel as a justification, albeit without explicitly applying it.²¹³ The implied consent approach requires that, for a third party's property to be subject to the lessor's tacit hypothec, the property must have been brought on to the leased premises to remain there for indefinite use by the lessee. The estoppel approach provides that, for a third party's property to be subject to the lessor's tacit hypothec, his action or inaction must have misled the lessor to believe that the property belonged to the lessee.²¹⁴ As a result, it is possible to subject a third party's property to the lessor's tacit hypothec if he is in a position to notify the lessor of his ownership but fails to do so.²¹⁵ In cases where the implied consent approach is applied, the onus is on the lessor to prove that the hypothec applies against a third party's property. On the other hand, in cases where the estoppel approach is applicable, the onus is on the estoppel assertor (the lessor) to prove that a third party's action or inaction constitutes a misrepresentation that caused him to act to his detriment.²¹⁶

In view of the discussion of both approaches, it is arguable that the Appellate Division in *Bloemfontein Municipality v Jacksons Ltd* failed to develop the doctrine of estoppel, which at that point in time had already received judicial recognition as a

²¹² See *Longlands v Francken* 1881 Kotzé 256; *Ulrich v Ulrich's Trustee* (1883) 2 SC 319; *Lazarus v Dose* (1884) 3 SC 42; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342; *Heugh's Trustee v Heydenrych* (1895) 12 SC 318; *Collins v Whittock* (1899) 9 HCG 182; *Noble v Heatley* 1905 TS 433; *Turpin v Wagstaff & Sons* 1906 TS 597; *Russell v Savory* (1906) 20 EDC 100; *Ncora v Untiedt* 1916 EDL 32; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 235; *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282; *Sercombe v Colonial Motors (Natal) Ltd* 1929 NPD 58; *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271; *Bradlow v Ward* 1929 TPD 313; *Rand Furnishing Co v Hydenrych* 1929 TPD 583; *Mackay Bros Ltd v Eaglestone* 1932 TPD 301; *Hilson & Taylor Ltd v Teukolskin* 1933 TPD 83; *Fresh Meat Supply Co v Standard Trading Co (Pty)* 1933 CPD 550; *Philips v Hearne & Co* 1937 CPD 61; *Van den Bergh, Melamed & Nathan v Polliack & Co* 1940 TPD 237 238; *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).

²¹³ See *Lazarus v Dose* (1884) 3 SC 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342; *Heugh's Trustee v Hydenrych* (1895) 12 SC 320; *Turpin v Wagstaff & Sons* 1906 TS 599; *Ncora v Untiedt* 1916 EDL 329; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282; *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266; *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) 501I-502A.

²¹⁴ In general, see JC Sonnekus *The law of estoppel in South Africa* (2000) 2.

²¹⁵ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266 271.

²¹⁶ I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 694.

basis for the extension of the lessor's tacit hypothec to a third party's property.²¹⁷ Furthermore, the conclusion reached in *Bloemfontein Municipality v Jacksons* could have been reached by application of the doctrine of estoppel.

The confusion regarding the justification of the extension of the lessor's tacit hypothec was recently recognised by at least one academic.²¹⁸ Lubbe is of the view that the court in *Bloemfontein Municipality v Jacksons Ltd*²¹⁹ reduced the consent requirement to a fiction while at the same time importing considerations that would be relevant in the application of the estoppel defence, such as negligence on the part of the third party.²²⁰ The author argues that the application of the doctrine of estoppel as an alternative in early case law has been obscured by the tendency in later decisions to consolidate the doctrine of estoppel and the consent doctrine into a single enquiry.²²¹ Lubbe further argues that the requirement that the lessor must be ignorant of the fact that the lessee is not the owner of the goods may be relevant to the requirement of inducement for the operation of the doctrine of estoppel.²²² Accordingly, Lubbe's view is that a return to a dualistic approach will be conducive to clarity in that it will enable the requirements for the operation of the doctrine to be restricted to the conceptual basis for the doctrine's meaning and relevance.²²³ Lubbe's view is that both the implied-consent theory and the doctrine of estoppel are relevant in explaining the subjection of third parties' property to the lessor's tacit hypothec for arrear rent.²²⁴

Lubbe's suggestion to return to a dualistic approach seems plausible, since it may assist the courts to decide cases on the basis of either of the theories. The

²¹⁷ See *Lazarus v Dose* (1884) 3 SC 44; *Mackay Brothers v Cohen* (1894) 1 Off Rep 342; *Heugh's Trustee v Hydenrych* (1895) 12 SC 320; *Turpin v Wagstaff & Sons* 1906 TS 599; *Ncora v Untiedt* 1916 EDL 329; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282.

²¹⁸ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440.

²¹⁹ 1929 AD 266.

²²⁰ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 441.

²²¹ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440. See also I Knobel "The tacit hypothec of the lessor" (2004) 67 *THRHR* 687-697 695.

²²² GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440.

²²³ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440. See also CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 658.

²²⁴ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440.

doctrine of estoppel will find application in cases where the third party is in a position to protect himself against the extension of the lessor's tacit hypothec but fails to do. Applied in this sense, it becomes possible to explain *Bloemfontein Municipality v Jacksons Ltd*²²⁵ on the basis of the doctrine of estoppel rather than on the basis of implied consent.

My opinion is that the consolidation of the two approaches has also led the courts to decide all cases on the basis of implied consent, even those that could have been decided on the estoppel approach. It is also arguable that the "implied consent" required for the extension of the lessor's tacit hypothec is not actually similar to the implied consent that could be inferred in the lease agreement between the lessor and the lessee, but rather consent that the court may impute (ascribe) to the third party considering that certain requirements are met. My view is that the argument that a third party had impliedly consented to the lessor's tacit hypothec is irrelevant, since the lessor's tacit hypothec is a real security right created by operation of law and not a right deriving from contract. Consequently, a third party's consent to be subject to the lessor's tacit hypothec cannot be implied because there is no contract between the lessor and the third party. Hence, I argue that a better explanation of consent (usually called "implied consent") in the extension of the lessor's tacit hypothec is that the law may impute consent to a third party if the requirements set out in *Bloemfontein Municipality v Jacksons Ltd*²²⁶ are met.

Taking into consideration the explanation of what "consent" means in the extension of the lessor's tacit hypothec and Lubbe's suggestion, I conclude that both implied (imputed) consent and estoppel are justifications of the extension of the lessor's tacit hypothec and that they should only be applicable in cases where a third party's knowledge regarding his property being on the leased premises is established. Consequently, if the knowledge of a third party concerning his property being on the leased premises is not established, neither of the theories should be relied on as a justification for the extension of the lessor's tacit hypothec. Applied in this sense, the extension of the lessor's tacit hypothec to third parties' property on the basis of either the "implied-consent" or estoppel approach is justifiable.

²²⁵ 1929 AD 266.

²²⁶ *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266.

3 4 Statutory protection for third parties

The common law position regarding the extension of the lessor's tacit hypothec has been amended by the Security by Means of Movable Property Act.²²⁷ Section 2(1) of the Act provides as follows:

- “Notwithstanding anything to the contrary in the common law or in any other law, movable property;
- (a) which, while hypothecated by a notarial bond mentioned in section 1(1), is in the possession of a person other than the mortgagee; or
 - (b) to which an instalment agreement as defined in in section 1 of the National Credit Act²²⁸ relates, shall not be subject to a landlord's tacit hypothec.”

Section 2(1) of the Security by Means of Movable Property Act protects two different categories of third parties. The first part, section 2(1)(a), protects third parties who have notarial bonds registered against such movable property. Section 2(2) of the Act provides that these third parties are only protected in terms of section 2(1) if the notarial bond is registered in terms of section 61(1) of the Deeds Registries Act²²⁹ before the lessor's tacit hypothec is perfected.²³⁰ The implication of section 2(2) is founded on the *prior in tempore potior in iure* rule, which provides that the first real security right to be created is always the strongest and enjoys preference on the debtor's insolvency.²³¹

The second part, section 2(1)(b), protects third parties (credit providers) who sold property in terms of an instalment agreement against the extension of the lessor's tacit hypothec to their property. The section states that movable property to which an instalment agreement, as defined by section 1 of the National Credit Act²³²

²²⁷ 57 of 1993.

²²⁸ Previously s 2(1)(b) of the Security by Means of Movable Act 57 of 1993 referred to the definition of instalment sale transaction in s 1 of the repealed Credit Agreement Act 75 of 1980. Currently an instalment agreement is defined in s 1 of the National Credit Act 34 of 2005 (see sch 2 of the National Credit Act 34 of 2005).

²²⁹ 47 of 1937.

²³⁰ S 2(2) of the Security by Means of Movable Property Act 57 of 1993. See also See H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 328; GF Lubbe “Mortgage and pledge” rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 440; CG van der Merwe “Real security” in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 658; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 405.

²³¹ For an explanation of the *prior in tempore potior in iure* rule see TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 101, 264-265.

²³² 34 of 2005.

relates, shall not be subject to a lessor's (landlord's) tacit hypothec. Section 1 of the National Credit Act defines an instalment agreement to mean a sale of movable property in terms of which

- “(a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either
 - (i) passes to the consumer only when the agreement is fully complied with; or
 - (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
- (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.”²³³

In terms of the principles surrounding instalment agreements,²³⁴ ownership of the movable property passes to the consumer only when the agreement had been fully complied with, particularly as soon as the full purchase price had been paid.²³⁵ It is also possible that ownership passes to the consumer immediately, subject to a right of the credit provider to re-possess the property if the buyer fails to satisfy all the consumer's financial obligations under the instalment agreement.²³⁶ Prior to the coming into operation of the Security by Means of Movable Property Act,²³⁷ the property belonging to a credit provider could be subject to the lessor's tacit hypothec only if the credit provider failed to give notice to the lessor of the existence of the instalment agreement.²³⁸ However, section 2(1) of the Act amended this position and, as the law now stands, property to which an instalment agreement relates is no longer subject to the lessor's tacit hypothec. The Security by Means of Movable Property Act has therefore added protection for certain third parties whose movables might otherwise have been subject to the extension of the landlord's tacit hypothec.

²³³ S 1 (sv “instalment agreement”) of the National Credit Act 34 of 2005.

²³⁴ An instalment sale agreement refers to what used to be known as a hire-purchase agreement.

²³⁵ S 1(c)(i) of the National Credit Act 34 of 2005.

²³⁶ S 1(c)(ii) (sv “instalment agreement”) of the National Credit Act 34 of 2005.

²³⁷ 57 of 1993.

²³⁸ See s 8 of the Credits Agreement Act 75 of 1980. See also TJ Scott & S Scott *Wille's Law of mortgage and pledge in South Africa* (3rd ed 1987) 102.

3 5 Conclusion

The extension of the lessor's tacit hypothec to third parties' property as developed in seventeenth century Roman-Dutch law was accepted in South African law. The South African law position regarding the lessor's tacit hypothec is that it may only extend to third parties' property if the movable property was brought on to the leased premises with the knowledge and consent of its owner to remain on the leased premises indefinitely for the use by the lessee.²³⁹ However, in certain circumstances the extension of the lessor's tacit hypothec may apply to third parties' property even though the third party is not aware of the presence of his property on the leased premises.

The extension of the lessor's hypothec is founded on either of two theories. The first view is based on the third party's implied consent. According to this approach a third party is assumed to have consented that his goods can serve as security for the debt of another. The second approach is based on the doctrine of estoppel. In terms of this approach a third party is estopped from instituting the *rei vindicatio* against the lessor if his property had been attached for the arrear rent of the lessee as a result of his failure to notify the lessor of his ownership of the property.

Prior to the Appellate Division's decision in *Bloemfontein Municipality v Jacksons Ltd*²⁴⁰ South African courts held that third parties' property could be subject to the lessor's tacit hypothec only if a third party had knowledge that his property was on the leased premises. However, the court in *Bloemfontein Municipality v Jacksons Ltd* extended this principle to also apply in cases where a third party had no knowledge of his property being on the leased premises. The development of the third party's knowledge and consent requirement in *Bloemfontein Municipality v Jacksons Ltd*²⁴¹ has reduced it from being a decisive element to more of a consideration. Accordingly, the fact that the third party was not aware that his property was on the leased premises does not exempt his property from the extension because the court could also inquire whether the third party had done anything to protect himself or to find out about the whereabouts of his property, as was the case in *Bloemfontein Municipality v Jacksons Ltd* and *Fresh Meat Supply Co*

²³⁹ See *Longlands v Francken* 1881 Kotzé 256; *Ulrich v Ulrich's Trustee* (1883) 2 SC 319; *Russell v Savory* (1906) 20 EDC 100.

²⁴⁰ 1929 AD 266.

²⁴¹ 1929 AD 266.

*v Standard Trading Co.*²⁴² Analysis of *Bloemfontein Municipality v Jacksons Ltd* and subsequent case law proves that what is commonly referred to as “implied consent” of the third party is in reality imputed consent. Consequently, the courts may impute consent to the third party in cases where the third party is unaware of the presence of his property on the leased premises, but is in a position to find out where his property was stored and fails to protect himself.

In conclusion, the uncertainty surrounding the justification of the extension of the lessor’s tacit hypothec is the result of the confusion about how the extension of the lessor’s tacit hypothec should apply and when and how each of the theories applies. I argue that a return to a dualistic approach may serve a useful purpose in the application of the doctrine extension. Further, the meaning of the third party’s consent should **not** be understood as either actual consent or implied consent in contractual terms, but rather consent that may be ascribed or imputed to the third party by operation of law. My view is that the solution regarding the justification of the extension of the lessor’s tacit hypothec to third parties’ property lies in the correct application of both theories.

Considering the analysis above of what is commonly referred to as implied consent (but is in fact imputed consent), it is clear that if this theory is applied correctly (without consolidating the inquiry with the estoppel approach), there will probably be no cases in which the extension of the lessor’s tacit hypothec will find application in practice based on the implied consent theory. Also, if the estoppel approach (inclusive of the fault requirement) is correctly applied, there may only be few cases in which estoppel will serve as the basis for attachment, especially since the lessor must first prove the third party’s negligence.

The aim of this chapter was to describe the foundational common law principle that provides for the extension of the lessor’s tacit hypothec to third parties’ property. More specifically, the goal was to set out the justifications for the existence of this common law principle and to describe the protection measures for third parties as provided by the common law and legislation. Therefore, this analysis serves as the basis for the next chapter, in which the extension of the lessor’s tacit hypothec to third parties’ property is scrutinised in light of section 25 of the Constitution.²⁴³

²⁴² 1933 CPD 550.

²⁴³ Constitution of the Republic of South Africa, 1996.

Chapter 4:

The property clause

4 1 Introduction

Given the history of conquest and dispossession of property in South Africa, it was inevitable that the proposition to include the property clause in the Interim Constitution¹ would cause great controversy between the proponents and opponents of the property clause.² The adoption of the Interim Constitution, which included a property clause,³ brought the debate about the desirability of the property clause to a halt and the meaning, content and interpretation of the property clause became the commentators' main focus.⁴ The Interim Constitution has been repealed by the final Constitution.⁵ Like section 28 of the Interim Constitution, section 25 of the final

¹ Constitution of the Republic of South Africa Act 200 of 1993.

² On the one hand, proponents of a property clause argued that existing property rights might be under threat in the "reform-oriented constitutional context" and pleaded for a strong property guarantee. On the other hand the opponents of a property clause pointed out that existing property interests might be protected too strongly against necessary reforms and therefore argued against the inclusion of a property clause in the Bill of Rights: See I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 532. AJ van der Walt *Property and constitution* (2012) 4 states that the debate regarding the inclusion of a property clause in the Bill of Rights "created the impression that post-apartheid reform of property law might result in a tug of war between the champions of vested property rights on the one hand and the promoters of the constitutionally mandated reform, including land reform and related measures, on the other". See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 3; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 521. For arguments against the inclusion of a property clause, see J Nedelsky "Should property be constitutionalised? A relational and comparative approach" in GE Maanen & AJ van der Walt (eds) *Property on the threshold of the 21st century* (1996) 417-432. For arguments supporting the inclusion of a property clause, see AJ van der Walt "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 1-47 1-5; AJ van der Walt "The constitutional property clause: Striking a balance between guarantee and limitation" in J MacLean (ed) *Property and the constitution* (1999) 109-146; FI Michelman "Socio-political functions of constitutional protection for private property holdings (in liberal political thought)" in GE Maanen & AJ van der Walt (eds) *Property on the threshold of the 21st century* (1996) 433-450; AJ van der Walt "Towards a theory of rights in property: Explanatory observations on the paradigm of post-apartheid property law" (1995) 10 *SAPL* 289-345.

³ S 28 of the Interim Constitution.

⁴ AJ van der Walt *Property and constitution* (2012) 2-3; AJ van der Walt *Constitutional property law* (3rd ed 2011) 3, 81-82.

⁵ See s 25 of the Constitution of the Republic of South Africa, 1996. AJ van der Walt "Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state" (2001) *SALJ* 258-311 259-260 (citing E Mureinik "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* 31-48 31-32) describes the Interim Constitution as a bridge that facilitates the transition "from a culture of authority to a culture of justification". In other words, the bridge metaphor is the expression of the wish to break with the past and to open a new chapter in South African history, an expectation of a clean and complete transition from old to new, from bad to good, from a culture of authority to a culture of justification. See also P de Vos "A bridge too far? History as context

Constitution protects property interests of individuals against arbitrary deprivation by the state. Section 25 of the Constitution also extends the idea of a social-obligation norm by including an explicit commitment to land reform and social justice.⁶ Accordingly, the South African Constitution is regarded as the most “admirable Constitution in the history of the world”.⁷

The lessor’s tacit hypothec is a real security right created by operation of law and without the cooperation of the parties. The lessor’s tacit hypothec entails that the lessor may have the lessee’s movable property on the leased premises attached and sold in execution in order to satisfy the lessor’s claim for unpaid arrear rent. In certain circumstances the lessor’s tacit hypothec extends to third parties’ property. This effect, extending the real security right to property belonging to third parties who are not parties to the primary debt relationship, is similar to what section 114 of the Customs and Excise Act⁸ provided, which was held to be inconsistent with section 25(1) of the Constitution in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*⁹ (“*FNB*”). The *FNB* decision may therefore imply that the extension of the lessor’s tacit hypothec to a third party’s property could be inconsistent with section 25(1), since it extends the real security right of the lessor to third parties’ property and in so doing constitutes a forced transfer of ownership (a deprivation) that might be arbitrary if (as was held in *FNB*) it is too wide. Accordingly, it is necessary to scrutinize the extension of the lessor’s tacit hypothec in terms of the methodology expounded in the *FNB* judgment in order to determine whether the extension of the lessor’s tacit hypothec also amounts to arbitrary deprivation.

In this chapter I examine whether the extension of the lessor’s tacit hypothec to third parties’ property complies with section 25(1). The second part of the chapter explores the structure and application of section 25 of the Constitution. It also explains the *FNB* methodology in general. In the third and fourth parts I apply section

in the interpretation of the South African constitution” (2001) 17 *SAJHR* 1-33 16, who also refers to the interim constitution as a bridge.

⁶ GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 149.

⁷ GS Alexander *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 149. See also K Klare “Legal subsidiary and constitutional rights: A reply to AJ van der Walt” (2008) 1 *CCR* 129-154 129.

⁸ Act 91 of 1964.

⁹ 2002 (4) SA 768 (CC).

25(1) to the extension of the lessor's tacit hypothec to third parties' property with the aim to determine whether it is constitutionally valid.

4 2 Property clause in context

4 2 1 Structure and purpose of section 25

Generally, the purpose of section 25 of the Constitution (the property clause) is to balance private and public interests in property.¹⁰ Section 25 can be divided into two main parts,¹¹ section 25(1) to (3), read with section 25(4); and section 25(5) to (9), read with section 25(4).¹² The purpose of section 25(1) to (3) is to protect existing property rights and interests against unconstitutional state interference. The purpose of section 25(4) to (9) is to legitimate and promote land and other related reforms.¹³ Stated differently, section 25 protects existing property interests against arbitrary deprivation and uncompensated expropriation, and simultaneously aims to achieve transformation in the shape of land and other reforms.¹⁴ Although these two parts of the property clause seem to contradict one another, they must be understood as striking a proportionate balance between these two functions.¹⁵ Accordingly, it is possible – as Van der Walt states – to subject individual interests to control, regulations, restrictions, levies, deprivations and changes that promote or protect legitimate public interests, sometimes with relatively serious negative effects for the property owner.¹⁶ Nevertheless, this kind of infringement may occur without compensation.¹⁷

¹⁰ AJ van der Walt *Constitutional property law* (3rd ed 2011) 101. See also T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-2; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 534-535.

¹¹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 91.

¹² See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 16.

¹³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 50. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 16.

¹⁴ AJ van der Walt *Constitutional property law* (3rd ed 2011) 30, 91, 101. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 521; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 532.

¹⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 50. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 13.

¹⁶ AJ van der Walt *Constitutional property law* (3rd ed 2011) 91.

¹⁷ AJ van der Walt *Constitutional property law* (3rd ed 2011) 91.

Generally, constitutional property clauses are difficult to interpret and the South African property clause is no exception.¹⁸ What makes the South African clause more difficult to interpret is the built-in tension between protective provisions and reform provisions.¹⁹ However, it is both necessary and possible to read section 25 as a “coherent whole that embodies a creative tension within itself, without being self-conflicting or contradictory”.²⁰ This means that an understanding of the dual structure and purpose of section 25 plays a vital role in the interpretation of the clause.²¹

4 2 2 Application of section 25

Section 25(1) provides that no one may be deprived of property except in terms of “law of general application”. It further provides that no “law” may permit arbitrary deprivation. Section 25 is structured in a way that indicates how it should be applied. The law-of-general-application requirement provides a safeguard against deprivation that is unauthorised.²² It is therefore important that the courts first enquire whether an alleged deprivation is authorised by law of general application that specifically or generally provides for and effects control of property rights.²³ Consequently, if the deprivation is not authorised by law of general application, it is for that reason invalid and unconstitutional.²⁴ Although law of general application may authorise a deprivation, it may not permit *arbitrary* deprivation of property.²⁵ Whether or not the deprivation is valid depends on the law that authorises the deprivation.²⁶ Since section 25(1) focuses on “law of general application” that either regulates the property right or authorises the regulatory action that causes the deprivation, it is

¹⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 47. See further AJ van der Walt *Constitutional property law* (3rd ed 2011) 29.

¹⁹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 29.

²⁰ AJ van der Walt *Constitutional property law* (3rd ed 2011) 22, 29.

²¹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 22.

²² AJ van der Walt *Constitutional property law* (3rd ed 2011) 237.

²³ R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 297. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 237.

²⁴ AJ van der Walt *Constitutional property law* (3rd ed 2011) 237.

²⁵ S 25(1) of the Constitution.

²⁶ T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-21.

logical to argue that a litigant must challenge the law that authorises and not the action of deprivation as such.²⁷

In the next section I discuss two questions regarding the application of section 25, namely whether section 25(1) applies between private parties in a private dispute such as a lessor's tacit hypothec and whether section 25(1) can apply directly in a lessor's tacit hypothec dispute.

The first question is whether section 25(1) applies between private parties in a private dispute such as that surrounding a lessor's tacit hypothec. Section 8(1) of the Constitution provides that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. All "law" in section 8(1) includes all forms of legislation, common law and customary law.²⁸ This section provides for the direct vertical application of the Bill of Rights. Section 8(2) provides for horizontal application of the Bill of rights, that is, between private individuals. Horizontal application of the Bill of Rights can be either direct or indirect.²⁹ Direct horizontal application involves direct reliance on a constitutional provision for a cause of action or defence.³⁰ This means that the third party may argue that the common law principle that provides for the extension of the lessor's tacit hypothec is inconsistent with section 25(1). Van der Walt states that in the case of indirect horizontal application the cause of action or defence relies on the Constitution in such a way that the private law rules (statutory or common law) that govern the dispute are open to amendment or influence from the Constitution, even though a state threat against either party is not directly in issue.³¹ Applied to the extension of the lessor's tacit hypothec to third parties' property dispute, it follows that the third party would challenge the common law principles that permit the deprivation of property instead of the lessor's actions.

As a result, the Bill of Rights applies either horizontally or vertically.³² Since the lessor's tacit hypothec dispute is usually between private individuals without direct

²⁷ R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 297-298.

²⁸ F du Bois "Sources of law: Overview and Constitution" in F du Bois (ed) *Wille's Principles of South African Law* (9th ed 2007) 33-45 39.

²⁹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 58; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 43.

³⁰ AJ van der Walt *Constitutional property law* (3rd ed 2011) 59.

³¹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 59.

³² See I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 43.

state involvement, the question of vertical application seems irrelevant. However, both the fact that the extension of the lessor's tacit hypothec is granted by the common law (law of general application) and the fact that the enforcement of the lessor's tacit hypothec is effected by a state organ, namely the sheriff, indicate that the state is indeed involved. Although the state is not a party to a dispute about the lessor's tacit hypothec, it is indirectly involved to ensure the peaceful enforcement of private debts. As a result the state, through the courts and the office of the sheriff, uses its powers to force a transfer of property rights from a third party to the lessor in fulfilling its obligation to ensure that the debt enforcement procedure takes place in a proper manner.³³

In *Du Plessis v De Klerk*³⁴ it was held that in cases where the common law regulates disputes between private individuals, the Bill of Rights entrenched in the Interim Constitution can only apply indirectly to the private legal dispute.³⁵ In *Khumalo v Holomisa*³⁶ the court expressed the view that the common law does not in all circumstances fall within the direct application of the Constitution.³⁷ In *Phoebus Apollo Aviation CC v Minister of Safety and Security*³⁸ it was held that a direct reliance on section 25(1) to protect the appellant's property rights against another private party was not possible.³⁹ Roux argues that, since one of the objects of the Bill of Rights is to protect people against arbitrary deprivation of property, it is unnecessary to consider whether section 25 is directly horizontally applicable.⁴⁰ Van der Walt is of the view that the answer to the question whether section 25 allows for direct horizontal application in disputes between private parties is to a certain extent implicit in section 25 read with section 8(2) of the Constitution.⁴¹

³³ See also R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 298.

³⁴ 1996 (3) SA 850 (CC).

³⁵ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

³⁶ 2002 (5) SA 401 (CC).

³⁷ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 32.

³⁸ *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC).

³⁹ 2003 (2) SA 34 (CC) para 4. I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 73 argues that this decision still holds true for the 1996 Constitution in the area of common law disputes between private persons who are in formula provided for in s 8(2). Currie & De Waal further argues that in such cases the Bill of Rights only applies indirectly to common law disputes. See further AJ van der Walt *Constitutional property law* (3rd ed 2011) 61.

⁴⁰ T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-7.

⁴¹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 61.

The significance of the conclusion that section 25 always applies vertically or indirectly horizontally to disputes regarding property between private parties is that it offers the possibility to develop the common law.⁴² Development of the common law is required by section 39(2):

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

This means that when the courts apply any common law principle or doctrine that authorises deprivation of property, they must apply or develop the common law in a way that gives effect to section 25. The above analysis shows that section 25 impacts private law in an indirect manner. Since any deprivation that might occur during the enforcement of the lessor’s tacit hypothec would be authorised by the common law, it is possible that section 25 will impact the common law indirectly.⁴³

4 2 3 The *FNB* methodology

The Constitutional Court follows a two-stage approach to constitutional litigation.⁴⁴ In the first stage the applicant needs to show that he is a beneficiary of a right in the Bill of Rights, and that the right has been limited or infringed. In the second stage the defendant is afforded the opportunity to prove that the limitation can be justified in terms of section 36(1) of the Constitution.⁴⁵ In *FNB*⁴⁶ the Constitutional Court has specified the two-stage approach’s application to constitutional property disputes in terms of section 25.⁴⁷ The *FNB* judgment also terminated a number of uncertainties and debates regarding the interpretation of section 25(1) of the Constitution and

⁴² See in this regard JWG van der Walt “Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence” (2001) 17 *SAJHR* 343-361; S Woolman “Application” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2005) 31-46 - 31-49.

⁴³ See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) para 4. See also T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-7; AJ van der Walt *Constitutional property law* (3rd ed 2011) 61.

⁴⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 100-102. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 74-75; T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-3.

⁴⁵ AJ van der Walt *Constitutional property law* (3rd ed 2011) 75.

⁴⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

⁴⁷ See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 220.

brought some clarity regarding the approach to be followed.⁴⁸ The Court explicitly stated that section 25 can and should be interpreted purposefully in view of its historical context and constitutional purpose.⁴⁹ Furthermore, the *FNB* judgment introduced a methodology for analysing section 25 disputes, which has significant implications for the application of section 25's requirements.⁵⁰ It is therefore important to set out the *FNB* methodology before proceeding to the individual requirements. Roux lists the seven stages of the *FNB* methodology as follows:

- “(a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(2)?
- (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?”⁵¹

According to the *FNB* methodology, the starting point for all constitutional property disputes is section 25(1).⁵² The subsection provides that “[n]o one may be deprived

⁴⁸ AJ van der Walt *Constitutional property law* (3rd ed 2011) 220. T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-2 argues that before the *FNB* judgment it was possible that the balance of private and public interest could be struck at one or more of six stages of the constitutional inquiry. However, in his view, after the *FNB* judgment the constitutional property clause inquiry will focus on the test for arbitrariness.

⁴⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 47-50. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) paras 47-50; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-23; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 48. See further AJ van der Walt *Constitutional property law* (3rd ed 2011) 22.

⁵⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 220.

⁵¹ T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-3.

⁵² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 60. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 75.

of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". The first question is whether the affected interest is "property" in terms of section 25(1).⁵³ If the first question is answered in the affirmative, the second question is whether there has been a deprivation.⁵⁴ If so, the next question is whether such deprivation is consistent with the provisions of section 25(1).⁵⁵ If it is consistent, then the inquiry proceeds to the fifth question (step five), since there is no constitutional violation that requires justification provided for by the fourth question. However, if the deprivation does not comply with section 25(1), the next question is whether such deprivation is justified under section 36 of the Constitution.⁵⁶ If not, the matter ends there and the deprivation is invalid and unconstitutional. If the deprivation is consistent with section 25(1) or if the limitation of section 25(1) is justifiable under section 36, the next question is whether such deprivation amounts to expropriation for purposes of section 25(2).⁵⁷ If so, the next question is whether the expropriation complies with the requirements of section 25(2)(a) and (b).⁵⁸ If the expropriation does not comply with subsection 25(2), the next question is whether such expropriation is justified under section 36(1).⁵⁹ If not, such expropriation is invalid and unconstitutional.

Roux argues that if the *FNB* methodology is followed, it is unlikely that a constitutional property dispute would proceed through all the stages.⁶⁰ Roux argues that the three threshold questions (whether the applicant is a beneficiary who qualifies for the protection of section 25, whether the affected interest is property and whether the interest was indeed infringed) are apparently "sucked into" the

⁵³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(a).

⁵⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(b).

⁵⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(c).

⁵⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(c).

⁵⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(d).

⁵⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(f).

⁵⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46(g).

⁶⁰ T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-21 – 46-25.

arbitrariness test.⁶¹ According to Roux⁶² the arbitrariness test tends to dominate the section 25 inquiry, and as a result, the general limitation clause (section 36) has receded into the background.⁶³ Van der Walt agrees with Roux and states that all constitutional property disputes that follow the *FNB* methodology are likely to get stuck in the section 25(1) arbitrariness analysis.⁶⁴

According to the *FNB* methodology, expropriation is a sub-set of deprivation and therefore all expropriations are deprivations, while not all deprivations are expropriations.⁶⁵ This categorisation makes it possible to postpone the question of expropriation to a later stage until it is established whether a particular interference with property rights amounts to deprivation that complies with section 25(1) or, if not, whether such a deprivation is justified in terms of section 36(1) of the Constitution.⁶⁶ It has been confirmed that the *FNB* methodology is still the correct approach when bringing any challenge regarding the property clause.⁶⁷ In what follows, I apply the *FNB* methodology to the extension of the lessor's tacit hypothec to third parties' property.

4 3 Attachment of third parties' *invecta et illata*

4 3 1 Is third parties' *invecta et illata* "property"?

The question whether the third party's *invecta et illata* is "property" as meant by section 25(1) is important and should be considered before engaging in an analysis of the meaning of arbitrary deprivation.⁶⁸ The constitutional property clause provides that property is not limited to land.⁶⁹ In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,

⁶¹ T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-2 - 46-5. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 75-77.

⁶² T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-3.

⁶³ See in this regard *Nhlabathi and Others v Fick* [2003] 2 All SA (LCC) paras 30-31; *Geysers v Msunduzi Municipality* 2003 (3) BCLR 235 (N) 250B-251H.

⁶⁴ AJ van der Walt *Constitutional property law* (3rd ed 2011) 77-78.

⁶⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

⁶⁶ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 57-59.

⁶⁷ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 66; *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) 48.

⁶⁸ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

⁶⁹ S 25(4)(b) of the Constitution.

1996⁷⁰ the Constitutional Court had to decide whether the formulation of the right to property adopted by the Constitutional Assembly in the final Constitution complies with the test of “universally accepted fundamental rights”. The Court held that “no universally recognised formulation of the right to property exists”, and concluded that the term “property” in section 25 is of such a nature that it allows sufficient scope to include all rights and interests that have to be protected according to international standards.⁷¹

In *FNB* the Constitutional Court confirmed that ownership of corporeal movables and land are at the heart of the constitutional concept of property,⁷² and consequently the Court found it unnecessary to construe a comprehensive definition of property for purposes of the property clause.⁷³ The fact that a real security right has been created by the operation of law over a third party’s property does not change the fact that the third party is the owner of the movable property, although such ownership is limited for security purposes.⁷⁴ The third party’s *invecta et illata* are the corporeal movables brought on to the leased premises by the lessee and clearly falls within the scope of property for purposes of section 25 of the Constitution.⁷⁵

4 3 2 Is attachment a “deprivation”?

If the question whether a third party’s *invecta et illata* is property for purposes of section 25 is answered affirmatively, the next question is whether there was a deprivation of the third party’s property if the lessor’s tacit hypothec is extended to

⁷⁰ 1996 (4) SA 744 (CC).

⁷¹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) para 72.

⁷² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 93; T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-10.

⁷³ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

⁷⁴ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 53-55, where the Constitutional Court rejected an argument that the Bank’s ownership in the vehicles was a contractual device that reserves ownership of the vehicle and therefore was not property for purposes of section 25 of the Constitution.

⁷⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

that property.⁷⁶ To answer this question it is necessary to establish the definition of deprivation. According to the *FNB* decision, deprivation is the wider category that encompasses all species of state interference with property, and expropriation is a sub-set of deprivation.⁷⁷ Although the term deprivation may be confusing in that it creates the impression that it refers to dispossession in the sense of taking away property,⁷⁸ the Constitutional Court has made it clear that deprivation does not have to involve taking away or dispossession of property.⁷⁹ Nevertheless, forfeiture and confiscation of property are forms of regulatory deprivations that have the effect of taking property away.⁸⁰ The Constitutional Court has also expressly stated that “[d]ispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation”.⁸¹ In *FNB* deprivation was defined widely to mean

“[a]ny interference with the use, enjoyment or exploitation of private property”.⁸²

In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of*

⁷⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

⁷⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 203-204.

⁷⁸ AJ van der Walt *Constitutional property law* (3rd ed 2011) 190.

⁷⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 191.

⁸⁰ See AJ van der Walt *Constitutional property law* (3rd ed 2011) 311-314.

⁸¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

⁸² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32 it was held that “[a]t the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation”. For criticism of this decision see AJ van der Walt “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* (CC)” (2005) 122 SALJ 75-89. See further AJ van der Walt *Constitutional property law* (3rd ed 2011) 204-206.

*the Executive Council for Local Government and Housing, Gauteng and Others*⁸³ (“*Mkontwana*”) the court apparently altered the *FNB* definition of deprivation by requiring

“[a]t the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation”.⁸⁴

Van der Walt argues that the definition in *Mkontwana* was made subject to a disclaimer and that one should be prudent about it because it is problematic.⁸⁵ The author contends that the finding in *Mkontwana*⁸⁶ that section 25(1)’s definition of deprivation should be limited to regulatory action that exceeds what is normal in an open and democratic society is strange and that it is unclear why the definition of deprivation should be linked to the notion of what is normal in an open democracy.⁸⁷

In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another*⁸⁸ (“*Reflect-All*”) the court quoted – with approval – the minority judgment of O’Regan J in *Mkontwana*. The Court held that the purpose of section 25(1) is to recognise both the material and non-material value of property to owners, and that it would defeat that purpose were deprivation to be read narrowly.⁸⁹ In *Reflect-All* the court seems to have followed the wider *FNB* definition of deprivation rather than the narrow *Mkontwana* definition.⁹⁰ In *Offit Enterprises (Pty) Ltd and Another v COEGA Development Corporation (Pty) Ltd*

⁸³ 2005 (1) SA 530 (CC).

⁸⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32.

⁸⁵ AJ van der Walt *Constitutional property law* (3rd ed 2011) 204.

⁸⁶ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).

⁸⁷ AJ van der Walt *Constitutional property law* (3rd ed 2011) 204-205.

⁸⁸ 2009 (6) SA 391 (CC).

⁸⁹ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 36. See *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 89.

⁹⁰ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 36. See further AJ van der Walt *Constitutional property law* (3rd ed 2011) 207.

and Others⁹¹ the Constitutional Court referred to the *FNB* and *Reflect-All* definitions of deprivation, but it approved and applied the narrower definition adopted in *Mkontwana*.⁹²

In *National Credit Regulator v Opperman and Others*⁹³ the Constitutional Court referred to the *FNB* definition of deprivation. However, it stated that “interference significant enough to have a legally relevant impact on the rights of the affected party amounts to deprivation”.⁹⁴ In *Agri South Africa v Minister for Minerals and Energy*⁹⁵ the Constitutional Court defined deprivation to include taking away or “significant interference” with property rights.⁹⁶

Van der Walt defines deprivation as uncompensated, regulatory restrictions on the use, enjoyment and exploitation of property.⁹⁷ Deprivation is distinguished from expropriation in which the state acquires the property against compensation, whereas by deprivation the state only regulates the use, enjoyment and exploitation of the property.⁹⁸ The deterioration of the value of the property holder caused by regulatory control differs and in some instances it can be considerable. Although regulation may in some cases result in complete destruction of the property, the state does not acquire the property for public purpose and as a result such regulation does not amount to expropriation.⁹⁹ The important element of this definition is that regulatory deprivation is not aimed at taking away the property but at regulating its use. In addition, it always causes a loss of the value to the property holder and can sometimes cause significant loss for the property holder.¹⁰⁰ Further, notwithstanding its extent, deprivation is usually not compensated, since it applies generally and not to one owner or user. The importance of deprivation or regulation is that it serves a public purpose in protecting public health and safety. Thus it affects every owner

⁹¹ 2011 (1) SA 293 (CC) paras 38-39.

⁹² *Offit Enterprises (Pty) Ltd and Another v COEGA Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 39.

⁹³ 2013 (2) SA 1 (CC) para 66.

⁹⁴ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 66.

⁹⁵ 2013 (4) SA 1 (CC)

⁹⁶ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) 48.

⁹⁷ AJ van der Walt *Constitutional property law* (3rd ed 2011) 192.

⁹⁸ AJ van der Walt *Constitutional property law* (3rd ed 2011) 196.

⁹⁹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 196.

¹⁰⁰ AJ van der Walt *Constitutional property law* (3rd ed 2011) 196-197.

equally or benefits them equally. Expropriation is normally compensated because it targets the property of one owner for the benefit of the public.¹⁰¹

The above analysis shows that the Constitutional Court is struggling to provide a single definition of deprivation. For present purposes I accept that any uncompensated, regulatory restriction of the use, enjoyment or exploitation of property should suffice to qualify as a deprivation.¹⁰²

The question is whether the attachment and subsequent sale in execution of a third party's property in terms of an extension of the lessor's tacit hypothec amounts to deprivation of property. In fact, the question comprises of two sub-questions. The first question is whether the creation of a real security right by the operation of law over property belonging to a third party in favour of the lessor qualifies as deprivation. The creation of a real security right by the operation of the law does not involve the cooperation of a real security right grantor and its holder. Indeed, what it does is to create a real security right in favour of the lessor upon application to the court for an attachment order against all the movable property found on the leased premises, including third parties' property. This real security right entails that the lessor can keep the property so attached (including the third party's property) until his rent in arrears is paid by the lessee. The creation of a real security right without the cooperation of a third party over his property amounts to interference with the use, enjoyment or exploitation of property, since it limits the third party's entitlement to dispose of his property in any manner he wishes. Such limitation of the right to dispose of property must be seen as a deprivation in terms of section 25(1) of the Constitution.¹⁰³

The second question is whether the subsequent sale in execution of the third party's property by the sheriff to satisfy the lessor's claim for arrear rent amounts to a deprivation. If the lessee fails to pay the arrear rent within a certain time, the lessor may apply to the court for sale in execution of the attached property in order to satisfy his claim for arrear rent. Although the lessor might become aware that some of the movable property belongs to the third party after attachment but before sale in

¹⁰¹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 197.

¹⁰² AJ van der Walt *Constitutional property law* (3rd ed 2011) 192.

¹⁰³ See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

execution, such knowledge does not affect his hypothec. As a result, the sheriff can sell at auction the attached property (including the third party's property) without the cooperation of its owner and use the proceeds to satisfy the lessor's claim. A sale in execution results in what may be called a forced sale and the transfer of ownership.¹⁰⁴ The consequence of a sale in execution is that a third party loses all entitlements of ownership. This amounts to a substantial interference with the third party's property rights and therefore qualifies as a deprivation in terms of section 25(1).¹⁰⁵

In light of the preceding description and analysis of the meaning of deprivation and its application, I conclude that both the attachment of a third party's property and the subsequent sales in execution of the third party's property are deprivations in terms of section 25(1).¹⁰⁶ Since the deprivation of the third party's property rights already occurs the moment a real security right is created in favour of the lessor without the third party's cooperation, this chapter focuses only on the attachment and not the sale in execution.¹⁰⁷

4 3 3 Does the deprivation comply with section 25(1)?

4 3 3 1 *Law of general application*

The first part of section 25(1) deals with the requirement of law of general application whereas the second part deals with arbitrariness of the deprivation. Section 25(1) of the Constitution does not insulate property against deprivation but protects property against unauthorised and arbitrary deprivations.¹⁰⁸ Therefore, the law-of-general-application requirement is intended to protect individuals from being deprived of property by bills of attainder or other laws that single them out for "discriminatory

¹⁰⁴ See R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 311.

¹⁰⁵ See *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32.

¹⁰⁶ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

¹⁰⁷ For a detailed discussion of sales in execution as deprivation, see R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 307-323.

¹⁰⁸ The law of general application requirement also appears in ss 25(2) and 36(1) of the Constitution.

treatment”, or which limit their property rights without proper legal authorisation.¹⁰⁹ The reference in section 25(1) to “law of general application” instead of “a law of general application” serves a significant purpose, namely to indicate that regulatory deprivation of property may also be authorised by the rules of common law and customary law.¹¹⁰ Consequently, the common law and customary law are also subject to the provision that they may not authorise arbitrary deprivation.¹¹¹ In *S v Thebus and Another*¹¹² it was held that the common law is law of general application and must be consistent with the Constitution. The Court further held that if the common law limits any of the rights guaranteed in the Constitution, such a limitation must be justifiable under the limitation clause.¹¹³ Applied to the extension of the lessor’s tacit hypothec, this means that the extension of the lessor’s tacit hypothec must first comply with section 25(1) of the Constitution and if the extension limits the right protected in section 25(1), such a limitation must be justifiable under section 36(1). Consequently, if the common law principle authorises arbitrary deprivation of property that is unjustifiable in terms of section 36(1), it will be invalid and unconstitutional.

The consequence of the law-of-general-application requirement is that the focus of section 25(1) falls on the law that authorises the deprivation and not on any private or state action that causes the deprivation as such.¹¹⁴ Applied to the extension of the lessor’s tacit hypothec, this implies that the section 25(1) analysis should focus on the common law principle that provides for the extension of the lessor’s tacit hypothec and not on the attachment by the sheriff.

¹⁰⁹ *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) 29H. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 232; S Woolman & H Botha “Limitations” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-50; T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-21; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 542.

¹¹⁰ AJ van der Walt *Constitutional property law* (3rd ed 2011) 234.

¹¹¹ S 25(1) of the Constitution.

¹¹² 2003 (6) SA 505 (CC).

¹¹³ *S v Thebus and Another* 2003 (6) SA 505 (CC) para 65. See also *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 44. L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 86 argues that the common law of servitude of right of way is law of general application. Z Temmers *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 151 argues that the common law principles of encroachment qualify as law of general application. R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 314 also argues that the common law principles of mortgage qualify as law of general application.

¹¹⁴ AJ van der Walt *Constitutional property law* (3rd ed 2011) 235. See also T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-21.

Apart from the requirements of validity and the general applicability of the law, it is further necessary for the court to determine whether the law in question indeed authorises the alleged deprivation.¹¹⁵ In other words, if the deprivation is not authorised by law of general application the matter ends there because such a deprivation is unconstitutional for lack of authority. The common law principles regarding the lessor's tacit hypothec provide that the lessor may, in terms of section 32(1) of the Magistrate's Courts Act, apply to the court for an order that mandates the sheriff to attach all movable property found on the leased premises. When the sheriff effects the attachment of movable property, he does so under the authority of the law and under instruction from the court acting within the boundaries of the law.¹¹⁶ Accordingly, if the attachment by the sheriff amounts to a deprivation, the common law should be challenged for non-compliance with section 25(1) and not the attachment.¹¹⁷

In view of the discussion above and the conclusions in the previous chapter it may be concluded that, insofar as the common law does allow an extension of the lessor's tacit hypothec for arrear rent to movables that belong to third parties other than the lessee, the deprivation of the third parties' property so caused is indeed authorised by law of general application.

4 3 3 2 *The non-arbitrariness test*

The second requirement of section 25(1) is that the law of general application in question may not permit arbitrary deprivation of property.¹¹⁸ In the *FNB* case, the bank (FNB) was owner of certain vehicles that were in the possession of the customs debtor. The state (South African Revenue Services) established a statutory lien over the same vehicles to enforce payment of a customs debt.¹¹⁹ The Constitutional Court had to decide whether the creation and enforcement of the state's security interest in the property belonging to an "innocent" third party (FNB) constituted an arbitrary deprivation of property. The Constitutional Court held that

¹¹⁵ AJ van der Walt *Constitutional property law* (3rd ed 2011) 236.

¹¹⁶ See R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 312.

¹¹⁷ See AJ van der Walt *Constitutional property law* (3rd ed 2011) 235.

¹¹⁸ See T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-20.

¹¹⁹ In terms of s 114 (1)(a)(ii) of the Customs and Exercise Act 91 of 1964.

“[a] deprivation of property is arbitrary as meant by section 25 when the ‘law’ referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is “procedurally unfair”.¹²⁰

In other words, a deprivation is arbitrary if there is insufficient reason for it or if it is procedural unfair.¹²¹ The Constitutional Court also developed a mechanism that must be followed to establish whether or not there is sufficient reason for a deprivation.¹²² The court stated that a complexity of relationships has to be considered in order to establish sufficient reason.¹²³ The complexity of relationships includes the relationship between the means employed (deprivation) and the ends sought to be achieved (purpose of deprivation),¹²⁴ and the relationship between the purpose for the deprivation and the person whose property is affected.¹²⁵ In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation.¹²⁶ The court adopted and applied a substantive proportionality interpretation of the non-arbitrariness requirement and concluded that in the absence of a close nexus between the owner of the vehicles (FNB) and the customs debt, and between the customs creditor (SARS) and the owner of vehicles, there was insufficient reason for section 114 of the Customs and Exercise Act to deprive third parties of their property.¹²⁷ Accordingly, the court held that the deprivation caused by section 114 of the Customs and Exercise Act was arbitrary for purposes of section 25(1).¹²⁸

¹²⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²¹ See also *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 39. See further AJ van der Walt *Constitutional property law* (3rd ed 2011) 245.

¹²² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(b).

¹²⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(a).

¹²⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(c).

¹²⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (d).

¹²⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 109.

¹²⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 109. The FNB judgment was followed in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC).

Prior to the *FNB* decision it was unclear whether South African courts would follow a “thin” rationality or a “thick” proportionality-type interpretation of the non-arbitrariness requirement.¹²⁹ The Constitutional Court responded by deciding that the test involved will vary between a mere rationality and a full proportionality approach, depending on the context of each case.¹³⁰ Roux argues that the Constitutional Court deliberately reserved almost absolute discretion to itself to decide future cases in a manner it deems fit.¹³¹ He also argues that the non-arbitrariness test will dominate the constitutional property inquiry and that as a result it will “suck” all aspects of the constitutional property analysis into the non-arbitrariness test.¹³² According to Roux, the level of scrutiny of the non-arbitrariness test will vacillate between rationality review at the lower end of the scale, and something just short of a review for proportionality at the other end.¹³³

According to Van der Walt, there are two views with regard to the meaning of the non-arbitrariness provision. The first view is that the non-arbitrariness requirement is a rationality requirement that is satisfied whenever there is a legitimate government reason for the deprivation.¹³⁴ The second view of the non-arbitrariness requirement “means that deprivation should not impose an unacceptably heavy burden upon or demand an exceptional sacrifice from one individual or a small group of individuals for the sake of the public at large”¹³⁵ and “any law that authorises deprivation of property must establish sufficient reason for the deprivation in the sense that it is not only rationally linked to a legitimate government purpose but also justified”.¹³⁶

¹²⁹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 238. T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-21 states that before the *FNB* decision commentators agreed that the requirement of non-arbitrariness in s 25(1) was equivalent to the rationality requirement imposed by s 9(1) of the Constitution. However, this view was rejected in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 98.

¹³⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(g). See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 243.

¹³¹ T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-24.

¹³² T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-24.

¹³³ T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-24.

¹³⁴ AJ van der Walt *Constitutional property law* (3rd ed 2011) 237.

¹³⁵ AJ van der Walt *Constitutional property law* (3rd ed 2011) 238.

¹³⁶ AJ van der Walt *Constitutional property law* (3rd ed 2011) 238.

In *Mkontwana*¹³⁷ the Constitutional Court had to decide the constitutionality of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000, which had the effect that a landowner could not transfer his land to a purchaser until unpaid consumption charges that had been run up during the previous two years have been settled in full.¹³⁸ The question was whether the limitation on ownership brought about by section 118(1) of the Act could include consumption charges for services used by a tenant or an unlawful occupier of the land and, if so, whether such a limitation amounted to arbitrary deprivation of property. The high court concluded that there was no relevant nexus between the debts and the landowner. According to the high court, there was insufficient reason for section 118(1) to deprive owners of the right to transfer their properties in cases where the landowners were not responsible for the charges for services.¹³⁹ The high court's finding that section 118(1) is unconstitutional was referred to the Constitutional Court for confirmation. However, the Constitutional Court held that there was a close enough connection between the deprivation and the consumption charges for services to the extent that the services were delivered and consumed on the premises.¹⁴⁰ It was held that it is reasonable to expect the owner to take steps to prevent illegal occupation of the premises,¹⁴¹ to choose a responsible tenant and to ensure payment by the tenant of consumption charges.¹⁴² The Court stated that the deprivation did affect an important incident of ownership but held that the deprivation was slight in that it limited only one incident of ownership and that it was temporary. The Court concluded that the deprivation was not arbitrary because there was a sufficient nexus between the deprivation and the consumption charges for services.

¹³⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).

¹³⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 2.

¹³⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality* case no 1238/02 (SECLD) para 57.

¹⁴⁰ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 53.

¹⁴¹ AJ van der Walt *Constitutional property law* (3rd ed 2011) 255 argues that this argument is flawed because it unfairly places the burden on the landowner to evict unlawful occupiers while simultaneously restricting the use of this remedy by the Constitution (s 26), legislation and case law.

¹⁴² *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 53.

Van der Walt states that “on the surface it looks as if the court merely applied the test as set out in *FNB*, but in fact the court’s subtle rephrasing of the test points towards a significant shift.”¹⁴³ The author argues that the *Mkontwana* formulation of the non-arbitrariness test is much closer to mere rationality than the contextualised, proportionality-focused formulation applied in *FNB*.¹⁴⁴ Further, that the Constitutional Court in *Mkontwana* altered the interplay between the various factors set out in the *FNB* test.¹⁴⁵ Accordingly, the question whether a deprivation is arbitrary was based on the questions whether the purpose of the deprivation is legitimate and compelling, and whether it would be unreasonable in the circumstances to place the burden where the relevant provision does.¹⁴⁶ Van der Walt argues that the purposes of the deprivations in *FNB* and *Mkontwana* are the same, that the purpose of the deprivation in *Mkontwana* was legitimate but not compelling,¹⁴⁷ and therefore that there is no clear reason for the difference in the results.¹⁴⁸ The Constitutional Court in *Mkontwana* proved that Roux was correct in stating that the court by means of the test it developed in the *FNB* case reserved a wide discretion for itself to vacillate between the proportionality-type test and something more closely resembling a mere rationality analysis.¹⁴⁹ Van der Walt concludes that the Constitutional Court in *Mkontwana* retreated from the *FNB* proportionality-type test.¹⁵⁰

Section 114 of the Customs and Exercise Act that was at issue in the *FNB* case had the effect of extending the statutory lien to the third party’s property; the third party owner of the affected movables in that case was neither the customs debtor nor connected with the customs debt. Also, section 118(1) of the Local Government: Municipal Systems Act, which was at issue in *Mkontwana*, had the effect of precluding the landowner from transferring his land to a purchaser until unpaid consumption charges that had been run up during the previous two years by a third

¹⁴³ AJ van der Walt *Constitutional property law* (3rd ed 2011) 249.

¹⁴⁴ AJ van der Walt *Constitutional property law* (3rd ed 2011) 250.

¹⁴⁵ AJ van der Walt *Constitutional property law* (3rd ed 2011) 250.

¹⁴⁶ See AJ van der Walt *Constitutional property law* (3rd ed 2011) 251.

¹⁴⁷ AJ van der Walt *Constitutional property law* (3rd ed 2011) 251.

¹⁴⁸ AJ van der Walt *Constitutional property law* (3rd ed 2011) 253.

¹⁴⁹ See T Roux “Property” in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-24. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 250.

¹⁵⁰ AJ van der Walt *Constitutional property law* (3rd ed 2011) 250,253. See also AJ van der Walt “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* (CC)” (2005) 122 SALJ 75-89.

party (tenant or unlawful occupier) have been fully paid. Similarly, the lessor's tacit hypothec provides that if the lessee's and/or the sub-lessee's movable property proves insufficient to satisfy the lessor's claim for arrear rent against the lessee, the lessor's tacit hypothec may extend to third parties' property found on the leased premises. It is clear that both section 114 of the Customs and Exercise Act and the extension of the lessor's tacit hypothec involve the extension of real security rights to third parties' property.

However, the difference between *FNB, Mkontwana* and the extension of the lessor's tacit hypothec is that the statutory provisions in both *FNB* and *Mkontwana* favoured the state, whereas the common law principle that provides for the extension of the lessor's tacit hypothec to third parties' property favours private creditors. The Constitutional Court in *FNB* held that "[t]o exact payment of a customs debt is a legitimate and important legislative purpose, essential for the financial well-being of the country and in the interest of all its inhabitants".¹⁵¹ It has been argued – convincingly in my view – that the same is the position with regard to the enforcement of private debts.¹⁵² Accordingly, my view is that the lessor's tacit hypothec serves a useful purpose in the enforcement of the lessor's claim for arrear rent. The question is whether that consideration is sufficient to justify extension of the real security right to third parties' property. In effect, the Constitutional Court decided in *FNB* that it was not, while holding in *Mkontwana* that it was.

In the next section I apply the *FNB* non-arbitrariness test to the extension of the lessor's tacit hypothec to third parties' property, focusing especially on the interplay of factors set out in *FNB* in order to determine whether there is sufficient reason to deprive a third party of his property to ensure payment of the lessee's debt.

The lessor's tacit hypothec provides the lessor with a tacit real security right. The hypothec entitles the lessor to attach the lessee's, the sub-lessee and/or third parties' movable property until the arrear rent owed by the lessee is paid in full. To perfect the hypothec the lessor must apply to the court for an attachment order. The lessor's tacit hypothec has similar effects to section 114 of the Customs and Exercise Act, namely that they both create real security rights that extend to include

¹⁵¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108.

¹⁵² See R Brits *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 315.

a third party's property. In fact, the lessor's tacit hypothec creates a real security right over property belonging to three categories of persons, namely the lessee, the sub-lessee and the third party, whereas section 114 of the Customs and Exercise Act created a real security right over property of two categories of persons, namely the customs debtor and third parties.

The only nexus required by section 114 of the Act between the third party's property and the customs debtor to render the third party's property subject to the statutory lien was "possession and control" or the presence of the third party's property on "any premises in the possession or under the control" of the customs debtor. Accordingly, the commissioner of the SARS could detain and sell any property, including third parties' property found on "any premises in the possession or under the control" of the customs debtor. The customs debtor need only be in "possession or control" of the premises and not of the property itself. In other words, the customs debtor could be unaware of the presence of the third party's property on his premises.

With regard to the lessor's tacit hypothec, attachment of third parties' property is based on imputed consent and the doctrine of estoppel. According to the implied-consent theory, a third party is taken to have impliedly consented that his property can be utilised as security for the lessee's rent in arrears. The lessor bears the onus to prove that the property was on the leased premises with the knowledge and consent of the third party; that he was unaware that the property belongs to the third party; and that the property was on the leased premises permanently and for the lessee's use. It is worth noting that the last requirement of the implied-consent theory, namely that the third party's property must be on the leased premises for the use of the lessee, creates a nexus between the third party's property and the duty to pay rent (the purpose of deprivation). It is this requirement that distinguishes the nexus in section 114 of the Customs and Exercise Act from the one in the case of the extension of the lessor's tacit hypothec. Section 114 of the Act required only the presence of the third party's property on "any premises in the possession or under the control" of the customs debtor and not use of the third party's property by the customs debtor, whereas the extension of the lessor's tacit hypothec to third parties' property requires both possession (presence on the premises) and use of the property by the lessee. The extension of the lessor's tacit hypothec also requires

permanence of third parties' property on the leased premises, which section 114 of the Act did not require. Thus, in terms of section 114 of the Act, the property that could have been on the customs debtor's possession purely by chance and for short period could be subject to the statutory lien.

According to the second justification, namely the doctrine of estoppel, it is argued that the third party is estopped (or precluded) from raising the *rei vindicatio* against the lessor because he has negligently induced the lessor to believe that the property belongs to the lessee. As is argued in the previous chapter, the doctrine of estoppel (with the fault requirement) should also be regarded as a justification for the extension of the lessor's tacit hypothec. Accordingly, the correct application of both justifications will mean that if the third party is unaware that his property is on the leased premises, his property should not be subject to the hypothec. Thus, if the third party is not aware of the presence of his property on the lessor's premises, he should not be held to be negligent. In other words, correct application of the extension of the lessor's tacit hypothec implies that the fault requirement of the doctrine of estoppel will not be established easily. However, if the estoppel denier fails to prove that he was not negligent with the whereabouts of his property, attachment of his property might be justified.

In light of the analysis above, one can argue that although section 114 of the Customs and Exercise Act and the extension of the lessor's tacit hypothec have similar effects (creating real security rights over the property of third parties), they also differ in important aspects. Firstly, the lessor's tacit hypothec only extends to third parties' property if the property of the lessee and/or the sub-lessee proves to be insufficient to satisfy the lessor's claim for rent. Secondly, unlike section 114 of the Act, the extension of the lessor's tacit hypothec requires that certain requirements must be met before third parties' property could be subject to the lessor's tacit hypothec. These requirements serve as protection of third parties, whereas section 114 of Customs and Exercise Act provided no protection since it required only the presence of third parties' property on the premises in the possession or under the control of the customs debtor. My view is that if correctly applied and successfully proven, the requirements for the extension of the lessor's tacit hypothec establishes the necessary connection between the third party's property and the purpose of deprivation that would prevent the extension from being an arbitrary deprivation.

Accordingly, I conclude that the extension of the lessor's tacit hypothec to third parties' property does not amount to arbitrary deprivation of third parties' property as meant by section 25(1) of the Constitution.

4 3 5 Does the deprivation amount to expropriation for purposes of section 25(2) of the Constitution?

In the *FNB* decision the Constitutional Court accepted that deprivation is a wider category that includes expropriation.¹⁵³ Expropriation does not refer to all interference with the property but only to a specific subset of interference. The main difference between the effects of deprivation and expropriation is that the state is required to pay compensation for expropriation whereas deprivation occurs without payment of compensation.¹⁵⁴

According to the *FNB* methodology, if the deprivation authorised by law of general application complies with section 25(1) or is arbitrary but justifiable under section 36(1), the next question is whether the deprivation in question amounts to an expropriation, and therefore whether it complies with section 25(2) and (3) of the Constitution.¹⁵⁵ Section 25(2) of the Constitution prohibits expropriation of property except in terms of "law of general application" and specifies that property may only be expropriated for a public purpose or in the public interest and subject to payment of compensation that is just and equitable according to section 25(3).¹⁵⁶ At this stage it is clear that the extension of the lessor's tacit hypothec to third parties' property is authorised by common law (law of general application). Further, it has been argued that expropriation should be authorised by legislation and not the common law,¹⁵⁷ with the result that it is impossible that principles of common law can be a source of expropriation, although it qualifies as law of general application.¹⁵⁸ It is therefore

¹⁵³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57-58.

¹⁵⁴ AJ van der Walt *Constitutional property law* (3rd ed 2011) 344.

¹⁵⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

¹⁵⁶ See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

¹⁵⁷ AJ van der Walt *Constitutional property law* (3rd ed 2011) 346; A Gildenhuys *Onteieningsreg* (2nd ed 2001) 10.

¹⁵⁸ AJ van der Walt *Constitutional property law* (3rd ed 2011) 453.

unnecessary to consider whether a deprivation caused by the common law amounts to expropriation.

4 5 Conclusion

The purpose of this chapter was to examine whether the extension of the lessor's tacit hypothec to the property of third parties complies with section 25(1). The chapter established that the common law that provides for the extension of the lessor's tacit hypothec is law of general application as meant by section 25(1) of the Constitution.

I applied the *FNB* methodology in order to determine whether the extension of the lessor's tacit hypothec to a third party's property complies with section 25. The chapter argues that the principles of the common law that provide for the extension of the lessor's tacit hypothec authorise deprivation of third parties' property, since they authorise the creation of a real security right over and attachment of the third party's property to secure payment of the lessee's arrear rent. I also applied the *FNB* arbitrariness test in order to determine whether the extension of the lessor's tacit hypothec provides sufficient reasons for the attachment of the third party's property and came to the conclusion that it does, since the extension of the lessor's tacit hypothec requires that certain requirements must be met before third parties' property could be subject to the lessor's tacit hypothec and that these requirements serve as protection of third parties. It was concluded that the extension of the lessor's tacit hypothec to the property of a third party is consistent with section 25(1). Further, the extension of the lessor's tacit hypothec does not amount to expropriation as meant by section 25(2). Consequently, one can conclude that the extension of the lessor's tacit hypothec to third parties' property is consistent with section 25 of the Constitution, and therefore constitutionally valid.

Chapter 5: Conclusion

5 1 Introduction

The lessor's tacit hypothec developed in Roman law and Roman-Dutch law, and was adopted in South African law. The lessor's tacit hypothec is a real security right that is created by operation of law. The hypothec accrues as soon as the lessee is in arrears with rent. It operates against the movable property of the lessee found on the leased premises when rent is due and not paid. If the lessee's property proves to be insufficient, a sub-lessee's property found on the leased may also be attached to satisfy the lessor's claim against the lessee. However, the sub-lessee's property is only subject to the hypothec to the extent that the sub-lessee's owes rent. In cases where the lessee and the sub-lessee's property proves insufficient to satisfy the lessor's claim, property belonging to a third party may also be subject to the lessor's tacit hypothec. The rationale for the extension of the lessor's tacit hypothec to third parties' property was set out in *Bloemfontein Municipality v Jacksons Ltd*.¹ However, recent discourse has shown that there are uncertainties surrounding the justification of this extension of the hypothec. It is the purpose of this thesis to examine whether and how the existing common law principles that provide for extension of the lessor's tacit hypothec to property belonging to third parties are affected by the Constitution and more specifically to determine whether the common law principles need to develop in a different direction under the influence of the Constitution.

The second chapter analyses the general principles that provide for the lessor's tacit hypothec. In light of the general principles regarding the lessor's tacit hypothec set out in Chapter two, Chapter three scrutinises the justifications for the extension of the lessor's tacit hypothec to property belonging to third parties. It further explores the statutory protection of third parties against the lessor's tacit hypothec. Chapter four examines the extension of the lessor's tacit hypothec in view of section 25 of the Constitution.

¹ 1929 AD 266 271.

5 2 General principles

Chapter two describes and analyses the principles that regulate the lessor's tacit hypothec. The chapter starts by examining the meaning of real security. The analysis of the historical background of real security is intended to enable an understanding of the need for and significance of the lessor's tacit hypothec. The chapter's main focus is on the operation of the lessor's tacit hypothec in South African law.

Similar to other real security rights, the lessor's tacit hypothec secures payment of the principal obligation (payment of rent).² In other words, where the lessee is unwilling or unable to pay arrear rent the lessor may apply to the court to have movable property belonging to the lessee attached and sold in execution. The lessor's tacit hypothec gives a lessor a right of first preference over the proceeds of sale in execution of the attached movable property (security object).³ However, upon the lessee's insolvency the lessor automatically acquires the right of first preference. Unlike other real security rights that are created by agreement between the parties, the lessor's tacit hypothec is created by operation of law. In contrast to the lessor's tacit hypothec in Roman and Roman-Dutch law, the South African lessor's hypothec only secures the lessor's claim for arrear rent. It only relates to movable property found on the leased premises when the rent is due and not paid. The lessor's tacit hypothec does not attach to incorporeal property or the proceeds of a sale of property by the lessee.⁴

In principle, the lessor's tacit hypothec applies to movable property belonging to the lessee found on the leased premises when rent is in arrear and not paid. However, if the lessee's movable property proves insufficient to satisfy the lessor's arrear rent, movable property of a sub-lessee may also be subject to the lessor's tacit hypothec to the extent that the sub-lessee owes rent. The most striking feature of the lessor's tacit hypothec is that it may also extend to a third party's property. However, this may only occur where the lessee's and/or the sub-lessee's property

² H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 298; CG van der Merwe "Real security" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 630-665 631.

³ GF Lubbe "Mortgage and pledge" rev TJ Scott in LTC Harms & FA Faris (eds) *LAWSA Vol 17 Part 2* (2nd ed 2008) para 437.

⁴ See chapter 2 section 2 4 1.

proves insufficient to satisfy the lessor's claim for arrear rent and also subject to the conditions set out in *Bloemfontein Municipality v Jacksons Ltd.*⁵

The lessor's tacit hypothec accrues as soon as the rent is in arrears.⁶ Since accrual of the hypothec does not afford the lessor with a real security right, in order to obtain a real security right the lessor has to apply to the court for an attachment order or an interim interdict.⁷ Although the analysis of case law and academic literature shows that there are some doubts as to whether attachment of the movable property is essential to create a real security right, relying on legislation, case law and authoritative academic views I argue that attachment is necessary, since it provides unambiguous compliance with the publicity principle and also ensures legal certainty. However, it is accepted that upon the lessee's insolvency attachment is not necessary because on the lessee's insolvency the lessor automatically obtains preference over the proceeds of the sale in execution of the security object. It is accepted that the preference that the lessor acquires on the lessee's insolvency is less than what he acquires when the lessee is unwilling to pay the arrear rent. The amount claimable on the lessee's insolvency is provided for in section 85(2) of the Insolvency Act 24 of 1936. The effect of section 85(2) of the Act is that the lessor becomes a concurrent creditor for the balance of free residue in the lessee's insolvent estate.⁸

Although the question as to whether the lessor's tacit hypothec or the instalment agreement hypothec should prevail upon the lessee's insolvency has not yet been decided by South African courts, relying on section 2(1)(b) of the Security by Means of Movable Property Act 57 of 1993, I conclude that the instalment agreement hypothec trumps the lessor's tacit hypothec. However, the academic literature seems to favour the view that the lessor's tacit hypothec prevails over the instalment agreement hypothec.⁹

⁵ See chapter 2 section 2 4 2.

⁶ See chapter 2 section 2 5 1.

⁷ See chapter 2 section 2 5 1 for a discussion of attachment.

⁸ See chapter 2 section 2 5 2.

⁹ See chapter 2 section 2 5 2.

5 3 Extension of the tacit hypothec to third parties' property

In light of the general principles regulating the lessor's tacit hypothec discussed in the second chapter, the common law principle that provides for extension of the lessor's tacit hypothec to property belonging to third parties is discussed in Chapter three. More specifically, the chapter focuses on setting out the justifications for the extension of the lessor's tacit hypothec as well as the statutory protective measures developed under the common law and recently enacted statutory protection.

The study of case law and literature shows that the extension of the lessor's tacit hypothec to third parties' property is justified on the basis of either of two theories, namely implied consent and the doctrine of estoppel.¹⁰ According to the implied consent theory the extension of the lessor's tacit hypothec to third parties' property is founded on the premise that by allowing his property to be on the leased premises, the third party is taken to have impliedly consented that it may be utilised as security for the payment of the lessee's arrear rent.¹¹ Case law analysis demonstrates that even though the requirements that the lessor must prove in order to succeed with the tacit hypothec against third parties' property developed in seventeenth-century Roman-Dutch law, a pivotal development took place in *Bloemfontein Municipality v Jacksons Ltd*.¹² At this point it suffices to state that prior to the Appellate Division's decision in *Bloemfontein Municipality v Jacksons Ltd* a third party's property could only be subject to the lessor's tacit hypothec if it was brought on to the leased premises with the knowledge and consent of its owner, for the lessee's use and to remain on the leased premises permanently. The analysis of *Bloemfontein Municipality v Jacksons Ltd* has shown that the court extended the knowledge and consent requirement. As a result, third parties' property may be subject to the lessor's tacit hypothec even if the third party has no knowledge that his property is on the leased premises. This development had the effect of strengthening the lessor's rights on the one hand and weakening the protection of third parties on the other. It is also apparent from the analysis of the implied consent theory that the third party's knowledge and consent play a significant role in the application of the extension principle.¹³ The case law also shows that a further development regarding

¹⁰ See in general chapter 3 section 3 3 1.

¹¹ See chapter 3 section 3 3 2.

¹² 1929 AD 266.

¹³ See chapter 3 section 3 3 2 2.

the lessor's knowledge of the ownership of the property occurred in *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*.¹⁴ The analysis of *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd* and academic comments on it shows that as a result of this judgment the lessor's knowledge requirement has been reduced from being a decisive requirement to a mere factor, and consequently the lessor's rights had been weakened.¹⁵ This means that where the lessor is in a position to find out the true ownership of the movable property but fails to do so, he will be held to have known of the true ownership of the property (thus his knowledge may be inferred from his conduct) and consequently, his hypothec cannot apply against such a third party's property. The chapter argues that the correct application of the requirements for the extension of the lessor's tacit hypothec provides protection to third parties who might be affected by extension of the hypothec.

The second theory for the extension of the lessor's tacit hypothec relies on the doctrine of estoppel. Unlike the implied consent theory that developed in Roman-Dutch law, the doctrine of estoppel is of English law origin. The application of the doctrine of estoppel to the extension of the lessor's tacit hypothec implies that the third party's *rei vindicatio* against the lessor may be limited if certain requirements are met. The case law and academic literature show that even though South African courts have in several cases referred to the doctrine of estoppel as justification for the extension principle, none of the cases has been decided on it; instead, the cases were in fact decided on the basis of implied consent even when they refer to estoppel.

Although the case law and academic literature demonstrate that these theories (implied consent and doctrine of estoppel) are relied on to justify the extension of the lessor's tacit hypothec to third parties' property, criticism against these theories is not lacking.¹⁶ Nevertheless I argue that the correct application of the requirements of the extension of the lessor's tacit hypothec may play a significant role in protecting third parties' property. Furthermore, I argue that what the courts label as the third party's implied consent is not actual implied consent as meant in contract law, since there is no contract between the third party and the lessor. My view is that consent in cases of the extension of the lessor's tacit hypothec means that the law may ascribe

¹⁴ 1997 (2) SA 815 (D).

¹⁵ See chapter 3 section 3 3 2 3.

¹⁶ See chapter 3 section 3 3 3.

(impute) consent to the third party, provided that certain requirements are met. Therefore, my view is that the argument that a third party had impliedly consented to the lessor's tacit hypothec is irrelevant, since the lessor's tacit hypothec is a real security right created by operation of law and not a right deriving from contract.

It was shown that the majority of case law favours the implied consent theory as a justification for the extension of the lessor's tacit hypothec to third parties' property and also that in some cases the courts seemed to have accepted the doctrine of estoppel as a justification, even though without explicitly applying it. Consequently, it is argued that the court in *Bloemfontein Municipality v Jacksons Ltd* failed to develop the doctrine of estoppel, which at that point in time had already received judicial recognition as a basis for the extension of the lessor's tacit hypothec to a third party's property. In fact, I argue that the confusion surrounding the justifications of the extension of the lessor's tacit hypothec to third parties' property is a result of the consolidation of the doctrine of estoppel and the consent doctrine into a single enquiry by the courts. Hence, I argue that a return to a dualistic approach will serve a useful purpose. Furthermore, both implied (imputed) consent and estoppel are justifications for the extension of the lessor's tacit hypothec and as such they should only be applicable in cases where a third party's knowledge regarding his property being on the leased premises is established. Consequently, the extension of the lessor's tacit hypothec should not apply in cases where the third parties had no knowledge of their property being on the leased premises or cases where the third parties have done everything to protect themselves against the extension of the lessor's tacit hypothec.

In summary, I argue that the correct application of the requirements for the extension of the lessor's tacit hypothec will play a significant role in protecting third parties' property. Furthermore, since the Security by Means of Movable Property Act excludes a large number of potential cases in that it protects third parties who are instalment agreement creditors and notarial bond holders against the extension of the lessor's tacit hypothec, it appears that there will probably be few, if any, cases in which the extension of the lessor's tacit hypothec will find application in practice based on the implied consent theory. Also, if the estoppel approach (inclusive of the fault requirement) is correctly applied, there may only be few cases in which estoppel

will serve as the basis for attachment, especially since the lessor must first prove the third party's negligence.

5 4 The property clause

Chapter 4 considers the question whether the extension of the lessor's tacit hypothec to property of third parties complies with section 25(1) of the Constitution. A further question, namely whether the extension of the lessor's tacit hypothec to third parties' property constitutes an expropriation of property is also considered. The structure of the analysis set out in the *FNB* case is applied to the extension of the lessor's tacit hypothec to third parties' property to determine whether it complies with section 25(1) and section 25(2) of the Constitution.

In the first instance, it has to be determined whether the common law principle that provides for the extension of the lessor's tacit hypothec to goods belonging to third parties affects property as understood by section 25. It is argued that third parties' property is property as meant by section 25.¹⁷ Since the question whether third parties' movable property is property in terms of section 25 of the Constitution is answered in the affirmative, the next question is whether the creation of a real security right over and the attachment and sale in execution of third parties' property constitute a deprivation of the third parties' property. It is argued that the creation of a real security right by the extension of the lessor's tacit hypothec and attachment of the third party's movable property is a deprivation of property in terms of section 25(1) since it limits a third party's entitlement to dispose of his property as he wishes.¹⁸

In the third instance, it has to be determined whether the deprivation is consistent with the provisions of section 25(1) of the Constitution. Section 25(1) provides that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. It is argued that the common law principles that provide for extension of the lessor's tacit hypothec to third parties' property constitute law of general application that must comply with section 25(1). It is further argued that the common law principles that provide for extension of the lessor's tacit hypothec to property belonging to third

¹⁷ See chapter 4 section 4 3 1.

¹⁸ See chapter 4 section 4 3 2.

parties authorise deprivation of the third party's property.¹⁹ A deprivation is arbitrary if there is insufficient reason for it or if it is procedurally unfair. The purpose of the extension of the lessor's tacit hypothec to property belonging to third parties is to ensure payment of the arrear rent owed by the lessee to the lessor. It is argued that the enforcement of private debts such as this is a legitimate purpose.

In line with the *FNB* decision I argue that section 114 of the Customs and Exercise Act and the extension of the lessor's tacit hypothec have similar effects (creating real security rights over the property of third parties). However, they differ in that the lessor's tacit hypothec only extends to third parties' property if the property of the lessee and/or the sub-lessee proves to be insufficient to satisfy the lessor's claim for rent and unlike section 114 of Customs and Exercise Act, the extension of the lessor's tacit hypothec requires that certain requirements must be met before third parties' property could be subject to the lessor's tacit hypothec. My view is that these requirements serve as protection for third parties, whereas section 114 of Customs and Exercise Act provided no protection since it required only the presence of third parties' property on the premises in the possession or under the control of the customs debtor. My view is that if correctly applied and successfully proven, the requirements for the extension of the lessor's tacit hypothec establish the necessary connection between the third party's property and the purpose of deprivation that would prevent the extension from being an arbitrary deprivation. Accordingly, I argue that the extension of the lessor's tacit hypothec to third parties' property does not amount to arbitrary deprivation of third parties' property as meant by section 25(1) of the Constitution.

Since I argue that that the common law principle that provides for the extension of the lessor's tacit hypothec to property belonging to third parties does not constitute an arbitrary deprivation of property, the next step of the *FNB* analysis is to determine whether the deprivation constitutes an expropriation for purposes of section 25(2). I argue that since expropriation cannot be authorised by common law, the common law principles that provide for the extension of the lessor's tacit hypothec do not constitute expropriation. Accordingly, the chapter concludes that the extension of the

¹⁹ See chapter 4 section 4 3 3 1.

lessor's tacit hypothec to the property of a third party is consistent with section 25(1) of the Constitution, and therefore constitutionally valid.²⁰

5 5 Concluding remarks

This thesis starts by considering the general principles regulating the lessor's tacit hypothec, with the aim to enable understanding of how the lessor's tacit hypothec developed and how it operates in practice. The thesis' main focus is on the extension of the lessor's tacit hypothec to property belonging to third parties. It is shown in Chapter three that the traditional justifications for the extension of the lessor's tacit hypothec are controversial, but that the correct application of the common law principles as well as the statutory protection that has been introduced to exclude a large number of cases from the reach of the extension nevertheless adequately protect third parties against the extension of the lessor's tacit hypothec. In Chapter four, the extension of the lessor's tacit hypothec to property belonging to third parties is scrutinised in view of section 25 of the Constitution. It is concluded that the extension of the lessor's tacit hypothec to the property of a third party does not constitute an arbitrary deprivation as meant by section 25, and it is therefore constitutionally valid.

²⁰ See chapter 4 section 4 5.

List of abbreviations

<i>ASSAL</i>	Annual Survey of South African Law
<i>CCR</i>	Constitutional Court Review
<i>Edin LR</i>	The Edinburgh Law Review
<i>EJCL</i>	Electronic Journal of Comparative law
<i>JAL</i>	Journal of African Law
<i>Int Insolv Rev</i>	International Insolvency Review
<i>JBL</i>	Juta's Business Law The Quarterly Law: Review for People in business
<i>LAWSA</i>	The Law of South Africa
<i>PULP</i>	Pretoria University Law Press
<i>SA Merc LJ</i>	South African Mercantile Law Journal
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALJ</i>	South African Law Journal
<i>SAPL</i>	South African Public Law
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg

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