

EXTENDING THE LESSOR'S TACIT HYPOTHEC TO THIRD PARTIES' PROPERTY[★]

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In case law the lessor's tacit hypothec has been extended to cover movable property belonging to a third party. This extension of the hypothec is reasonably well established, but there is some uncertainty about the reasons or justifications for it. Two seemingly contradictory explanations for the extension have been raised in the literature, namely implied consent and estoppel. Upon closer scrutiny the former reason appears in fact to refer to (judicially) imputed rather than implied consent. Provided that the consent is judicially attributed to the third-party owner of the movables on the ground that she should have been aware of the whereabouts of her property and should have taken the necessary and reasonable steps to protect it against the landlord's hypothec (for example by informing the landlord of her right in the property), this seems to be an acceptable explanation for the extension of the hypothec. The same can be said for estoppel in cases where the requirements for estoppel are actually proved, particularly if fault (negligence) is required and if it is proven that the owner of the movables could have disabused the landlord of the false impression that the movables belonged to the tenant, but failed to do so. From a policy perspective, it can therefore be said that the extension of the hypothec to movables that belong to a third party is justified, provided that the reasons for the extension (either imputed consent or estoppel) are understood correctly, and the accompanying requirements are applied correctly and strictly. From a constitutional property perspective, the deprivation of property that extension of the hypothec brings about when a third party's property is affected by the landlord's right to attach and sell the movables would be constitutionally unassailable (not arbitrary in terms of s 25(1) of the Constitution) if there is sufficient reason for the deprivation. Provided the requirements are applied correctly and strictly, in line with the policy explanations (imputed consent or estoppel) that explain the extension satisfactorily, the deprivation of a third party's property that results from extension of the hypothec should generally speaking not be arbitrary, and thus should be constitutionally uncontroversial. This conclusion contradicts views to the contrary that have been expressed in the academic literature.

I INTRODUCTION

The lessor's tacit hypothec (also known as the landlord's tacit hypothec) is a real security right that improves the chances of the lessor to recover rent in

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arrears. In principle, the lessor's tacit hypothec attaches to the lessee's movable property found on the leased premises when rent is due but not paid. A sub-lessee's property may also be subject to the lessor's tacit hypothec to the extent that the sub-lessee owes rent.

Significantly, the lessor's tacit hypothec may extend to property belonging to third parties (other than the lessee or sub-lessee) found on the leased premises. Extending the lessor's tacit hypothec to third parties' property is usually justified with reference to one of two grounds, namely implied consent or estoppel. To the extent that a proper application of these justifications also limits the extension of the hypothec to third parties' property, third parties are protected against the unjustified extension of the lessor's tacit hypothec. In this article we analyse the justifications for the extension of the hypothec to third parties' property so as to gauge their implications for the scope of extending the hypothec.

The common-law position regarding the extension of the lessor's tacit hypothec to third parties' property has been amended by the Security of Movable Property Act 57 of 1993¹ ('SMMPA') to provide more protection to third parties. However, despite the degree of statutory protection that the Act provides, scholars and judges have cast doubt on the justification for extending the lessor's tacit hypothec to third parties' property that is not covered by the SMMPA. The critics' principal argument is that there is no contract between the lessor and a third party that could underlie the extension of the hypothec in these cases on the basis of implied consent. Some critics also reject the doctrine of estoppel as a justification for the extension of the lessor's hypothec to third parties' property. Accordingly, some critics argue that the lessor's tacit hypothec should never be extended to property that belongs to third parties. Recent debate has also suggested that if constitutionally challenged, the extension of the lessor's tacit hypothec to third parties' property might be found to be inconsistent with s 25 of the Constitution,² which prohibits arbitrary deprivation of property.

In this article we describe the common-law principles that provide for the extension of the lessor's tacit hypothec to third parties' property. More specifically, we consider the justifications for extending the lessor's tacit hypothec to property that belongs to third parties, as well as the protective measures developed under the common law and by Parliament for third parties who might be affected. Our view is that the conundrum that courts and scholars face regarding the justification for extending the lessor's tacit hypothec to third parties' property is a result of flawed reasoning. The case law concerning the justification of the extension often fails to recognise that the lessor's tacit hypothec is a limited real right that arises by operation of law: ie without the co-operation of the parties. Furthermore, uncertainties surrounding the extension of the hypothec to third parties' property have been exacerbated in case law by a consolidation (or confusion) of the

¹ See s 2.

² The Constitution of the Republic of South Africa, 1996.

implied-consent and estoppel approaches into a single justification. Based on our analysis of the two approaches, we argue in this article that the common-law principles that provide for the extension of the lessor's tacit hypothec — correctly applied — adequately protect third parties whose movables are not covered by the SMMPA. Furthermore, we argue in this article 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 s 25, and it is therefore constitutionally valid.

Part II of the article explains the extension principle and its origins. Parts III and IV describe and analyse the justifications for extending the lessor's tacit hypothec to third parties' property. Part V sets out and analyses statutory protection for certain third parties against the lessor's tacit hypothec. Part VI examines the extension of the lessor's tacit hypothec to third parties' property in view of s 25 of the Constitution.

II THE EXTENSION PRINCIPLE AND ITS ORIGINS

The lessor's tacit hypothec is a real security right that developed in Roman law³ and Roman-Dutch law⁴ and was adopted in South African law.⁵ This

³ D 20.2.7 (English translation of the Digest referred to here is from T Mommsen, P Kruger & A Watson *The Digest of Justinian* Vol II (1985)). See also Rena van den Bergh 'The development of the landlord's hypothec' (2009) 15 *Fundamina* 155 at 158; Andrew Borkowski & Paul du Plessis *Textbook on Roman Law* (2005) 304; Paul van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) 116; W W Buckland *A Textbook of Roman Law from Augustus to Justinian* (1975) 475; R W Lee *The Elements of Roman Law with a Translation of the Institutes of Justinian* 4 ed (1956) 172; H F Jolowicz *Historical Introduction to the Study of Roman Law* (1954) 319; F Schulz *Classical Roman Law* (1951) 407–8.

⁴ Van Leeuwen *RHR* 4 13 12. See also Voet 20.2.5; T J Roos & H Reitz *Principles of Roman-Dutch Law* (1909) 89; R W Lee *Introduction to Roman-Dutch Law* 5 ed (1953) 188; Manfred Nathan *Common Law of South Africa* Vol II (1904) 936; A F S Maasdorp *The Introduction to Dutch Jurisprudence of Hugo Grotius* 3 ed (1903) 188; T Berwick *A Contribution to an English Translation of Voet's Commentary on the Pandects* (1902) 308; D P de Bruyn *The Opinions of Grotius as Contained in the Hollandsche Consultation en Advijzen* (1894) 186.

⁵ See *Friedlander v Croxford & Rhodes* (1867) 5 Searle 395; *Baker v Hirst & Co* (1880) 2 NLR 55 at 57; *Longlands v Francken* 1881 Kotzé 256; *Isaacs v Hart & Henochsberg* (1887) 8 NLR 18; *Webster v Ellison* 1911 AD 73; *Bloemfontein Municipality v Jacksons Ltd* 1929 AD 266; *Columbia Furnishing Co v Goldblatt* 1929 AD 27. For a discussion of the lessor's tacit hypothec see Hanri Mostert & Anne Pope (eds) *The Principles of the Law of Property in South Africa* (2010) 325; Graham Bradfield & Karin Lehmann *Principles of the Law of Sale and Lease* 3 ed (2013) 158; C G van der Merwe 'Real security' in François du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 656; P Havenga, M Havenga, R Kelbrick, M McGregor, H Schulze, K van der Linde *General Principles of Commercial Law* 6 ed (2007) 178; J T R Gibson, C Visser, J T Pretorius, R Sharrock & M van Jaarsveld (eds) *South African Mercantile and Company Law* 8 ed (2003) 182; W E Cooper *Landlord and Tenant* 2 ed (1994) 180; T J Scott & S Scott *Wille's Law of Mortgage and Pledge in South Africa* 3 ed (1987) 99; M A Diemont, R M Marais & P J Aronstam *The Law of Hire-Purchase in South Africa* 4 ed (1978) 208; A F S Maasdorp *Maasdorp's Institutes of South African Law* Vol II 8 ed (1960) 193; Lee op

real security right accrues by operation of law, without the co-operation of the parties, when rent is due but not paid.⁶ The hypothec terminates upon payment of the due amount.⁷ The lessor's tacit hypothec applies both where the lessee is able but unwilling to pay the due amount of rent for some reason, and where the lessee is insolvent. In cases where the lessee is unwilling to pay arrear rent, the lessor's tacit hypothec entitles the lessor to have the lessee's property attached and sold in execution.⁸ Attachment therefore grants the lessor a right of first preference over the proceeds of the sale in execution of the lessee's movable property.⁹ However, upon the lessee's insolvency, where the lessee is unable to pay the arrear rent, the lessor automatically acquires a right of first preference against unsecured creditors.¹⁰

In principle, the lessor's tacit hypothec applies to the lessee's movable property (*invecta et illata*, fruits, and crops of the leased property)¹¹ found on the leased premises and property attached while in transit to a new destination subsequent to removal from the premises.¹² If the lessee's property proves insufficient to secure the lessor's claim, a sub-lessee's property found on the leased premise may also be subject to the lessor's tacit hypothec, but only to the extent that the sub-lessee owes rent.¹³

cit note 4 at 189; George Wille *Landlord and Tenant in South Africa* 4 ed (1948) 189; Roos & Reitz op cit note 4 at 94; Nathan op cit note 4 at 936; A F S Maasdorp *The Institutes of Cape Law Book II* (1903) 255.

⁶ 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) at 514E–G. See also Bradfield & Lehmann op cit note 5 at 158; P J Badenhorst, J M Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 405. Scott & Scott op cit note 5 at 99 state that the lessee cannot be prevented from dealing with and disposing of his movables so long as the lessee is not in arrears with the rent.

⁷ *Koenigsberg, Hopkins & Co v Robinson Gold Mining Co Ltd* 1905 TH 90 at 95–6. See also *Noble v Heatley* supra note 6; *Hamp-Adams v Loubser* 1911 CPD 564 at 568.

⁸ Section 32(1) of the Magistrates' Courts Act 32 of 1944. See further A C Cilliers, C Loots & H C Nel *Herbstein and Van Winsen: The Civil Procedure of the High Courts and the Supreme Court of Appeal of South Africa* Vol 2 5 ed (2009) 1456–7.

⁹ Before attachment the lessor does not have a real security right, but a personal right to acquire a real right. Attachment therefore converts the lessor's personal right into a real security right: *Webster v Ellison* supra note 5 at 94. See also G F Lubbe 'Mortgage and pledge' (revised by T J Scott) in L T C Harms & J A Faris (eds) *LAWSA* Vol 17(2) 2 ed (2008) para 437; Van der Merwe in *Wille's Principles* op cit note 5 at 631; Badenhorst et al op cit note 6 at 357.

¹⁰ Section 85(2) of the Insolvency Act 24 of 1936. See also *Holderness NO & others v Maxwell & others* [2012] ZAKZPHC 49 at 20; Scott & Scott op cit note 5 at 100.

¹¹ *Invecta et illata* are movable goods brought on to the leased premises by the lessee.

¹² *WG Baker v Ellison & Co* (1880) 2 NLR 55; *Leech v Gardner*, reported in (1898) 15 *Cape LJ* 206; *Bourne & Co v Lindsay* 1912 TPD 144; *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230. See further Lubbe op cit note 9 para 439; Wille op cit note 5 at 192.

¹³ *Friedlander v Croxford & Rhodes* supra note 5 at 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 at 383. In *Yost Typewriter Co*

The most striking and controversial feature of the lessor's tacit hypothec is that it may extend to property that belongs to third parties (other than the lessee or a sub-lessee) found on the leased premises. However, this could only occur if the lessee's and sub-lessee's property found on the leased premises proves insufficient to secure the lessor's claim for arrear rent. The extension principle was developed in seventeenth century Roman-Dutch law, and in *Hollandsche Consultatien* Grotius explained it 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.'¹⁴

Voet reviews the principal 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 fraud when with the full knowledge of the facts, he dissembled and did not inform the lessor [of his ownership].'¹⁵

The extension principle has been accepted in South African law¹⁶ and its justifications were set out in *Bloemfontein Municipality v Jacksons Ltd*¹⁷ 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 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.'¹⁸

v Andrew 1915 NPD 21 the court held that the lessee is also entitled to a hypothec over goods of the sub-lessee.

¹⁴ De Bruyn op cit note 4 at 186. See also Van Leeuwen 1.4.9.3, who supports this view.

¹⁵ Voet 20.2.5. See also Nathan op cit note 4 at 936.

¹⁶ *Longlands v Francken* supra note 5. See also *Lazarus v Dose* (1884) 3 SC 42 at 44; *Mackay Brothers v Cohen* (1894) 1 OR 342 at 344; *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 at 320; *Collins v Whittock* (1899) 9 HCG 182; *Noble v Heatley* supra note 6; *Turpin v Wagstaff & Sons* 1906 TS 597; *Russell v Savory* (1906) 20 EDC 100 103; *Border and Allen v Gowlett* 1911 OPD 29.

¹⁷ Supra note 5.

¹⁸ *Bloemfontein Municipality* supra note 5 at 271. See also *Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd* 1933 CPD 550.

Accordingly, the South African common-law 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, to remain on the leased premises indefinitely for use by the lessee. Stated differently, property belonging to third parties is subject to the lessor's tacit hypothec if the third party knows that his property is on the leased premises but fails to inform the lessor of his ownership of the property prior to attachment.

III JUSTIFICATION FOR THE EXTENSION

(a) Introduction

For many years, there has been uncertainty regarding the justification for the extension of the lessor's tacit hypothec to third parties' property to satisfy the lessor's claim for arrear rent. In *TR Services (Pty) Ltd v Poynton's Comer Ltd & others*,¹⁹ Warner AJ expressed the following view:

[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 . . . except upon the basis of implied consent by the owner to the goods becoming subject to the hypothec. 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?"²⁰

In *Eight Kaya Sands v Valley Irrigation Equipment*,²¹ Van der Walt J in an obiter dictum observed that there is no legal relationship between the lessor and a third party whose movables are on the leased premises. Therefore, there can be no justification to attach the third party's property as security for the debt of the lessee.²² Other scholars also argue that there is no legal basis for extending the lessor's tacit hypothec to third parties' property, and that the hypothec should therefore not extend to third parties' property.²³

Judging from the case law, the extension of the lessor's tacit hypothec to third parties' property is supposedly based either on implied consent or on the doctrine of estoppel. In what follows we analyse these justifications in case law and academic literature, with the objective to identify the requirements for each justification and to determine when and how each of the justifications applies, or rather how they should apply.

¹⁹ 1961 (1) SA 773 (N).

²⁰ *TR Services (Pty) Ltd v Poynton's Comer Ltd* supra note 19 at 775D–H. A J M Steven 'Landlord's hypothec in comparative perspective' (2008) 12 *EJCL* 1 at 14 concurs with this view.

²¹ Supra note 6.

²² *Ibid* 500G–H.

²³ In this regard see D Smith 'The constitutionality of the lessor's hypothec: Attachment of a third party's goods' (2011) 27 *SAJHR* 308 at 330; Steven op cit note 20 at 15; J S McLennan 'A lessor's hypothec over the goods of third parties – anomaly and anachronism' (2004) 16 *SA Merc LJ* 121 at 123.

(b) Implied consent

According to the first approach, the extension principle is supposedly based on the third party's implied consent that his property can be utilised as security for payment of arrear rent by the lessee.²⁴ The circumstances under which the third party's consent to the lessor's tacit hypothec may be implied have never been clearly analysed by South African courts, but the courts nevertheless often rely on this justification for extending the lessor's hypothec.²⁵

Disputes regarding third parties' property usually occur when a third-party owner seeks to recover his movable property from the leased premises and the lessor relies on his hypothec to attach the movables for sale in execution. In such circumstances the onus is on the lessor to prove that the hypothec exists and also that it attaches to third parties' property found on the leased premises.²⁶ The lessor can discharge this onus by proving the four requirements that were set out in the *Bloemfontein Municipality* judgment, namely:

- (i) The movable property is on the premises with the knowledge and consent of its owner;
- (ii) the lessor must have been unaware of the fact that the property belongs to someone other than the lessee before attachment;
- (iii) the movable property must be present on the lease premises with some degree of permanence and not merely temporarily; and
- (iv) the property must be there for use by the lessee.²⁷

These requirements are discussed below with reference to their application in case law prior to 1929; in *Bloemfontein Municipality*; and in post-1929 case law. Although these requirements were already developed in Roman-Dutch law, the decision in *Bloemfontein Municipality* was a pivotal moment in the development of the extension principle in South African law because, as we explain below, the court extended the third party's knowledge and consent requirement further than it had been applied before.

(i) Third parties' knowledge and consent

Prior to the decision in *Bloemfontein Municipality*, South African courts accepted that the lessor's tacit hypothec could only extend to third parties'

²⁴ *Bloemfontein Municipality* supra note 5 at 271.

²⁵ *Baker v Hirst & Co* supra note 5 at 55; *Longlands v Francken* supra note 5; *Noble v Heatley* supra note 6; *Turpin v Wagstaff & Sons* supra note 16; *Carstens v Basson* 1912 CPD 170; *Goldinger's Trustee v Whitelaw & Sons* supra note 12. In *Barclays Western Bank Ltd v Dekker & another* 1984 (3) SA 220 (D) at 222C–D, Kumleben 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.

²⁶ *Ncora v Untiedt* 1916 EDL 32; *TR Services (Pty) Ltd v Poynton's Corner Ltd* supra note 19 at 775C–D; *Barclays Western Bank Ltd v Dekker* supra note 25 at 222C–D. See also Nathan op cit note 4 at 938; Wille supra note 5 at 196; Graham Glover Kerr's *The Law of Sale and Lease* 4 ed (2014) 456.

²⁷ *Bloemfontein Municipality* supra note 5 at 271.

property if the third party had actual knowledge that his property was on the leased premises. For instance, in *Heugh's Trustee v Heydenrych*²⁸ the respondent 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 respondent 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.²⁹

In 1929 a major development took place with the then Appellate Division's decision in *Bloemfontein Municipality*.³⁰ The respondents sold furniture in terms of a hire-purchase agreement to Smit, who was then living on the leased premises situated in Shannon Valley. The respondents gave notice of their ownership of the furniture to the landlord of the premises in which the property was used. Without giving notice to the respondents, Smit moved from Shannon Valley to 205 Monument Road. Upon Smit's failure to pay the hire-purchase instalments, the respondents issued summons against Smit, but the sheriff was unable to serve him with the summons at Shannon Valley. However, with the assistance of the respondents' attorneys, Smit was served with the summons at 205 Monument Road. Consequently, the respondents re-possessed the furniture. Subsequent to payment of the due instalments, the furniture was returned to Smit at 205 Monument Road.

Bloemfontein Municipality then attached the property found on the leased premises, including the respondents' furniture, under a judgment for arrear rent. The question was whether the respondents' property was subject to the lessor's tacit hypothec.³¹ The court rejected the respondents' argument that knowledge of its attorneys could not be imputed to it because the

²⁸ Supra note 16.

²⁹ Ibid at 320. Another example is *Bradlow & Co v Lucas* 1917 TPD 314, where 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 notice 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. 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. See also *Lazanus v Dose* supra note 16 at 44; *Mackay Brothers v Cohen* supra note 16 at 344; *Collins v Whittock* supra note 16; *Noble v Heatley* supra note 6; *Turpin v Wagstaff & Sons* supra note 16; *Russell v Savory* supra note 16 at 103; *Ncora v Untiedt* supra note 26; *Goldinger's Trustee v Whitelaw & Sons* supra note 12; *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187 at 189; *Colonial Cabinet Manufacturing Co v Wahl* 1924 CPD 282 at 284; *Bradlow v Ward* 1929 TPD 313; *Sercombe v Colonial Motors (Natal) Ltd* 1929 NPD 58 at 65; *Rand Furnishing Co v Hydenrych* 1929 TPD 583.

³⁰ Supra note 5 at 266.

³¹ Ibid at 271.

attorneys were only its agents for the purpose of issuing summons for recovery of the due instalments. The court stated that ordinary prudence demands that an owner of property sold in terms of a hire-purchase agreement should protect itself in some way.³² Furthermore, the hire-purchase agreement did not prohibit Smit from removing the furniture without first obtaining the consent of the respondents, nor did it contain a clause binding Smit to give notice to the respondents in case he moved to new premises. The court held that the respondents were in a position to find out where Smit was living, but failed to do so and to take other reasonable measures to protect themselves.³³ As a result, the court inferred from the respondents' conduct that the respondents implicitly consented to the lessor's tacit hypothec.³⁴ In other words, even though the third party had no actual knowledge of its property being on the leased premises, the court ascribed knowledge (implied consent) to it on the basis that it could or should have known the whereabouts of its property.

In *Fresh Meat Supply Co v Standard Trading Co*,³⁵ the respondents sold electric appliances to Birke (the lessee) in terms of a hire-purchase agreement. The agreement obliged Birke to notify the respondents of his new lessor's name and address in the event that he moved to new premises.³⁶ However, the hire-purchase agreement was not completely filled-in, and did not indicate whether Birke was living on the leased premises. The respondents accepted an incomplete agreement and had no knowledge that Birke kept its furniture on the leased premises. Subsequent to Birke's failure to pay rent, the furniture was attached by the appellant in terms of a judgment for arrear rent. The question was whether the respondents' furniture was subject to the lessor's tacit hypothec. The court relied on *Bloemfontein Municipality* for the view that consent to the lessor's tacit hypothec may be extended on the basis of implied knowledge even when the owner does not in fact know that his property had been kept on the leased premises. The court held that the clause that imposed an obligation on Birke to notify the respondents of his move, and the new address, was not sufficient to protect the respondents against the lessor's tacit hypothec. The respondent had not taken reasonable steps to protect its property, and consequently it had implicitly consented that its property could be subject to the lessor's tacit hypothec.³⁷

Cooper criticises the decisions in *Bloemfontein Municipality* and *Fresh Meat Supply Co*. He argues that the respective courts were not entitled to infer that the respondents implicitly consented to the respective lessors' tacit hypothecs, unless the respondents' knowledge that their property had been used on

³² Ibid at 273.

³³ De Villiers ACJ, Wessels JA and Stratford JA wrote separate judgments but concurred with the judgment of Curlewis JA.

³⁴ *Bloemfontein Municipality* supra note 5 at 272–8.

³⁵ Supra note 18.

³⁶ *Fresh Meat Supply Co v Standard Trading Co* ibid.

³⁷ Ibid at 555–66.

the leased premises could have been established.³⁸ Nevertheless, Cooper contends that both decisions could be justified on the basis that the hire-purchase agreements did not prohibit the lessees from removing the goods to other premises without the consent of the respondents.³⁹ Cooper's view can be interpreted to mean that *Bloemfontein Municipality* and *Fresh Meat Supply Co* should have been decided on the basis of estoppel rather than implied consent. It is arguably a pity that the Appellate Division failed in *Bloemfontein Municipality* to apply the doctrine of estoppel, which at that point in time had already received judicial recognition as a basis for the extension of the hypothec.⁴⁰ The court's failure to apply the doctrine of estoppel in *Bloemfontein Municipality* strengthened the view instead that the extension of the hypothec is based on the third party's implied knowledge and consent. The result is that third parties' property may be subject to the lessor's tacit hypothec even if the third parties have *no actual knowledge* that their property is present at and being used on the leased premises. This development expands the area of applicability of the hypothec, and weakens the position of the owners of potentially affected movable property.

(ii) *The lessor's knowledge of ownership*

The lessor's tacit hypothec does not extend to the third party's property if the lessor is aware that the property belongs to someone other than the lessee.⁴¹ Knowledge of ownership may be inferred from the nature of the lessee's business or occupation,⁴² as well as from the fact that the property bears a notice that it is the property of a third party.⁴³

In *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*⁴⁴ the respondents 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, and attached property found in the debtor's possession, including the respondents' property. The trial court held that the third party's property found on the leased premises could not be subject to the lessor's tacit hypothec because the lessor knew before attachment that the

³⁸ Cooper op cit note 5 at 188–9. See also Scott & Scott op cit note 5 at 102–3.

³⁹ Cooper *ibid*.

⁴⁰ See *Lazarus v Dose* supra note 16; *Mackay Brothers v Cohen* supra note 16; *Heugh's Trustee v Heydenrych* supra note 16; *Ncora v Untiedt* supra note 26; *Colonial Cabinet Manufacturing Co v Wahl* supra note 29; *Rand Furnishing Co v Heydenrych* supra note 29. In *Turpin v Wagstaff & Sons* supra note 16 at 599, Innes CJ stated that there may be cases in which estoppel would operate.

⁴¹ *Heugh's Trustee v Heydenrych* supra note 16; *Collins v Whittock* supra note 16; *Bradlow & Co v Lucas* supra note 29; *Bradlow v Ward* supra note 29; *Rand Furnishing Co v Heydenrych* supra note 29 at 591; *Bloemfontein Municipality* supra note 5 at 273. See also Glover op cit note 26 at 459.

⁴² *Henderson v Waldron* (1885) 6 NLR 89; *Mackay Brothers v Cohen* supra note 16 at 344; *Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd* supra note 18 at 556; *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd* 1997 (2) SA 815 (D).

⁴³ *TR Services (Pty) Ltd v Poynton's Corner Ltd* supra note 19 at 776C–D.

⁴⁴ 1997 (2) SA 815 (D).

property belonged to a third party. On appeal it was argued that the lessor did not know that the property belonged to a third party. The court held that, because the lessor had received a copy of the hire-purchase agreement, it could not heedlessly ignore the facts that were before it.⁴⁵ Accordingly, the appeal was dismissed.

In *Eight Kaya Sands v Valley Irrigation Equipment*⁴⁶ the respondents leased movable property to the lessee, who used it on the leased premises owned by the appellant. Neither the lessee nor the respondent informed the lessor that the property belonged to the respondents. The appellant claimed that the respondents' property found on the leased premises was subject to the lessor's tacit hypothec for arrear rent. The court held that if the lessor acquires knowledge that the property belongs to a third party before attachment, his hypothec should not extend to the third party's property. The decisions in *Paradise Lost Properties* and *Eight Kaya Sands* were recently confirmed in *Holderness NO & others v Maxwell & others*,⁴⁷ where the court held that if the lessor becomes aware that the property belongs to a third party before attachment, his hypothec cannot extend to such movable property.⁴⁸

Sher argues that as a result of the judgment in *Paradise Lost Properties* the lessor's position has been weakened, since actual knowledge of the fact that the property used on the leased premises belongs to a third party is no longer a deciding requirement.⁴⁹ He 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 or should have established that the property did not belong to the lessee. Sher points out 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.⁵⁰ At the same time this development extends the protection of third parties whose property might be affected by extension of the hypothec.

It is indeed arguable that the courts are moving away from the lessor's actual-knowledge requirement regarding the true ownership of the property, to a test of imputed knowledge. This shift is apparent from *Paradise Lost Properties*, 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. The judgment in *Paradise Lost Properties* has strengthened third parties' protection against the extension of the lessor's tacit hypothec because, as a result of this judgment, the lessor can no longer be allowed to ignore the facts regarding the true ownership of the property and to proceed to attach third parties' property.

⁴⁵ Ibid at 823B.

⁴⁶ Supra note 6 at 499.

⁴⁷ Supra note 10 para 28.

⁴⁸ Ibid paras 34 and 35.

⁴⁹ H Sher 'The lessor's security for payment of the rent' (1997) 5 *JBL* 114 at 116.

⁵⁰ Ibid.

(iii) *Degree of permanence*

The third requirement for the extension of the hypothec to third parties' property is that the third party's property should have been brought on to the leased premises to remain there indefinitely.⁵¹ This requirement is not met if the property is leased to the lessee on a monthly basis and only a few months have passed.⁵² For instance, in *Mangold Bros Ltd v Hirschman Bros*⁵³ 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; in such cases the element of permanence is absent, since the employer can at any time take his vehicle back.⁵⁴ Conversely, in *The Standard and Diggers' News Company v Esterhuizen*⁵⁵ a piano sold in terms of a hire-purchase agreement to the lessee of a certain premises was held to be on the leased premises for permanent use by the lessee and was therefore subject to the lessor's tacit hypothec.⁵⁶ In *TR Services (Pty) Ltd*, Warner AJ expressed the view that it is difficult to know what is required under the time factor, but when the leased property is on the premises for a period of fifteen years, the requirement of permanence is certainly met.⁵⁷ Accordingly, the lessor's tacit hypothec cannot extend to third parties' property that is on the leased premises for temporary use by the lessee.

(iv) *For use by the lessee*

The final requirement that the lessor must prove for his hypothec to include third parties' property is that the movable property was on the leased premises for use by the lessee.⁵⁸ This fact can be inferred from the nature of the property or from the circumstances.⁵⁹ For instance, in *Crowley v Domony*⁶⁰ the lessee's wife brought some furniture into the house rented by her husband. She claimed that the furniture was not subject to the lessor's tacit hypothec. The court held that the property was there for use by the lessee and his wife, and was therefore subject to the lessor's tacit hypothec.⁶¹

⁵¹ *Bloemfontein Municipality* supra note 5 at 271.

⁵² *Lazarus v Dose* supra note 16.

⁵³ Supra note 29.

⁵⁴ See further *Goldinger's Trustee v Whitelaw & Sons* supra note 12 at 241. Contrast with *Ordemann v Peinke* 1911 EDL 201.

⁵⁵ 1893 H 22.

⁵⁶ *Ibid* at 24. See also *Bloemfontein Municipality* supra note 5 at 271. However, see *Spayile v Bower* 1911 CPD 65 at 68; *Leech v Gardner* supra note 12, 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.

⁵⁷ Supra note 19 at 776H.

⁵⁸ *Baker v Hirst & Co* supra note 5 at 55. See further *Longlands v Francken* supra note 5; *Lazarus v Dose* supra note 16; *Noble v Heatley* supra note 6; *Turpin v Wagstaff & Sons* supra note 16; *Goldinger's Trustee v Whitelaw & Sons* supra note 12; *Bloemfontein Municipality* supra note 5 at 271.

⁵⁹ Wille op cit note 5 at 198. See also Scott & Scott op cit note 5 at 104.

⁶⁰ 1869 Buch 205.

⁶¹ Scott & Scott op cit note 5 at 104 argue that this case was wrongly decided, because the requirement is that the property should be destined for the use by the

In *Reinhold & Co v Van Oudtshoorn*⁶² a 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 onto the premises for use by the lessee. Further, in *Van den Bergh, Melamed & Nathan v Polliack & Co*⁶³ the court 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.⁶⁴

Against the backdrop of the cases discussed so far, it appears that the consent required for the extension of the lessor's tacit hypothec to third parties' property has nothing to do with the lease agreement between the lessor and the lessee, but rather amounts to consent that the court may impute or ascribe to the third party if certain requirements are met. Since the third party is not involved in any contractual relationship with the lessor, the reference to *implied consent* is misleading in this context. What is described as implied consent is therefore in fact *imputed consent*.

It is therefore necessary to clarify the effect of the knowledge and consent requirement as it was developed in *Bloemfontein Municipality*. Should the courts impute knowledge and consent to a third party who is not in fact aware that his property is used on the leased premises, purely on the basis that the third party has not done enough to protect himself against the lessor's tacit hypothec?⁶⁵ Or should consent only be imputed to a third party who in fact knew that his property was used on the leased premises, but failed to inform the lessor of his ownership of the property? In our view, the latter interpretation is preferable, since it is unreasonable to expect a third party who does not actually know that his property is used on the leased premises to give notice to the lessor, merely to protect himself against the possibility that the lessee may fall in arrears with rent payments. However, the case law indicates that even in cases where a third party whose property might be affected by an extension of the landlord's tacit hypothec was in fact unaware that his property was present on the leased premises, the courts are willing to ascribe consent to that third party if the (rather vague and conflicting) requirements are met. The most significant requirement seems to be that the third party could or should have been aware of the presence of his movable property on the leased premises and failed to protect the property against the hypothec by giving notice of ownership to the lessor. To that extent, the development in case law and the confusion of implied consent and estoppel justifications for extending the hypothec tends to exacerbate the potentially negative effect of the hypothec on the movable property of third parties.

lessee and that the marriage relationship in this case did not imply that the property was there for use by the lessee.

⁶² Supra note 13.

⁶³ 1940 TPD 237.

⁶⁴ See further *Bloemfontein Municipality* supra note 5 at 278.

⁶⁵ *Heugh's Trustee v Heydenrych* supra note 16; *Collins v Whittock* supra note 16; *Bradlow & Co v Lucas* supra note 29 at 314; *Bradlow v Ward* supra note 29.

On the other hand, the lessor's tacit hypothec is not extended to third parties' property where the lessor became aware of the ownership of the movable property before perfection of the hypothec, and the courts seem to move towards a stricter objective test as far as this requirement is concerned. The analysis of the imputed-consent requirements above also shows that movable property that is subject to a contract of lease can probably not be subject to the lessor's tacit hypothec, at least in so far as it is brought on to the leased premises for temporary use only. The courts' approach protects third parties' property against the extension of the lessor's tacit hypothec to the extent that failure to prove any of these requirements means that the lessor's tacit hypothec does not extend to the third parties' property.

(c) *Estoppel*

The second justification for the extension of the lessor's tacit hypothec to third parties' property is the doctrine of estoppel.⁶⁶ The doctrine, which originated in English law,⁶⁷ entails that a party who has by means of a representation wilfully or negligently misled another to believe reasonably 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 he represented them, provided that to uphold the representation would not be contrary to public policy.⁶⁸

The requirements for estoppel are a misrepresentation; reliance by the estoppel asserter on the misrepresentation; prejudice; causation; and fault. There is some indication that fault is not required in all cases of estoppel.⁶⁹ However, the majority of authors support the view that fault (*dolus* or *culpa*) is required in cases where estoppel is used as a limitation of the *rei vindicatio*.⁷⁰ Since 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 could be limited, requiring fault strengthens the protection of the owner — i.e. third parties whose property might be affected by extension of the hypothec.

Although the doctrine of estoppel was formally adopted in South African law in *In re Reynolds Vehicle & Harness Factory Ltd*,⁷¹ its recognition as a limitation of the third party's *rei vindicatio* already received attention in cases

⁶⁶ *Eight Kaya Sands v Valley Irrigation Equipment* supra note 6 at 507A.

⁶⁷ *In re Reynolds Vehicle & Harness Factory Ltd* (1906) 23 SC 703.

⁶⁸ J C Sonnekus *The Law of Estoppel in South Africa* (2000) 31.

⁶⁹ *Sonday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 (2) SA 521 (C) at 534. See also Sonnekus op cit note 68 at 135–6; Ina Knobel 'The tacit hypothec of the lessor' (2004) 67 *THRHR* 687 at 694.

⁷⁰ *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 Gehria 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 (Pty) Ltd v Wm Spilhaus & Kie (WP) Bpk* 1996 (3) SA 273 (A). See also Sonnekus op cit note 68 at 136.

⁷¹ Supra note 67 at 712.

regarding the extension of the lessor's tacit hypothec as early as 1884.⁷² For instance, in *Lazarus v Dose*⁷³ it was stated that the third party would be *estopped* from denying that he intended them to become bound as security to the lessor if he failed to inform the lessor that the property belonged to him.⁷⁴ In the context of extending the lessor's hypothec this justification has been mentioned in subsequent case law, but it has never been properly formulated, nor has it been applied clearly and consistently.

In *Eight Kaya Sands*,⁷⁵ 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 there was a misrepresentation ('skyn') at the time of attachment that the property belonged to the lessee. In the same case, Preller AJ stated that the estoppel approach justifies the extension of the lessor's tacit hypothec to third parties' property on the basis of the appearance that the owner generates.⁷⁶ One can deduce that the court preferred the doctrine of estoppel as the justification for the extension of the lessor's tacit hypothec to third parties' property, but it did not apply the estoppel requirements clearly and consistently.

The majority of academic authors support the view that estoppel is the better justification for extending the hypothec. Lubbe argues that the court in *Eight Kaya Sands* favoured the estoppel approach by the emphasis it placed on the element of a culpable misrepresentation by the third party.⁷⁷ According to Cooper, estoppel justifies the subjection of a third party's property to the lessor's tacit hypothec.⁷⁸ 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.⁷⁹ She also contends that estoppel provides a more equitable ground for subjecting a third party's property to the lessor's tacit hypothec, and that it has a greater foundation in reality than implied consent. Knobel argues that legal certainty and equitable results will be

⁷² *Lazarus v Dose* supra note 16.

⁷³ *Ibid.*

⁷⁴ The possibility for application of estoppel in the extension of lessor's tacit hypothec cases is also apparent in early cases: *Lazarus v Dose* supra note 16; *Mackay Brothers v Cohen* supra note 16; *Heugh's Trustee v Hydenrych* supra note 16; *Turpin v Wagstaff & Sons* supra note 16; *Ncora v Untiedt* supra note 26; *Colonial Cabinet Manufacturing Co v Wahl* supra note 29; *Rand Furnishing Co v Hydenrych* supra note 29; *Bloemfontein Municipality* supra note 5 at 271; *Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd* supra note 18. In *Turpin v Wagstaff & Sons* supra note 16 at 599, Innes CJ stated that there may be cases in which estoppel would operate.

⁷⁵ *Supra* note 6 at 501I–502A.

⁷⁶ *Ibid* at 507A.

⁷⁷ Lubbe op cit note 9 para 440. McLennan op cit note 23 at 123 argues that the court in *Eight Kaya Sands* supra note 6 at 501B adopted the 'skyn' concept and that the explanation of the court has some resemblance to estoppel.

⁷⁸ Cooper op cit note 5 at 183.

⁷⁹ Knobel op cit note 69 at 695.

facilitated by an unambiguous adoption of the estoppel approach, including a fault requirement in the form of at least negligence.⁸⁰

There are authors who disagree, though. According to McLennan it is difficult to see how a third party's carelessness or negligence could constitute consent for the extension of the lessor's tacit hypothec to third parties' property.⁸¹ He argues that the estoppel assertor should be aware of the presence of the property on his premises and that this is not a 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. Hence, McLennan argues that implied consent does not justify the extension of the hypothec to third parties' property either, since there is no contractual privity between the lessor and the third party.⁸² In short, 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 and would therefore prefer that third parties' property should never be used as security for the debt of the lessee without his actual consent.⁸³

Steven argues that implied consent is a fiction whereby the owner is taken to have accepted his property being subjected to the lessor's tacit hypothec. He further argues that since implied consent is a fiction, the notion that consent is inferred when the owner was negligent in asserting his ownership should be dismissed.⁸⁴ Smith also states that there is no legal nexus or contract between the lessor and the third party, and therefore the lessor's tacit hypothec should not extend to the third party's property.⁸⁵

The discussion of the literature above shows that all but two authors⁸⁶ prefer the estoppel approach, inclusive of the fault requirement, as the justification for extending the lessor's tacit hypothec to third parties' property. However, even though the analysis of case law above suggests that the courts have in fact relied on estoppel when they justified the extension of the hypothec in terms of implied consent, South African courts have not yet justified the extension of the lessor's tacit hypothec to third parties' property on the basis of estoppel explicitly, clearly and consistently.

IV EVALUATION

For a third party's property to be subject to the lessor's tacit hypothec, the imputed-consent approach requires that the property must have been brought on to the leased premises to remain there indefinitely for use by the lessee. The estoppel approach provides that a third party, with knowledge of his property being used on the leased premises, could be estopped from

⁸⁰ Ibid.

⁸¹ McLennan op cit note 23 at 122.

⁸² Ibid at 123.

⁸³ Ibid.

⁸⁴ Steven op cit note 20 at 14–15.

⁸⁵ Smith op cit note 23 at 330.

⁸⁶ Steven op cit note 20 at 14–15; McLennan op cit note 23 at 123.

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. If the imputed-consent approach is followed, the lessor has to prove that the hypothec applies to a third party's property on the basis that it would be fair for the court to impute consent to the third party, whereas the estoppel approach expects the lessor to prove that the third party's action or inaction in asserting its ownership of the movables constitutes a misrepresentation that caused the lessor to act to his detriment. The onus of proof in the two instances is not that far apart, but it would make a difference if the requirements for each approach are applied clearly and consistently. More specifically, clear and consistent application of the estoppel approach would probably place a heavier burden on the lessor, especially if he has to prove fault on the side of the third party.

It is apparent from the analysis above that there are uncertainties concerning these justifications for extending the lessor's tacit hypothec to third parties' property. The case law seems to favour the imputed-consent approach, but in some cases the courts apparently rely on the doctrine of estoppel, albeit without explicitly saying so or applying its requirements consistently. This is especially apparent from the recent decision in *Eight Kaya Sands*, where the court more or less explicitly showed its willingness to justify the extension of the hypothec on the basis of estoppel, but again without actually applying its requirements.⁸⁷ Some scholars reject the imputed-consent approach and prefer the doctrine of estoppel, inclusive of the fault requirement, as a justification for the extension of the lessor's tacit hypothec to third parties' property; but a few scholars reject both justifications and would prefer the lessor's tacit hypothec never to apply to third parties' property.

These uncertainties regarding the justifications for extending the lessor's tacit hypothec were recognised by Lubbe,⁸⁸ who is of the view that the Appellate Division in *Bloemfontein Municipality* reduced the consent requirement to a fiction, while at the same time importing considerations that would be relevant to estoppel, such as negligence on the part of the third party.⁸⁹ He argues that the possibility to develop the estoppel approach, which existed in early case law, has been obscured by the tendency in later decisions to telescope both approaches into a single enquiry.⁹⁰ In his view, 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 doctrine of estoppel.⁹¹ Lubbe's view is that a return to a dualistic approach will be conducive to greater clarity in that it will enable the requirements for the doctrine of estoppel to be restricted to the conceptual

⁸⁷ *Eight Kaya Sands* supra note 6 at 501I–502A and 507A.

⁸⁸ Lubbe op cit note 9 para 440.

⁸⁹ Ibid para 441.

⁹⁰ Ibid para 440. See also Knobel op cit note 69 at 695.

⁹¹ Lubbe op cit note 9 para 440.

basis for the doctrine's meaning and relevance, while clearly distinguishing estoppel cases from imputed-consent cases.⁹²

Lubbe's suggestion that our law should return to a dualistic approach is plausible, since it may assist the courts to decide cases on the basis of either of the approaches. An explicitly dualistic approach might also help avoid the confusion that follows from claiming to apply one approach, while in fact relying on the other. Unfortunately, in *Bloemfontein Municipality* the Appellate Division failed to develop the estoppel approach, which at that point in time had already received judicial recognition as a basis for extending the lessor's tacit hypothec to third parties' property.⁹³ In fact, *Bloemfontein Municipality* should have been decided on the basis of estoppel rather than on the basis of imputed consent. The tendency in decisions such as *Bloemfontein Municipality* to telescope the two approaches into a single enquiry has led the courts to decide all cases on the basis of imputed consent, even when they should have been decided on the basis of estoppel.

Furthermore, it is important to recognise that the consent required for extending the lessor's tacit hypothec to third parties' property is not in any way related to the lease agreement between the lessor and the lessee. Hence, a better explanation of consent (usually called 'implied consent') in cases involving extension of the lessor's tacit hypothec is that the law may impute (or ascribe) consent to a third party whose property may be affected by an extension of the landlord's hypothec, provided that certain requirements are met. The argument that implied consent does not justify the attachment of third parties' property because there is no contract between the lessor and a third party whose property is found on the leased premises then appears to be less problematic, since the judicial imputation of consent of this kind does not require contractual privity: the lessor's tacit hypothec is a real security right acquired by operation of law, and without the co-operation of both parties.⁹⁴

Taking into consideration the controversy surrounding the justifications for extending the lessor's tacit hypothec to third parties' property, and the meaning of imputed consent in the extension of the lessors' tacit hypothec, we think that both imputed consent and estoppel could justify the extension of the lessors' tacit hypothec to third parties' property if they are applied correctly. Each justification should be applied in situations where it fits best. Hence, imputed consent should apply only in cases where a third party had *actual knowledge* of his property being used on the leased premises, but without having created a misrepresentation that could found an estoppel defence. On the other hand, estoppel should apply in cases where the third party was in a position to protect himself against the extension of the lessor's

⁹² Ibid. See also Van der Merwe in *Wille's Principles* op cit note 5 at 658.

⁹³ See *Lazarus v Dose* supra note 16; *Mackay Brothers v Cohen* supra note 16; *Heugh's Trustee v Hydenrych* supra note 16; *Turpin v Wagstaff & Sons* supra note 16; *Ncora v Untiedt* supra note 26; *Colonial Cabinet Manufacturing Co v Wahl* supra note 29.

⁹⁴ See in general Badenhorst et al op cit note 6 at 403–25 for a discussion of real security rights that are created by operation of law.

tacit hypothec but failed to do so, but without having had actual knowledge of his property being on the leased premises. Applying the common-law principles in this manner would be in line with the views expressed by the seventeenth and eighteenth century Roman-Dutch law writers.⁹⁵

V A NOTE ON STATUTORY PROTECTION FOR THIRD PARTIES

The common-law position regarding the extension of the lessor's tacit hypothec has been amended by the SMMPA. 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 Act⁹⁶ relates, shall not be subject to a landlord's tacit hypothec.'

Section 2(1) of the Act protects two categories of third parties against the extension of the lessor's tacit hypothec, namely third parties who have notarial bonds registered over their movable property, and third parties who sold their property in terms of an instalment agreement. Section 2(2) of the Act provides that these third parties are only protected in terms of s 2(1) if the notarial bond is registered in terms of s 61(1) of the Deeds Registries Act 47 of 1937 before the lessor's tacit hypothec is perfected.⁹⁷ The implication of s 2(2) is founded on the rule *prior in tempore potior in iure*, which provides that the first real security right to be created is the strongest and enjoys preference on the debtor's insolvency.⁹⁸ Prior to the coming into operation of the Act, property belonging to a credit provider could be subject to the lessor's tacit hypothec only if the credit provider failed to give the lessor notice of the existence of the instalment agreement.⁹⁹ Section 2(1) of the Act amended this position. As the law stands now, property to which an instalment agreement relates is no longer subject to the lessor's tacit hypothec.¹⁰⁰ Therefore, the Security by Means of Movable Property Act has

⁹⁵ De Bruyn op cit note 4 at 186. See also Voet 20.2.5; Van Leeuwen 1.4.9.3.

⁹⁶ Previously s 2(1)(b) referred to the definition of an instalment sale transaction in s 1 of the repealed Credit Agreements 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).

⁹⁷ Section 2(2) of the SMMPA. See also Mostert & Pope (eds) op cit note 5 at 328; Lubbe op cit note 9 para 440; Van der Merwe in *Wille's Principles* op cit note 5 at 658; Badenhorst et al op cit note 6 at 405.

⁹⁸ For an explanation of the rule *prior in tempore potior in iure* see Scott & Scott op cit note 5 at 101 and 264–5.

⁹⁹ See s 8 of the Credit Agreements Act. See also Scott & Scott op cit note 5 at 102.

¹⁰⁰ Section 2(1)(b) of the SMMPA.

strengthened the protection of certain third parties whose movables might otherwise have been subject to the extension of the lessor's tacit hypothec.

VI THE PROPERTY CLAUSE: A CONSTITUTIONAL ANALYSIS

(a) Introduction

The extension of the lessor's tacit hypothec to third parties' property has not yet been subjected to a constitutional challenge in the South African courts. However, academic commentators have suggested that, if challenged, the extension of the lessor's tacit hypothec to third parties' property might be inconsistent with the property clause.¹⁰¹ Those in favour of this view base their argument on foreign case law in which a similar extension had been challenged (albeit unsuccessfully),¹⁰² as well as on their interpretation of the judgment in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* ('FNB').¹⁰³

McLennan discusses the extension of the hypothec to third parties' property, but does not directly deal with the effect of the property clause on the extension of the hypothec, although he seems to accept that extension of the hypothec to third parties' property might have a constitutional effect.¹⁰⁴ Smith argues that the lessor's tacit hypothec would, if challenged, be unconstitutional in so far as it arbitrarily and unjustifiably deprives third parties of their property.¹⁰⁵ The major premise of his argument is that neither the imputed consent nor the estoppel approach justifies the attachment of third parties' property because there is no legal nexus (in the form of a contract) between the lessor and a third party whose property is found on the leased premises.¹⁰⁶

We disagree with Smith's argument, but consider it a valuable exercise to analyse the extension of the lessor's tacit hypothec to third parties' property in view of the South African property clause. The purpose of the property clause (s 25 of the Constitution) is to balance private and public interests in

¹⁰¹ Smith op cit note 23 at 319–30; Steven op cit note 20 at 16.

¹⁰² *RCA Global Communications Inc v Executive Office Towers*, Civil Action No 79-3712 (E D La 1981) (unpublished opinion). In *RCA Global* it was argued (unsuccessfully) that the lessor's hypothec violated the due process clause of the United States Constitution because it allowed for the attachment of the third party's property to satisfy the debts of another person and therefore amounts to an unreasonable deprivation of property. Smith op cit note 23 at 316 argues that this unsuccessful argument 'could be raised in South Africa against the constitutionality of the lessor's hypothec because it could be argued that it amounts to an arbitrary deprivation of property when it operates over the goods of a third party'.

¹⁰³ 2002 (4) SA 768 (CC).

¹⁰⁴ McLennan op cit note 23 at 123.

¹⁰⁵ Smith op cit note 23 at 319–30. See further Steven op cit note 20 at 14–15.

¹⁰⁶ Smith *ibid* at 313.

property.¹⁰⁷ Section 25(1) provides that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. The *FNB* case is still the leading decision on the property clause.¹⁰⁸ In *FNB*, the Constitutional Court resolved a number of uncertainties and debates regarding the interpretation of s 25(1), and brought some clarity regarding the approach to be followed when interpreting and applying this section in a constitutional property challenge.¹⁰⁹ Furthermore, the *FNB* judgment introduced a methodology for analysing s 25 disputes, which has significant implications for the application of the s 25 requirements for a valid deprivation or expropriation of property.¹¹⁰

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?'¹¹¹

According to the *FNB* methodology, expropriation is a sub-set of deprivation and therefore all expropriations are deprivations, while not all deprivations are expropriations. This categorisation makes it possible to postpone the question of expropriation until it has been established whether a particular interference with property rights amounts to deprivation that complies with s 25(1) or, if it is not, whether such a deprivation is justified in terms of s 36(1) of the Constitution.¹¹² In the paragraphs below we apply the *FNB* methodology to the extension of the lessor's tacit hypothec to third

¹⁰⁷ Section 25 can be divided into two main parts, subsecs (1)–(3), read with subsec (4); and subsecs (5)–(9), read with subsec (4). The purpose of subsecs (1)–(3) is to protect existing property rights and interests against unconstitutional state interference. The purpose of subsecs (4)–(9) is to legitimate and promote land and other related reforms: AJ van der Walt *Constitutional Property Law* 3 ed (2011) 16.

¹⁰⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality & another; Bissett & others v Buffalo City Municipality & others; Transfer Rights Action Campaign & others v MEC, Local Government and Housing, Gauteng, & others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32ff; *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC) para 66; *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48 *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) paras 58–60; *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & others* [2015] ZACC 23 para 37.

¹⁰⁹ Theunis Roux 'Property' in Stu Woolman et al (eds) *Constitutional Law of South Africa* Vol 3 2 ed (OS 2003) at 46–2.

¹¹⁰ *Supra* note 103 para 100.

¹¹¹ Roux in Woolman et al *op cit* note 109 at 46–3.

¹¹² *Supra* note 103 paras 57–59.

parties' property to determine whether, if challenged, it is constitutionally valid.¹¹³ In line with Roux's analysis (which finds support in the majority of subsequent decisions), we take it for granted that the deprivation question and the arbitrariness question will be the main points of focus for this analysis.

(b) Law of general application

The first part of s 25(1) deals with the requirement of law of general application. Section 25(1) does not insulate property against deprivation but protects property against unauthorised and arbitrary deprivation.¹¹⁴ 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.¹¹⁵ However, the reference in s 25(1) to 'law of general application' instead of 'a law of general application' indicates that regulatory deprivation of property may also be authorised by the common law.¹¹⁶ The common-law principles that govern the extension of the hypothec to third parties' property will satisfy this requirement. The common-law principles regarding the lessor's tacit hypothec provide that the lessor may, in terms of s 31(1) or s 32 of the Magistrates' 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 common law (as complemented by the relevant legislation and as interpreted in the case law) and under instruction from a court acting within the boundaries of the law.

A significant implication of this analysis is that, in so far as the attachment of third parties' property by the sheriff amounts to a deprivation, it is the common law that should be challenged for non-compliance with s 25(1), and not the attachment.

(c) Deprivation of property

In terms of the *FNB* methodology, the first question is whether the interest that is affected by the attachment qualifies as property for purposes of s 25.¹¹⁷

¹¹³ Roux in Woolman et al op cit note 109 at 46-21-46-25 argues that if the *FNB* methodology is followed, it is unlikely that a constitutional property dispute would ever proceed through all the stages. Furthermore, the three threshold questions (whether the applicant is a beneficiary who qualifies for the protection of s 25, whether the affected interest is property and whether the interest was indeed infringed upon) are apparently 'sucked into' the arbitrariness test. He contends that the arbitrariness test tends to dominate the s 25 inquiry, and as a result, the general limitation clause (s 36) has receded into the background. See further Van der Walt op cit note 107 at 75-8.

¹¹⁴ The law of general application requirement also appears in ss 25(2) and 36(1) of the Constitution.

¹¹⁵ Van der Walt op cit note 107 at 236.

¹¹⁶ In *S v Thebus & another* 2003 (6) SA 505 (CC) para 65 the court held that the common law is law of general application. See further *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC) para 44.

¹¹⁷ See *First National Bank* supra note 103 para 46.

The constitutional property clause does not define ‘property’, but merely provides that property is not limited to land.¹¹⁸ In *FNB* the Constitutional Court confirmed that ownership of corporeal movables and land are at the heart of the constitutional concept of property.¹¹⁹ The third party’s *invecta et illata* are corporeal movables brought on to the leased premises by the lessee and thus clearly fall within the scope of ‘property’ for purposes of s 25.

Since the question whether third parties’ *invecta et illata* are property for purposes of s 25 is answered affirmatively, the next question is whether there is a deprivation of property if the lessor’s tacit hypothec is extended to third parties’ property.¹²⁰ The Constitutional Court initially defined deprivation as ‘[a]ny interference with the use, enjoyment or exploitation of private property’.¹²¹ Furthermore, the court has 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’.¹²² The question is whether the creation of a real security right by operation of law in favour of the lessor qualifies as a deprivation in that sense. To acquire the hypothec, the lessor must seek the assistance of the court,¹²³ either by having the sheriff of the court attach property that is on the premises or by applying for an interim interdict to prevent removal of property from the leased premises.¹²⁴ The lessor’s tacit hypothec entails that the lessor can enforce an ongoing attachment of the property, including the third party’s property, until the rent in arrears is paid.

The deprivation of the third party’s property occurs at the moment when a real security right is created in favour of the lessor without the third party’s co-operation, with the effect that the third party can no longer freely use or dispose the property. Attachment of the third party’s property amounts to an interference with the use, enjoyment or exploitation of the property that amounts to a deprivation for purposes of s 25(1), since it limits his entitlement to dispose of his property in any manner he wishes. Since the first two

¹¹⁸ Section 25(4)(b) of the Constitution.

¹¹⁹ *Supra* note 103 para 51.

¹²⁰ *Ibid* para 46.

¹²¹ *Ibid* para 57. In *Mkontwana* *supra* note 108 para 32 the Constitutional 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’. However, this definition has not generally been accepted in either case law or academic commentary. For case law in this regard, see *Reflect-All 1025 CC & others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, & another* 2009 (6) SA 391 (CC) para 36; *National Credit Regulator v Opperman* *supra* note 108 para 66; *Agri South Africa* *supra* note 108 para 48 *Shoprite Checkers v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* *supra* note 108 paras 73–6. For academic criticism of the *Mkontwana* decision, see A J van der Walt ‘Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* (2005) 122 SALJ 75.

¹²² *Supra* note 13 para 61.

¹²³ *Webster v Ellison* *supra* note 5 at 94. See also Badenhorst et al *op cit* note 6 at 405.

¹²⁴ In terms of s 31(1) or s 32 of the Magistrates’ Courts Act 32 of 1944.

FNB questions have been answered in the affirmative, we turn to consider the third *FNB* question, namely whether the deprivation satisfies the other requirements of s 25(1).

(d) *The non-arbitrariness test*

Section 25(1) requires that the law of general application in question may not permit *arbitrary* deprivation of property.¹²⁵ The provision does not proscribe (properly authorised) deprivation of property as such; it is only *arbitrary* deprivation that is open to constitutional challenge. Therefore, as far as the common law authorises the extension of the lessor's tacit hypothec for arrear rent to movables that belong to third parties other than the lessee, the implication of s 25(1) is that it may not permit arbitrary deprivation of property. In *FNB* the Constitutional Court held that '[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"'.¹²⁶

In this article we assume, without analysis and without expressing a final view, that ss 31(1) and 32 of the Magistrates' Courts Act are procedurally fair because both forms of the deprivation that are authorised by these sections (an attachment order and a non-removal interdict) have to be issued by a court of law exercising a discretion. It is unlikely that a deprivation that results from such a court order will be procedurally unfair.¹²⁷ Accordingly, we focus on the sufficient-reason part of the test.

In our view, the main issue in an arbitrariness challenge in terms of the extension of the hypothec will focus on the fact that the extension renders the hypothec applicable to property that belongs to a third party who is not the debtor. The same problem was also at the heart of the *FNB* case. In *FNB*, the bank (FNB) was owner of certain vehicles that were in the possession of the customs debtor. The state (the South African Revenue Services) established a statutory lien over the vehicles to enforce payment of a customs debt.¹²⁸ 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.

Before the court came to its decision it developed a method that must be followed to establish whether or not there is sufficient reason for the deprivation.¹²⁹ The starting point is that a deprivation of property is substantively arbitrary in terms of s 25(1) if there is insufficient reason for it. The court stated that a complexity of relationships has to be considered in

¹²⁵ See Roux in Woolman et al op cit note 109 at 46–20.

¹²⁶ Supra note 103 para 100. See further *Reflect-All 1025 CC* supra note 121 para 39.

¹²⁷ See generally Van der Walt op cit note 107 at 264–70.

¹²⁸ In terms of s 114(1)(a)(ii) of the Customs and Excise Act 91 of 1964.

¹²⁹ Supra note 103 para 100.

order to establish sufficient reason.¹³⁰ The complexity of relationships includes the relationship between the means employed (deprivation) and the ends sought to be achieved (purpose of deprivation)¹³¹ and the relationship between the purpose for the deprivation and the person whose property is affected.¹³² 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.¹³³ The court adopted 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 s 114 of the Customs and Excise Act to deprive third parties of their property by way of a statutory security right. Accordingly, the court held that the deprivation caused by s 114 of the Customs and Excise Act was arbitrary for purposes of s 25(1).¹³⁴

Section 114 of the Customs and Excise Act, which was at issue in the *FNB* case, had the effect of extending the creditor's statutory lien to unrelated and uninvolved third parties' property; the third party owner of the affected movables in that case was neither the customs debtor nor connected with the customs debt. The property that was subjected to the statutory lien had no connection with the customs debt either. 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 significant that both s 114 of the Customs and Excise Act and the extension of the lessor's tacit hypothec involve the extension of real security rights to third parties' property that just happens to be present on the debtor's premises at the time when the non-consensual security right is created.

A significant difference between *FNB* and the extension of the lessor's tacit hypothec, however, is that the statutory provision in *FNB* 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. It

¹³⁰ Ibid para 100(b).

¹³¹ Ibid para 100(a).

¹³² Ibid para 100(c).

¹³³ Ibid para 100 (d).

¹³⁴ Ibid para 109. The *FNB* judgment was followed in *Reflect-All 1025 CC* supra note 121. 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. In *FNB* the court held the test involved will vary between a mere rationality and a full proportionality approach, depending on the context of each case. Roux in Woolman et al op cit note 109 at 46-24 argues that the Constitutional Court deliberately reserved almost absolute discretion to itself to decide future cases in a manner it deems fit. Furthermore, the non-arbitrariness test will dominate the constitutional property inquiry and 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.

might be thought that statutory security rights that favour the state should be treated more carefully, but that consideration does not apply to the extension of the landlord's hypothec. Furthermore, the mere fact that the extension serves the purpose of strengthening real security rights is not in itself a shortcoming that could lead to constitutional invalidity. The 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'.¹³⁵ By analogy, it could be said that the enforcement of private debts such as the lessor's tacit hypothec serves the same useful purpose of strengthening the economic system of securities. The question is whether that consideration is sufficient to justify the extension of the real security right to third parties' property and the deprivation of property that it causes. In effect, the court in *FNB* held that it was not: the nexus between the purpose of the statutory security right, the property affected by it and the affected property owner was not strong enough to justify the effect, namely that an uninvolved third party would be deprived of property that is not related to the debt. In the paragraph below we 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*, 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 has similar effects to those of s 114 of the Customs and Excise Act, namely that both create real security rights that extend to include a third party's property. In fact, the lessor's tacit hypothec upon attachment creates a real security right over property belonging to three categories of persons, namely the lessee, the sub-lessee and the third party, whereas s 114 of the Act created a real security right over the property of only two categories of persons, namely the customs debtor and third parties.

The only nexus required by s 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 custom debtor. Accordingly, the commissioner of 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 needed only be in 'possession or control' of the premises and not of the property itself. Therefore, the customs debtor could even have been unaware of the presence of the third party's property on his premises.

In terms of the lessor's tacit hypothec, attachment of third parties' property is based on either imputed consent or the doctrine of estoppel. According to the imputed-consent approach, a third party is taken to have consented that his property can be utilised as security for the lessee's arrear rent. The lessor

¹³⁵ *Supra* note 103 para 108.

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 imputed-consent approach, 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 (which is debt that is secured by the hypothec). This requirement and the nexus that it creates distinguish the security right in s 114 of the Customs and Excise Act from 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, whereas the extension of the lessor's tacit hypothec to third parties' property requires both possession (presence on the premises) and use of the third party's property by the lessee, on the premises. The extension of the lessor's tacit hypothec also requires that the third parties' property must be present permanently on the leased premises, which s 114 of the Customs and Excise Act did not require. Thus, in terms of s 114 of the Act, third parties' property that was in the customs debtor's possession purely by chance and for a short period could be subject to the statutory lien, but that would not be possible in the case of extending the hypothec.

According to the second approach to the extension of the hypothec, 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. We contend that the doctrine of estoppel (with the fault requirement) should also be regarded as a justification for the extension of the lessor's tacit hypothec, for much the same reasons that we set out in the previous paragraph. If it is found that the third party (with fault) did induce the lessor to believe that the property belongs to the lessee, it is highly unlikely that the property would have been present on the premises just fleetingly and without any real connection with the lessee's use of the premises.

Accordingly, the correct application of both justifications for the extension of the hypothec will mean that if the third party was unaware that his property was present on the leased premises, his property should not be subject to the hypothec. Thus, if the third party was not aware of the presence of his property on the lessor's premises, he should not be held to be negligent. In other words, the correct application of the principles that regulate the extension of the lessor's tacit hypothec to third parties' property implies that the fault requirement of the doctrine of estoppel will not be easily established. However, if the estoppel denier fails to prove that he was not negligent with the whereabouts of his property, the attachment of his property might be justified.

Although s 114 of the Customs and Excise Act and the extension of the lessor's tacit hypothec have similar effects (creating real security rights over third parties' property), they also differ in important aspects. First, 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 s 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. Our view is that these requirements serve as sufficient protection of third parties' interests, whereas s 114 of the Customs and Excise Act provided no similar 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. Therefore, 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 of the hypothec from causing an arbitrary deprivation of the third parties' property. For this reason we contend 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 s 25(1) of the Constitution.

In terms of the *FNB* methodology, if the deprivation is consistent with the provisions of s 25(1), the inquiry proceeds to the fifth question, since there is no constitutional violation that requires justification provided for by the fourth question, viz whether such deprivation amounts to expropriation for purposes of s 25(2).¹³⁶ Since South African law requires that expropriation should be authorised by legislation and there is no common-law authorisation for expropriation, it is impossible that principles of the common law can be a source of expropriation.¹³⁷ It is therefore unnecessary to consider whether a deprivation caused by the extension of the hypothec amounts to expropriation.

VII CONCLUSION

The lessor's tacit hypothec only extends to third parties' property in exceptional circumstances. The lessor must first execute against the lessee's property found on the leased premises when rent is due but not paid. It is only when the lessee's property proves insufficient to satisfy the lessor's claim for arrear rent that the lessor's tacit hypothec could extend to third parties' property. However, the mere fact that the lessee's property found on the leased premises is insufficient to cover the arrear rent does not imply that the lessor can use third parties' property to satisfy his claim for arrear rent. Extending the hypothec to cover the property of third parties must be justified. According to the case law, this justification could assume one of two forms. The courts tend to collapse the two justifications into a single enquiry that is not clearly distinguished or applied consistently, but we prefer a properly dualistic approach in which the two are distinguished clearly and consistently.

¹³⁶ *Supra* note 103 para 46(d).

¹³⁷ Antonie Gildenhuys *Onteieningsreg* 2 ed (2001) 10. See further Van der Walt *op cit* note 107 at 346.

According to the imputed-consent approach, the lessor who obtained an attachment order before he knew that some of the property on the premises does not belong to his lessee must prove that the third party's property was brought on to the leased premises with *actual knowledge* of its owner and for permanent use on the premises by the lessee. According to the estoppel approach, the lessor must prove misrepresentation by the third party, prejudice, causation, and fault. It is only when the lessor has successfully relied on either of the two justifications and proven the requirements for it that he can sell third parties' property in execution to satisfy his claim for arrear rent.

Since the SMMPA excludes a 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 in practice there will probably be few, if any, cases in which the lessor's tacit hypothec will be extended to third parties' property based on imputed consent. Furthermore, if estoppel (inclusive of the fault requirement) is correctly applied, there may equally only be a few cases in which estoppel will serve as the basis for attachment of third parties' property, especially since the lessor must first prove the third party's negligence. Applied in this way, the limited extension of the lessor's tacit hypothec to third parties' property on the basis of either imputed consent or estoppel is justifiable. Notwithstanding the controversies surrounding the justifications for extending the lessor's tacit hypothec to third parties' property, we argue that correct application of the common-law principles, as set out above, adequately protects third parties whose movables are not covered by the SMMPA against the extension of the lessor's tacit hypothec.

We acknowledge that the justifications for extending the lessor's tacit hypothec to third parties' property are controversial. However, our view is 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, adequately protect third parties against the extension of the lessor's tacit hypothec. We conclude that the extension of the lessor's tacit hypothec does not constitute an arbitrary deprivation as meant by s 25 of the Constitution, and it is therefore constitutionally valid.