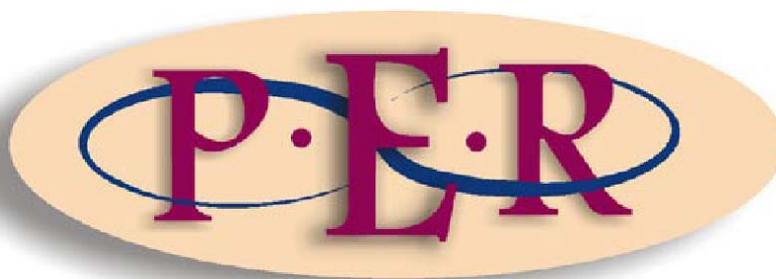


**CONSTITUTIONAL INTERPRETATION ACCORDING TO FIRST NATIONAL BANK OF SA  
LIMITED T/A WESBANK V COMMISSIONER FOR THE SOUTH AFRICAN REVENUE  
SERVICES AND ANOTHER; FIRST NATIONAL BANK OF SA LIMITED T/A WESBANK V  
MINISTER OF FINANCE 2002 (7) BCLR 702 CC**

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“Constitutional interpretation” has become the focus point of all lawyers and academics interested in the development of Constitutional Law in South Africa. But far more important than mere interest, is the practical application of the Constitution in every matter handled by lawyers and presided over by presiding officers.

Words, phrases and ideas, foreign to the Roman-Dutch judicial system, have entered our jurisprudence. New concepts have emerged and old, familiar concepts have been re-defined. It is essential to define these new concepts. The guidelines for this interpretation process, laid down by the Higher Courts, specifically the Constitutional Court, are indispensable for the development of Constitutional Law in South Africa.

A prime example of the re-defining of an established concept, is found in First National Bank of S.A. Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of S.A. Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 CC

Due to the time constraint, I will not discuss the merits of the case or the finding of the Court. After taking a bird’s eye view of the facts of the case, we will focus on the process followed by Ackerman J in defining the concept “arbitrary” as used in section 25 of the Constitution.

## THE FACTS

Both these matters involved the detention of property by the Commissioner of S.A. Revenue Services arising from custom duties owed to the Commissioner. Vehicles belonging to the applicant, had been detained as security for custom's duties and penalties owed not by the applicant itself, but by certain importers. Section 114 of the Customs and Excise Act 91 of 1964, permitted a seizure of goods without requiring any prior application to court by the Commissioner. The Commissioner intended to sell the vehicles in question to recover unpaid duties and penalties owed by the importers.

It was contended on behalf of the applicant that the detention and anticipated sale of the vehicles amounted to an expropriation and that such expropriation was inconsistent with sec. 25 (1) of the Constitution, and invalid.

## THE APPROACH

The Court set a tone for it's approach to the constitutional analysis of the concept 'arbitrary', by finding it necessary to consider the meaning of section 25 more broadly and in a more comprehensive context, before turning to the issue at hand.

This is a clear indication of the context sensitive approach followed throughout the case. I will do this decision injustice if I attempt to describe the interpretation-process in my own words. The Court's modus operandi becomes evident through the words of Ackerman J himself:

“ The subsections which have specifically to be interpreted in the present case **MUST NOT BE CONSTRUED IN ISOLATION** but in the **CONTEXT** of the

- other provisions of section 25 and
- their historical context and
- indeed in the context of the Constitution as a whole.” (My emphasis.)

After establishing the purpose of section 25 to be both the protecting of existing property rights and the serving of the public interest, the Court stated that section 25(1) must be the starting point for constitutional analysis when considering any challenge under section 25. Once it has been established that the deprivation of property has occurred, (and the dispossession of an owner of all his rights, use and benefit to and of corporeal movable goods is a prime example of deprivation in both its grammatical and contextual service) the infringement issue is limited to determining whether the deprivation of property is 'arbitrary'.

The purpose of this paper is not to ponder the meaning of the concept 'arbitrary', but to follow the process used in analyzing the concept.

## **METHODOLOGY**

The Court finds CONTEXT to be all-important. Context is however not limited to the statutory context within which the word is used. Context is found to be a very wide concept:

- it originates from the fact that the concept 'arbitrary' appears in a constitution and
- is part of a comprehensive and coherent Bill of Rights.

This implies that the "democratic values", "fundamental human rights" and "social justice" that form the basis of our society, must always be in the foreground of the mind during the interpretation process.

Context goes even further and would include the particular international jurisprudential context in which the Constitution came into existence and presently functions. One must therefore regard international law and may consider foreign law. Although comparative law cannot determine the proper approach to be followed in our legal system, important applicable principles can be deduced and applied according to our own developmental needs.

The Court stresses that one should never lose sight of the historical context in which the property clause came into existence. This implies that the purpose of section 25 must also be taken in to account in defining concepts emanating from the section.

It is also important that the legislative context, to which the prohibition against “arbitrary” deprivations refers, must be kept in mind. A flexible and individual approach is also illustrated by the importance attached to the nature and effect of each deprivation, in the quest for answering the question of constitutional validity.

Even though “context” is crucial, the grammatical meaning of the word “arbitrary” was considered.

## **CONCLUSION**

The Court’s approach can be summarized to include the following:

- The grammatical meaning of words are taken into consideration but
- interpreted against the historical background giving rise to the
- promulgation of the legislation wherein they appear.
- The purpose of the specific section is weighed up against the
- purpose of the legislation in question
- and individualized by taking into consideration the effect of the legislation.
- This is done being mindful to corresponding comparative law in foreign jurisdictions
- and enclosed within the spirit and aim of the Constitution.

