CASE NO.A 72/94

IN THE HIGH COURT OF NAMIB

In the matter between

FREIREMAR S.A. APPLICANT

versus

1. THE PROSECUTOR-GENERAL OF NAMIBIA FIRST RESPONDENT

2. THE MINISTER OF SEA FISHERIES AND MARINE RESOURCES OF NAMIBIA SECOND RESPONDENT

CORAM: STRYDOM, J.P. et FRANK, J.

Heard on: 1993/11/8,9

Delivered on:

1994/04/08

JUDGMENT

STRYDOM, J.P.: By Act 3 of 1990, Section 4(1), Parliament of the Republic of Namibia enacted that:

> "The sea outside the territorial sea of Namibia but within a distance of two hundred nautical miles from the low water line or any other base line from which the territorial sea was measured shall constitute the exclusive economic zone of Namibia."

Further, in terms of the provisions of the said Act 3 of 1990, various amendments were effected to the Sea Fisheries Act, 1973 (Act 58 of 1973). Inter alia the whole section 17 of Act 58 of 1973 was replaced with a new section 17 which provides for the forfeiture of various items, including any fishing boat or vessel, by the court convicting any person of any offence in terms of the Act.

On the 24th November 1990 the vessel "Frioleiro" was arrested by the Namibian authorities in the Namibian Exclusive Economic Zone. The master of the vessel, one Carlos M. Perez Redondo, together with two others, were charged with a contravention of section 22A(4)(b) of Act 58 of 1973 read with the provisions of the Territorial Sea and Exclusive Economic Zone of Namibia Act, no. 3 of 1990 in that on or about or between 18 November, 1990 and 24 November, 1990 the accused wrongfully and unlawfully used the said vessel as a fishing boat and/or factory within the Exclusive Economic Zone of Namibia.

On the 18th March, 1991 the said Perez Redondo was convicted in relation to fishing operations within the Exclusive Economic Zone during the period 20 to 24 November, 1990. On the 10th April, he was sentenced and the vessel "Frioleiro" was forfeited to the State together with all its equipment and implements. An appeal, which was lodged to the Supreme Court, was dismissed on the 18th June 1992. Although the question regarding the forfeiture of the "Frioleiro" formed part of this appeal the matter was not argued as the appellant, Perez Redondo, did not have the necessary locus. standi.

In the meantime an application was launched by the applicant for the setting aside of the forfeiture order. This application was enroled for the 25 November 1991 but was withdrawn before the date of hearing. Thereafter, and on the 19th February, 1993, a fresh application was launched by the applicant by Notice of Motion wherein, once again, it was claimed to set aside the declaration of forfeiture of the "Frioleiro" together with all its equipment and implements, and for the return thereof to the applicant, who claimed to be the owner of the vessel and equipment.

In an affidavit deposed to by the President of the applicant, one Manuel Freire Veiga, it was contended that such forfeiture was unconstitutional and contrary to public international law. In the alternative the applicant relied upon its rights in terms of the provisions of Section 17(1) of Act 58 of 1973.

The attack foreshadowed against the forfeiture order as set out in the founding affidavit of the applicant, is three fold. Firstly it was contended that in as far as section 17(1) purports to deprive persons other than a convicted person, such as the applicant, of their rights without a fair hearing, such provision is in conflict with Article 12 of the Constitution which embodied the right to a fair trial, and therefore liable to be struck down by a Court of law. Secondly it was contended that the second part of the proviso to section 17(1) which requires a person whose rights are thus affected, such as the applicant, to prove the taking of all reasonable steps to prevent the use of such vessel or implement in connection with the offence, is equally in conflict with the right to a fair trial as set out in Article 12 and therefore also liable to be struck down. Thirdly it was contended that the applicant's rights of property are entrenched by article 16 of the Constitution and that a confiscation of his property without compensation runs contrary to the provisions of Article 16.

In the alternative contended that it applicant reasonable steps took all the use of to prevent connection the vessel in and with the offence taken. set out what steps were

The respondents opposed the application on various grounds and also raised, in the affidavit of one Jurgens, certain objections to the application. Jurgens also incorporated

into his affidavit two other affidavits made by one Jose Luis Rodiquez Carrion and one Athur William Bluett which mainly dealt with the question of the knowledge of the various boat owners regarding the use of their vessels m the Exclusive Economic Zone. It was furthermore denied by respondents that the applicant was the owner of the "Frioleiro".

Shortly before the hearing of the matter the applicant applied in terms of Court Rule 33(4) to have certain questions of law, respectively raised in paragraph 8 of the applicant's founding affidavit, and paragraph 8 of the respondents' answering affidavit, be determined in limine.

At the hearing of the application the Court was informed by Mr Gauntlett, assisted by Mr Fitzgerald, on behalf of the respondents, that they do not persist in the objections raised in paragraph 8 of the respondent's affidavit. However Mr Gauntlett objected to the matter being dealt with in terms of Court Rule 33(4) and submitted that the Court can only deal with the Constitutional matters once evidence is lead and the full picture is therefore placed before the Court.

The Court thereupon ruled that both Counsel address the Court on the Rule 33(4) application and the objection thereto as well as the points in limine raised by the applicant. If the Court upholds the submission of Mr Gauntlett in regard to the Rule 33(4) application the

matter would then have to be referred to evidence and the points in limine would have to stand over to be decided thereafter. However if the Court upholds the contentions of Mr Blignaut, assisted by Mr Smuts, for the applicant, the Court can then deal with the points *in* limine and refer whatever is left thereafter to evidence.

On the basis of Mr Gauntlett' s submission that a Court will only deal with an attack on the constitutionality of a legislative act without hearing evidence if satisfied that evidence cannot affect the answer it gives as to such constitutionality, or the relief it grants, it is therefore necessary, first of all, to embark on such an investigation before it can be determined whether evidence would be necessary or not.

During argument the dispute further crystallised into one main issue namely whether the second part of the proviso to section 17(1) is in conflict with Article 12(1)(d) of the Constitution. (I will furtheron only refer herein to the proviso.) It seems to me that Counsel for the applicant was correct in jettisoning the other two points namely that the forfeiture order deprived the applicant of his rights without giving him a fair hearing and that no forfeiture of property can take place without compensation.

As far as the first of these points are concerned it is clear that a party with rights in the property to be forfeited can join issue with the State at the time when

application is made for a forfeiture order. (See S_____
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Pineiro and Others 1992(2) SA 683 (NmHC)).

However such a party is, in terms of section 35(4)(a) of Act 51 of 1977 which is incorporated into section 17, namely section 17(2), also given the right to apply within a period of three years from the date of forfeiture, to have his claim investigated. If it is found to be substantiated, the court is obliged to set aside the order of forfeiture and order the return of the said article to the applicant or, if the article was disposed of by the State, order that the applicant be paid the amount by which the State was enriched by such disposal. In the circumstances a party, such as the applicant, has therefore a choice and it cannot be said that he is deprived of a fair hearing by the forfeiture order. In the latter instance the declaration of forfeiture is at most provisional in nature.

In regard to the second point set out above the parties were ad idem, and correctly so in my opinion, that section 17(1) constitutes a penal provision and that the statutory purpose was not to acquire the vessel but rather to deprive or to prevent repetition of the offence and to serve as a deterrence to others, which in the circumstances is permissable. (See Hewlett v Minister of Finance and Another, 1982(1) SA 490 (ZSC)). The confiscation of property as a penalty for crime seems to be permitted in

International Law. See in this regard Akehurst: A modern introduction to International Law; 4th Ed., page 92; Bromlie: Principles of International Law; 4th Ed. p. 535 and O'Connell: International Law; Vol 2 (2nd Ed. 1970) at p. 776.

It was submitted by Counsel that once it is clear that section 17(1) is a penalty provision it must comply with article 12(1)(d) of the Constitution which provides that all persons charged with an offence shall be presumed innocent until proven guilty according to law. The section, as far as relevant, provides as follows:

> "17(1) The court convicting any person of any offence in terms of this Act may, in addition to any other penalty it may impose declare any fish, sea-weed, shells or implement or any fishing boat or other vessel or vehicle in respect of which the offence was committed or which was used in connection with the commission thereof, or any rights of the convicted person thereto, to be forfeited to the State, ...
>
> Provided that such a declaration of forfeiture shall not affect any rights which any person other than the convicted person may have to such implement, boat, vessel or vehicle, if it is proved that such other person took all reasonable steps to prevent the use thereof in connection with the offence.
>
> (2) The provisions of section 35(3) and (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall mutatis mutandis apply in respect of any such rights.

It was accepted by both Counsel that the proviso to section 17(1) places an inverted or reverse onus on any person, other than the convicted person, who has any rights in respect of the forfeited article, to prove that he took all reasonable steps to prevent the use thereof in connection with the offence.

I must agree with Counsel. It seems to me that the proviso requires proof that all reasonable steps were taken and the only person who can do so and who has knowledge thereof will inevitably be the person who wants to establish his rights in regard to such article. If he cannot show that he took all reasonable steps such forfeiture becomes absolute. My finding in S v Pineiro, supra, at p. 694, to the effect that section 17(1) does not directly place an onus on the parties i.e. the State and the applicant, is therefore not correct.

As I have stated earlier Counsel were also agreed that Article 12(1)(d) of the Constitution applies to section 17(1). This, so it seems to me, will depend on the interpretation of Article 12(1)(d) because strictly speaking the applicant is not standing before the Court as an accused in criminal proceedings to which the provisions of -the article will undoubtedly apply.

It has been well established in the Courts of Namibia that in the interpretation of the provisions of the Constitution, and more particularly in giving effect to the fundamental rights and freedoms as set out and enshrined in Chapter 3, the provisions of the Constitution are to be:

> "broadly liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government (per Mahomed, C.J. in Government of the Republic of Namibia and Another v Cultura 2 000 and Another NmSC, unreported 15 October, 1993) at p. 20-21.

In the same case it was furthermore stated at p. 21 that the interpretation should ensure that its clear words be given a construction which is "most beneficial to the widest possible amplitude."
(See also Minister of Defence v Mwandinghi 1992(2) SA 355 (NmS)).

As set out before the seizure of the applicant's property (this must be accepted for purposes of this judgment) without compensation on the basis of section 17(1) constitutes a penalty provision. It flowed from the use of the vessel for illegal fishing in Namibia's Exclusive Economic Zone and the conviction of the Master of the vessel. The applicant itself was not charged with the crime and was not convicted at any stage. However,

by forfeiting the vessel it is directly penalised, for the commission of a crime in respect of which it was not convicted and section 17(1) would undoubtedly have been unconstitutional if it did not make such forfeiture subject to the rights of persons other than the convicted person. It would have militated against the provisions of Article 12, the right to a fair trial, and Article 16, the right to own property.

The fact that a rightholder can by application, even within a period of three years, apply to establish his rights in the article, does not detract anything from the penal character of the section because if such rightholder can't discharge the onus, the forfeiture becomes absolute.

Although the wording of Article 12(1)(d) is that

> "All persons charged with an offence shall be presumed innocent until proven guilty according to law ..... "

and the applicant in an application such as this is not charged with an offence, his position is analogous to that of a person charged with an offence in that if he cannot discharge the onus placed upon him a penalty will be exacted from him, which can have a far reaching effect.

Taking into account the purpose of section 12 of the Constitution and the values that it represents and bearing in mind that the Court should "broadly, liberally and

purposively" interpret the provisions of the Constitution (Per Mahomed, C.J. in Government of the Republic of Namibia and Another v Cultura 2 000 and Another NmSC, supra), I have come to the conclusion that the presumption of innocence enshrined in Article 12(1) (d) does also apply to a person such as the applicant whose rights are affected by a forfeiture order in terms of Section 17(1).

The fact that a reverse onus is placed on an accused does not mean that such reverse onus is unconstitutional in all circumstances. There is a lot of authority concerning reverse onus provisions under the Canadian Bill of Rights and section 11(3) of the Canadian Charter of Rights. See Regina v Oaks 26 DLR (4th) 200 (1986). Laskin in his work The Canadian Charter of Rights (annotated (1985)) 16. 4 - 2 summarised the decision in Regina v Oaks, supra, as follows:

> "While statutory exceptions to the general rule that an accused has the right to be presumed innocent do not contravene the presumption of innocence if they are reasonable, a statutory exception which is arbitrary or unreasonable does. For a reverse-onus clause to be reasonable and hence constitutionally valid, the connection between the proved fact and the presumed fact must at least be such that the existence of the proved fact rationally tends to prove that the presumed fact also exists. The presumed fact must also be one in which it is rationally open to the accused

to prove or disprove." (See also R v Bray, 144 DLR (3d) at 309; R v Dubois, 8CCC (3d) 344 (1983) at 346 - 347 and R v Frankforth, 70CCC (2d) 488 (1982) at 451.)

As far as the United States is concerned dealing with the presumption of innocence as embodied in the Fifth and Fourteenth Amendments of that Constitution it was stated in Learv v United States, 395 US 6 (1969) at 36 as follows:

> "A criminal presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favouring the particular presumption must, of course, weigh heavily."

See also TOT v United States, 319 U.S. 463 and United States v Gainey 380 US 63 (1965).

In the Namibian Courts the "rational connection" test as applied in Canada and the United States seems to have found favour. See in this regard: Namibian National Student's Organisation and Others v Speaker for the National Assembly for S.W.A. and Others 1990(1) SA 617; S v Titus, (unreported judgment of this Court by Frank, J in which O'Linn, J, concurred) given on 13 June, 1991, where reference is made to the situation in the United States of America.

In my opinion the test as applied in these cases is a practical one which would require an accused to speak up in circumstances where an explanation would be required because of the presumption raised by the proved facts and because of the personal knowledge of the accused. However where the proven facts are not such that an explanation is readily

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required the placing, in those circumstances, of an inverted onus on an accused will require an accused to prove his innocence which will be contrary to the Constitution containing a provision as that set out in Art. 12(1)(d) of the Namibian Constitution.

In the present matter Mr Blignaut has argued that there is no rational connection between the fact that the vessel "Frioleiro" was fishing illegally within the Exclusive Economic Zone of Namibia and the fact that the applicant is the owner of the boat. Mr Blignaut submitted that the proviso in section 17(1) could only be constitutional if and when the State has proved knowledge on the part of the owner that the vessel was fishing illegally. I think Mr Blignaut is putting the test too high.

As was stated by Laskin in his work The Canadian Charter of Rights, supra, "the connection between the proved fact and the presumed fact must at least be such that the existence of the proved fact, rationally tends to prove that the presumed fact also exists." (My underlining). If the State is required also to prove knowledge on the part of the

applicant there is very little to presume. The requirement is that the proved facts must tend to prove and not actually prove the presumed fact.

In the case of an owner-applicant it seems to me that once it is proven that its boat was caught fishing illegally in Namibia's Exclusive Economic Zone and it is further proved that the crew was in its employ and ostensibly acting within the course and scope of such employment and that the fish so caught was for the benefit of the owner there is in my opinion a rational connection between the proved facts and the presumed fact. It is further rationally open for the applicant to disprove the assumed fact by proving that he took all reasonable steps to prevent the use of the vessel in connection with the offence, and/or to prove his lack of knowledge.

Reverting back to the present case and although such rational connection may have been established in regard to the applicant as owner of the vessel "Frioleiro" so that the reversed onus cannot be said to be unconstitutional as it is concerned, I need not decide the issue for reasons which will hopefully become clear.

The proviso to section 17(1) is couched in wide and general terms to include <u>any rights</u> which <u>any person</u> other than the convicted person may have to such implement, boat, vessel or vehicle. The section then continues to saddle all and any holder of a right in such implement, vessel or boat

with a reverse onus to prove the taking of all reasonable steps to prevent the use thereof in the commission of the offence. There are a wide variety of rights which may be held in respect of a boat or vessel and thus a variety of people and or institutions holding such rights.

Because of the generality of the provision and because it does not distinguish between the various rightholders in such boat or vessel, in order to be constitutional the rational connection must exist in respect of all these possible rightholders otherwise it may be found that the presumption contained in section 17(1) is unconstitutional as regards some of those rightholders. If that is the case the presumption cannot be allowed to stand vis-a-vis those rightholders and the extend to which it is declared unconstitutional will depend on whether the Court is able to sever the good from the bad.

At this stage it is necessary to consider the effect of the case of Banco Exterior de Espana SA and Another v Government of the Republic of Namibia and Another 1992(2) SA 434.

The background to this case is that various Spanish fishing vessels were declared forfeited in terms of Section 17(1) of Act 58 of 1973, after conviction of the Masters and other crew members of the vessels for illegal fishing in

the Exclusive Economic Zone of Namibia in terms of Section 22A(4) of the said Act. The applicants in that matter, were the holders of mortgage bonds in the vessels. These bonds were registered in Spain according to Spanish law. The relief claimed by each applicant was a declarator whereby the respondents were required to recognise the rights of the applicants in the vessels. The Court, per Levy J, came to the conclusion that the issue of the liens or mortgages had to be decided according to the lex fori, i.e. the law of Namibia, and that the applicants' liens or mortgages, not complying with the law of the lex fori, would consequently give them no rights whatsoever in Namibia. For purposes of my decision I shall accept the correctness of this decision.

Although therefore the Banco Exterior de Espana-case has narrowed down the ambit of rightholders to those who are holders of such rights according to Namibian law the number of people or institutions which may have rights in a vessel or boat are still substantial. As was correctly found by Levy, J, the South African Admiralty Jurisdiction Regulation Act, Act No. 105 of 1983 does not apply to Namibia.

However prior to Act 105 of 1983 Admiralty Jurisdiction was exercised by South African Courts by virtue of the provisions of section 2 of the Colonial Courts of Admiralty Act 1890. (See in this regard Trivett & Co (Pty) Ltd v WM Brandt's Sons & Co Ltd, 1975(3) SA 432 (A)). The provisions of the Colonial Courts of Admiralty Act 1890 was therefore

part of the statute law of the Cape of Good Hope when by section 1(1) of Proclamation 21 of 1919 the law as existing and applied in that province was introduced into the then South-West Africa. (See further R v Goseb, 1956(2) SA 696 (SWA). S v Redondo 1993(2) SA 528 (NmSc) and The Law of Shipping and Carriage in South Africa, 3rd Edition, by Bamford, p. 4 footnote 27). In cases such as Tittel v The Master of the High Court, 1921 SWA 58 and Krueger v Hoge, 1954 (4) SA 248 (SWA) it was decided that statutes which applied in the Cape as at 1 January 1920 also apply in South-West Africa by virtue of the provisions of Proclamation 21 of 1919. This was again reaffirmed in the

Redondo-case, supra, at 5391 - 540B. Admiralty law as applied by the Colonial Courts of Admiralty Act, 1890, is therefore part of the Namibian Law.

Although Act 5 of 1972 of South Africa was enacted to govern jurisdiction of Courts in Admiralty cases, and was made specifically applicable to Namibia, this Act was however never promulgated and thus never applied in either South Africa or Namibia (See Euromarine International of Mauren v The Ship Berg, 1984(4) SA 647 at 665 E.)

By virtue of the Colonial Courts of Admiralty Act 1890 some six maritime liens exist and are therefore recognized according to Admiralty Law, applicable in Namibia, namely those of (1) salvage, (2) collision damage, (3) seaman's wages, (4) bottomry, (5) master's wages and (6) master's

disbursements. (See Transal Bunker BV v MV Andreco Unity and Others 1989(4) SA 325 (A) at 331 G; Lawsa, Vol 25 pa 177). According to Dillon and van Niekerk, Maritime Law and Marine Insurance 22 - 25 the maritime lien " ... arises automatically, by operation of law and without any agreement or formality, and comes into existence from the moment when the circumstances giving rise to the maritime lien occurs. It attaches the res secretly and without any record or registration, is not dependent upon possession of the res by the lien holder and remains so attached even if the res is thereafter alienated for value to a bona fide alienee without notice of the lien."

It was further submitted by Mr Blignaut that if regard is had to English Admiralty law foreign mortgagors would also have rights in a vessel according to Namibian Law which includes English Admiralty Law. (See Peca Enterprises (Pty) Ltd and Another v Registrar of the Supreme Court, Natal N.O. and Others, 1977 (1) SA 76(N) at 81 C - D; Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schif f scommerz Aussenhandelsbetrieb Per WB Schiffbau Intervening, 1979(4) SA 745 (N) at 750 G - H, and Ex parte Government of the United States of America: In re SS Union Carrier, 1950(1) SA 880 (C) at 884.) For purposes of this judgment I need not decide this issue but it is further illustation of the

wide variety of rights which may attach to a boat or vessel.

Looking at the rights which may attach to a boat or vessel, and I have only set out the examples above, it is immediately clear that any of those rightholders will also be subject to the provisions of section 17(1). Consequently if a boat or vessel in which such a lienholder has a real right, is forfeited by a court in terms of the provisions of section 17(1) the proviso to the section will require of such a lienholder to prove that he took all reasonable steps to prevent the use thereof in connection with the offence in order to avoid or set aside the forfeiture order. A lienholder in respect of damage caused by the vessel, or for salvage or master's disbursements, has nothing to do with illegal fishing and usually has no control over the boat. There is in my opinion no rational connection between such fact, i.e. the illegal fishing, and the presumed fact, i.e. the complicity of such a rightholder in the illegal fishing, so as to tend to prove the existence of such presumed fact in order to cast an onus on him to explain. The proved fact of illegal fishing simply does, in these instances, not raise a presumption that those holders of real rights in the vessel knew or could have taken reasonable steps to prevent it. In the case of such holders of rights the statutory inroad made into the presumption of innocence is arbitrary and unreasonable and therefore unconstitutional. To saddle them in these circumstances with a reverse onus will require of them to prove their innocence.

Mr Gauntlett submitted with reference to Pineiro's case that in the case of rightholders, other than the owner, they could with the greatest of ease discharge the onus placed on them by section 17(1). That may be so but the ease with which an onus can be discharged is not the test. In Pineiro's case the constitutionality of the presumption was neither raised nor argued. Further, on the basis that the provisions of section 35(3) and (4) were incorporated by reference into section 17, Mr Gauntlett argued that Section 17(1) should be so interpreted that not every person having a right in the vessel can apply for the setting aside of a forfeiture order but it should be limited to only the owner or hire-purchase owner as set out in section 35(4)(a)(i) and (ii) .

In my opinion the incorporation of the provisions of section 35(4) and (5) mutatis mutandis cannot change and limit the wide meaning of section 17(1) where it states that the forfeiture order shall not affect any rights which any person other than the convicted person may have in such vessel. (See also the Banco Exterior de Espana-case, supra, at 446H) .

The Court has come to the conclusion that in respect of a certain class of rightholder, e.g. the owner of the vessel or boat, the placing of a reversed onus on such class may be constitutional whereas it is unconstitutional as far as certain other classes of rightholders are concerned. If at

all possible the Court would be entitled to sever the bad from the good and only declare unconstitutional that part of the proviso to section 17(1) which militates against Article 12(1)(d) of the Constitution.

However the Legislator did not categorize the various rightholders but have joined them all together by stating that a forfeiture order shall not effect "any rights which any person other than the convicted person may have to such implement boat, vessel or vehicle", "if it is proved that such other person took all reasonable steps." The words "Such other person" refer back to "any person other than the convicted person."

In the circumstances it is impossible for this Court to sever the good from the bad, short from ourselves legislating and reading for "any person" the word "the owner" which in my opinion is not permissible. (See Johannesburg City Council v Chesterfield House (Pty) Ltd. 1952 (3) SA 809 (A)).

From this it follows that that part of the proviso to

Act 58 of 1973, set out hereunder namely: "if it is proved that such other person took all reasonable steps to prevent the use thereof in connection with the offence" is declared unconstitutional and is struck out.

STRYDOM, JUDGE PRESIDENT

FRANK, JUDGE

2. The issue of the ownership of the vessel is referred for hearing of viva voce evidence on a date to be arranged with the Registrar.

3. Respondents are ordered to pay the costs of the application. Such costs to include the costs of two Counsel.