SHAMIELAH HENDRICKS AND 4 OTHERS V ATTORNEY GENERAL OF NAMIBIA AND TWO OTHERS

CASE NO. (P) A 140/2000

2002/08/20

Teek, JP *et* Maritz, J

CONSTITUTIONAL LAW
COMBATTING OF IMMORAL PRACTICES ACT, 1980

Constitutional vagueness and overbreadth – meaning of "prostitution" and "lewd or immoral purpose" – words not terms of art – commonly used and frequently applied – definition of – not impermissibly vague.

Article 21(1)(j) of Constitution – protection of economic freedom – historical background of job reservation and discrimination – intended to guarantee freedom to choose and pursue profession, occupation, trade or business – choice limited to menu of lawful options – keeping of brothel for purposes of prostitution not a lawful option – proscription in s. 2(1) of the Act not derogating from that freedom – in any event, even if protected, derogation justified under article 21(2) in interest of public order, decency or morality – social ills associated with prostitution discussed.

Overbreadth and unreasonable restriction – definition of brothel including "place to visit for the purpose of 'unlawful carnal intercourse'" – such intercourse defined as intercourse between persons not married to one another or living in customary union – differences between such intercourse and intercourse in course of prostitution discussed – former not raising the same

moral, social, health and public concerns – inclusion of those words in definition of "brothel" falling outside the sweep of allowable area of State control – falls foul of minimum impairment rule and thus unreasonable

Overbreadth and unreasonable restriction – definition of brothel including "place to visit for other lewd or immoral purpose" – including activities that are otherwise perfectly lawful – not qualified to limit application to sexual interaction between persons – unreasonable restriction.

Article 25 (1)(b) of the Constitution - questions of constitutionality - Court will consider admissions, uncontested allegations and submissions relating thereto – not bound by concessions – constitutionality a question of law – Court charged by Constitution only to make declarator if it is of the opinion law is unconstitutional.

Article 25 (1) of the Constitution - serverance – Court not to make order of unconstitutionality wider than necessary - test for severance discussed – if "bad" part is severed, remainder linguistically sustainable, conceptually intact and functionally operational

Article 25(2) of Constitution - *locus standi* to challenge constitutionality of law – distinguished from requirements for common law standing – applicant bears *onus* to establish – applicants neither "aggrieved persons" nor claiming that a fundamental right has been "infringed or threatened" i.r.o their challenge to ss. 2(2), 10(b) and 12(3) of the Act – no standing to attack those sections.

Article 12(1)(d) of the Constitution – presumption of innocence – reverse *onus* provisions contained in ss. 2(3) and 12(1) and (2) of the Act – those provisions imposing full legal burden on the accused - rational connection test applied – provisions not passing muster - unconstitutional.

Article 12(1)(d) of the Constitution – rational connection test – adoption of the test by this Court suspect – not mindful of differences between our and other Constitutions – our Constitution not allowing in express terms derogation from entrenched right – presumption of innocence not qualified – *quaere*: should this Court not revisit the criteria adopted in earlier judgments allowing for reverse onus provisions?

Section 2(1) of the Act – keeping of brothel for the purpose of prostitution not unconstitutional – keeping of brothel for persons "to visit for purposes of unlawful carnal intercourse or for any other lewd or immoral purpose" severed and declared unconstitutional – latter struck from the definition.

Section 10(a) of the Act – "person knowingly (living) on earnings of prostitution" – not criminalizing prostitution – prostitution *per se* not a crime – section referring to pimps and others in a parasitic relationship with prostitute – not including those (s)he is under duty to maintain or those rendering services or supplying goods not associated with the promotion or management of her profession – not overly broad and unconstitutional.

CASE NO. (P) A140/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SHAMIELAH HENDRICKS	First Applicant
WILHELMINA ELIZABETH ROBERTSON	Second Applicant
CHARMAINE DU PLOOY	
THEODORA BEKOVA	Third Applicant
DIMITAR DIMOV KOUZIDIMOV	
	Fourth Applicant
	Fifth Applicant

versus

ATTORNEY GENERAL OF NAMIBIA	First Respondent
PROSECUTOR- GENERAL OF NAMIBIA	Second Respondent

MINISTER OF HOME AFFAIRS Third Respondent

CORAM: TEEK, J.P. *et* MARITZ, J.

Heard on: 2000/05/15

Delivered on: 2002/08/20

JUDGMENT

MARITZ, J.: Faced with charges that they have contravened sections 2(1) and 10(a) of the Combating of the Immoral Practices Act, 1980 (the "Act"), the applicants are seeking an order declaring sections 1(i), 2, 10 and 12 of the Act to be unconstitutional and of no force and effect. They are also seeking to interdict the second respondent from proceeding with the prosecution on those charges against them; an order compelling the third respondent to return to them all articles and monies seized from them on 16 November 1999 and costs of suit in the event of the application being opposed. In the *interim* they sought and obtained an order for the temporary stay of their prosecution in the Magistrate's Court pending the final determination of this application.

The grounds on which the applicants are attacking the constitutionality of the sections are wide-ranging: the sections conflict with or derogate

from the applicants' fundamental right to equality (Article 10); to presumed innocent (Article 12(1)(d); against self-incrimination (Article 12 (1)(f)); to privacy (Article 13); to freedom of association (Article 21(1)(e)) and to the freedom to practise any occupation, trade or business (Article 21(1)(j)); that the definition of "brothel" (read with the definition of "unlawful carnal intercourse" is overbroad and so too, is section 2(2) of the Act.

The respondents opposed the application in form but not in substance: they jointly filed a notice of opposition but, in his answering affidavit (echoed by the second and third respondents), the Attorney General states his stand on the issue as follows:

> "3. I wish to state unequivocally that I support the policy rationale underlying the Combating of Immoral Practices Act insofar as it criminalises the maintenance of houses of prostitution and the promotion of, and profiting from organised prostitution.
>
> 4. I sincerely believe that the afore-mentioned evils are unacceptable to the vast majority of the Namibian public and offend community standards of morality. For this reason, appropriate criminal laws are needed in this area.

> 5. I note that the Combating of Immoral Practices Act was enacted before Independence and in the absence of a supreme Constitution or a bill of rights. Having studied the statute, I have serious reservations as to whether certain sections of the statute will withstand constitutional scrutiny today. The Government of the Republic of Namibia stands ready to be guided by the Honourable Court as to the constitutionality of the sections challenged herein."

It is indeed so that the Act was adopted by the National Assembly of South West Africa under a positivistic dispensation where the exercise of its legislative discretion was not in any way fettered by the obligation to enact laws that do not conflict with or derogate from a body of entrenched fundamental rights. Whilst bearing this and the historical legislative disregard for certain basic fundamental rights under South African rule in mind but, at the same time, recognising the need to ensure a smooth transition to Independence, the Constituent Assembly adopted the body of South African laws applicable in South West Africa immediately before Independence as the laws of the new Namibian State. It did so, however, subject to the provisions of the Constitution and only until those laws are "repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court" (Article 140(1) of the Constitution). This Court is expressly charged in Article 80(2) with the adjudication of cases "which

involve the interpretation, implementation and upholding of (the) Constitution and the fundamental rights and freedoms guaranteed thereunder" and, in relation to pre-independence laws that do not meet the muster of the values articulated in the Constitution, to set them aside or to allow Parliament to correct any defect therein (Article 25(1)(b)). It is with this measure in mind that I shall first consider the constitutionality of the sections under which the applicants are charged (sections 2(1) and 10(a)), then the sections that do not form the subject matter of a charge (sections 2(2) and 10(b)) and finally, the presumptions (sections 2(3) and 12).

Sections 2(1) and 10(a) of the Act

Section 2(1) makes it an offence for any person to keep a brothel. In addition to its ordinary grammatical meaning, "brothel" by definition in section 1(i), "includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or immoral purpose." The Act also defines the word "house" to include "a dwelling-house, flat, building, room, out-house, shed or tent or any part thereof" and "place" to include "any premises, field, enclosure, space, vehicle or boat or any part thereof".

The extended definition in section 1(i) contemplates three activities, the commission of any of which will characterise a house or place as a "brothel": keeping or using it (a) for purposes of prostitution; (b) for persons to visit for the purpose of having unlawful carnal intercourse and (c) for persons to visit for any other lewd or immoral purpose. Those activities differ significantly from one another in substance and, for reasons of convenience, fall to be considered separately for purposes of the constitutional challenge. I shall do so in that order.

"… for purposes of prostitution"

This activity falls squarely within the ordinary and accepted meaning to the term "brothel" (see: *R v De Bruyn and Another*, 1957 (4) SA 408 (C) at 411A-B). The words "prostitution" and "prostitute" are not terms of art. They are commonly used and have frequently been considered and applied by this and other Courts in the past. In *R v Moonsamy*, 1918 TPD 79 the Court had to decide whether the evidence established that the appellant was a prostitute. De Villiers JP, who delivered the Court's judgment, said at 80:

> "We must take the word 'prostitute' in its ordinary sense – namely, a woman who is earning a living by means of prostituting her body."

(cf. *R v Wainer*, 1917 OPD 65 op 66). In *R v Kam Cham*, 1921 EDL 326 at 329 Graham JP, following *Moonsamy*'s case, held that the evidence in that case "was not sufficient to satisfy the Court that she was having indiscriminate connection for hire which it was necessary to establish in order to prove that she was a prostitute". The Court, relying on *R De Munck* [1918] 1 K.B.D. 635, accepted the view that proof of actual sexual connections is not necessary to prove that a person is a prostitute but that she may be one even if she is a *virgo intacta* who "submits her body for the purpose of general lewdness for gain". *De Munck's* case was also referred to in the matter of a *Reference Re ss.193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1159 where the Canadian Supreme Court (*per* Lamer, J.) held that the basic definition of prostitution is "the exchange of sexual services of one person in return for payment by another." Whilst I agree, I must add that the concept of prostitution always involves elements of indiscrimination and regularity: A mistress true to and kept by one lover can hardly be regarded as a prostitute and neither can a person who received payment for a single indiscretion. And whilst the traditional view of prostitution focused on the practice that it was almost invariably women who offered sexual services to men against payment and that other cross- or same sex prostitution was the

exception, the definition cannot be gender biased. Having considered these and other authorities in point, it seems to me that a prostitute is a person who renders sexual services on a regular and indiscriminate basis to another person for payment.

I must immediately point out that prostitution *per se* is not and was never a crime in common law. In earlier comments on the common law position, Milton and Cowling, *South African Criminal Law and Procedure*, vol. III at 343 wrote:

> "The law (and society) adopts an ambivalent attitude to this oldest of professions. On the one hand prostitution is condemned as a social evil while on the other hand it is tolerated in so far as it is not a criminal offence for a woman to be a prostitute nor is it an offence for a man to have sexual relations with a prostitute."

In *S v H*, 1988 (3) SA 545 (A) the prosecution submitted that prostitution was made an offence by s. 20(1)(a) of the Immorality Act, 1957 (RSA) – later renamed the “Sexual Offences Act”. That section, which reads identical to section 10(a) of the Act (and to which I shall return later in this judgment), provides that “any person who knowingly lives wholly or in part on the earnings of prostitution shall be guilty of an offence.” After a careful analysis of the section’s

predecessors in the Transvaal (s. 21(1)(a) of Ord. 46 of 1903), Orange Free State (s. 13(1)(a) of Ord. 11 of 1903), Cape (s. 33(1)(a) of Act 36 of 1902) and Natal (s. 15(1)(a) of Act 31 of 1903) and the legislative context in which the prohibition appears, Kumleben JA concluded (at 554F) that "on a proper interpretation of s 20(1)(a) it was not intended that criminal liability should attach to the prostitute involved…". The Court's finding had a quick response in South Africa: its Parliament criminalised prostitution by the promulgation of s. 20(1)(aA) of the Sexual Offences Act, 1957. A similar amendment was not made to the Act in Namibia and the common law position, as incorporated into our law by Article 66(1) of the Constitution, remained unaltered: Prostitution *per se* is not a crime.

It is from that premise that the applicants launched their main attack on the constitutionality of section 2(1) of the Act. Mr. Miller, appearing together with Mr. Mouton on behalf of the applicants, strenuously argues that the subsection creates an anomaly: Whereas a prostitute is seemingly allowed in law to ply his/her trade, s. 2(1) prohibits the prostitute from keeping or using any house or place for that purpose. In so doing, he submits, the Legislature "takes with the left hand, what it permitted with the right hand and the prostitute is left in a situation where she can for practical purposes not carry out her profession".

Hence, he contends, the essential content of the constitutional right to "practise any profession, or carry on any occupation, trade or business" entrenched in Article 21(1)(j) of the Constitution is negated.

The argument is by no means unique. In the *Reference*-case, *supra*, at 1162 Lamer J refers to the position in Canada where prostitution is also not illegal but where "almost everything related to prostitution has been regulated by the criminal law except the transaction itself". On that basis counsel in that case argued that Parliament had made prostitution *de facto* illegal even if it had not done so *de jure*.

Inasmuch as prostitution is not proscribed by law, it can hardly be contended that a prostitute's rights under Article 21(1)(j) have been directly infringed by section 2(1) of the Act. But even if I were to accept that the manner in which the Act regulates activities surrounding prostitution amounts to a *de facto* prohibition of the "profession", I have serious reservations whether it can be said that the applicants' rights as contemplated by Article 21(1)(j) are being derogated from. It is, in my view, implied by that Article that the protected right relates to a profession, trade, occupation or business that is lawful. The inclusion of that right in our Constitution must be seen against a shameful history of job reservation for the privileged few and the exclusion of a

large number of disadvantaged persons from access to certain professions, occupations, trades and businesses in South West Africa under South African rule. They are closely associated to the scourge of discriminatory *apartheid* laws and racist practices so expressly condemned in the preamble and other parts of our Constitution (cf. Articles 23, 40(l) and 63(i)). Those who founded this country's constitutional future were determined to eradicate those practices by providing, amongst others, for equal accessibility to and a free choice to pursue a career in any profession, occupation, trade or business. They never contemplated or intended to create a constitutional right to be or become a professional pedophile, assassin, kidnapper or drug lord.

I find some support for this view in the judgments of other courts in this region where South Africa had a similar and equally notorious history of racial discrimination and apartheid in the workplace. The historical similarity is apparent from the judgment in *City of Cape Town v AD Outpost and Others*, 2000 (2) SA 733 (C) at 747B-E, where Davis J quoted with approval the following remarks of Jones J in *JR1013 Investments CC and Others v Minister of Safety and Security and Others,* 1997 (7) BCLR 925 (E) 930B-E:

> "We have a history of repression in the choice of trade, occupation or profession. This resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions on where and how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens in the country did not have a free choice of trade, occupation and profession. Section 22 is designed to prevent a perpetuation of this state of affairs."

That being the case, judgments dealing with the entrenchment of a similar freedom in the interim and final Constitutions of the Republic of South Africa are of some relevance to the interpretation of Article 21(1)(j). In *S v Lawrence; S v Negal; S v Solberg*, 1997 (4) SA 1176 (CC) at par [34] Chaskalson P summarised the South African Constitutional Court's understanding of that freedom protected under s. 26 of the Interim Constitution:

> "On this approach to the interpretation of s 26 the right to engage in economic activity and to pursue a livelihood anywhere in the national territory would entail a right to do so freely with others. Implicit in this is that the participation should be in accordance with law. Thus nobody can claim that s 26 gives him or her the right to deal in stolen property or in harmful drugs or to break the law in any other way."

It is against Namibian law to keep a brothel. Unless the law is unconstitutional for another reason, it cannot be unconstitutional on account of Article 21(1)(j) simply because the business of "keeping a brothel" is not included in the menu of lawful business options available to the applicants.

But even if I accept that the manner in which prostitution is regulated and restricted by the Act *de facto* diminishes the right protected under Article 21(1)(j), it is by no means the end of the enquiry. In terms of Article 21(2) of the Constitution, Parliament has the right to limit the exercise of that freedom by law "in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or

morality, or in relation to contempt of court, defamation or incitement to an offence."

Summarising the Supreme Court's interpretation and application of Article 21 (2) in *Kauesa v Minister of Home Affairs and Others*, 1995 NR 175 (SC); 1996 (4) SA 965 (NmS), this Court said in *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs and Another; Nasilowski and Others v Minister of Justice and Others*, 1998 NR 97 (HC) at 101H-102D:

> "Based on the analysis of Article 21(2) by Dumbhutshena J in the *Kauesa* case, I am satisfied that any legislative provision which derogates from a person's right to freedom of speech and expression guaranteed in Article 21(1)(a) will, if challenged in a competent court, only be allowed to stand: (a) if that law imposes a reasonable restriction on the exercise of that freedom; (b) if that restriction is necessary in a democratic society and (c) if that restriction is required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality or required in relation to contempt of court, defamation or incitement to an offence (*Kauesa* p. 976B-C). Moreover, the "clawback" provisions of Article 21(2) are to be restrictively interpreted "*to ensure that the exceptions are not unnecessarily used to suppress the right to freedom guaranteed in Article 21(1)(a)"* (*Kauesa* p 981A) and the onus to prove that a legislative restriction falls squarely within the enabling provisions

> of Article 21(2) is on the Government which relies on the enforceability of the provision (*Kauesa* p 890A). In determining whether the Government has discharged that *onus* in any particular case, the court will be mindful that the law in question has been enacted by a body of democratically elected representatives of the people and allow a margin of appreciation in favour of Parliament's views.
>
> In determining whether a legislative provision passes the constitutional muster of Article 21(2), the court needs to identify the legislative objective of the Act; examine the means employed by the Legislature to achieve that end and satisfy itself that the one is rationally and reasonably connected to the other by applying the values and principles of a democratic society."

That is also the approach I intend to follow when considering the constitutional permissibility to prohibit the keeping of brothels.

The legislative objective of the Act, stated in general terms, is to maintain and promote public order, decency and morality and to prevent incitement to an offence. Those are permissible objectives expressly contemplated in Article 21(2). In so doing, the Legislature not only prohibited the keeping of brothels, but also the enticement or procurement of females to a brothel or to become prostitutes (s. 5), public solicitation (s. 7), the commission of immoral acts in public (s. 8), the exploitation of prostitutes for gain (s.10) and the commission of

sexual offences with girls under the age of 16 years, with female idiots or imbeciles and the like (ss. 14 and 15). The Legislature was clearly concerned both with the social ills at the core of prostitution and the keeping of brothels and with those on the periphery, such as child prostitution (especially in the poorer sections of the community with which this Court had to deal with on a number of occasions in the recent past), the notorious trafficking in women, the spread of HIV/AIDS and other sexually transmitted diseases and the nuisance or embarrassment that members of the public will be submitted to if brothels are established in their neighbourhoods, if prostitutes are permitted to publicly display themselves naked or in a demeaning manner in parlor windows and if they solicit business in the streets. In the latter regard Dickson CJ, dealing with sections 193 (keeping of bawdy-houses) and 195.1(1)(c) (public solicitation for purposes of prostitution) of the Criminal Code (Manitoba, Canada), said in the *Reference*-case, *supra*, at 1135 :

> "The Criminal Code provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses and residents of urban neighbourhoods Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. In my opinion, the eradication of

> the nuisance-related problems caused by street solicitation is a pressing and substantial concern. I find, therefore, that sending the message that street solicitation for purposes of prostitution is not to be tolerated constitutes a valid legislative aim."

It is with the general objectives of the Act in mind and the specific manner in which the Legislature went about to address them that I find the legislative purpose behind section 2(1) of the Act (in proscribing the keeping of brothels for the purpose of prostitution) as a valid and pressing one.

Turning to the reasonableness of the measures employed to achieve that statutory objective, I again remind myself that prostitution *per se* is not an offence. In the latter context I must briefly refer to the "apparent anomaly" propagated by Mr. Miller in argument. In *S v Jordan and Others*, 2002 (1) SA 797 (T) at 801B-I Spoelstra J dealt with a similar argument:

> "If I understand the argument correctly its point of departure and its conclusion is the same: namely, if prostitution is not criminal then no activity involving prostitution may constitute an offence. Once a woman is entitled to sell her body, everyone else is entitled to engage in services for his or her own gain to facilitate the prostitute in doing so. Such a submission ignores the fact that the brothel owner and the brothel employee cannot rely on

the same considerations that are relevant when the rights of the prostitute as an individual are inquired into. This difference is thoroughly outlined by the following quotation contained in Ms De Kock's heads of argument from *Prostitution in Europe* by Abraham Flexner (1919) at 94 - 5:

> 'A man and a woman may be permitted unobtrusively to arrange and carry out a rendezvous. So far there appears to be no police method of dealing with them effectively and impartially. But when the streets are used to carry on negotiations and thereby others are drawn into the maelstrom; when third parties - be they pimps, bordello keepers, vendors of liquor and entertainment, or others - endeavour to develop prostitution for their own profit; when disease is communicated, not infrequently to innocent persons: in all such cases a third party is concerned; and a public that was more or less indifferent as to what took place between two mature individuals has become increasingly clear as to its interests and duty.'

When prostitution becomes an organised business venture conducted by persons who profit from the prostitutes' activities, it is no longer a private affair between a man and a woman (or nowadays between any two persons), which takes place in private without directly affecting third parties. When it becomes a business openly carried on in business or residential areas or the streets or in buildings, the rights of every other citizen and therefore the community are affected. The evidence placed before the court in this matter shows conclusively that the general public regards any form of prostitution with repugnance

> and disgust. All such individuals have the right to be free of the risk of being accosted on a street by a prostitute or a pimp or of having to tolerate not only the disturbance of their peace of mind, their ethical or moral serenity, dignity and tranquility, but also of being exposed to and having to endure all the byproducts that accompany such business, such as disorderly, disgraceful or disgusting conduct, drunkenness and drug abuse - to name but a few."

I agree with the differentiation he made. Denying a person the right to keep a brothel for the purpose of prostitution impacts mainly on the ability of the brothel-keeper to earn an income from prostitution – in practice almost invariably from making money by selling sexual services rendered by prostitutes. It also deprives the prostitute from earning an income in a brothel. The financial implications that the prohibition has for brothel-keepers and prostitutes alike are far removed from the core issues that Article 21(1)(j) is seeking to protect, i.e. the freedom to choose and pursue a particular profession, occupation, trade or business. Considering the pressing and justifiable governmental and legislative concerns relating to public order, decency and morality, the prejudicial effect of the prohibition on the earning capacity of prostitutes and brothel-keepers pales by comparison.

It is for these reasons that I conclude that inasmuch as section 2(1), read with the definition of “brothel”, proscribes the keeping of a brothel for the purpose of prostitution, it constitutes a reasonable restriction that is necessary in a democratic society and, furthermore, that it is rationally connected and proportional to the statutory objective of the Act to promote and maintain public order and standards of decency an morality.

“…to visit for the purpose of having unlawful carnal intercourse”

But can the same be said if a house or place is defined, not by keeping or using it for the purpose of prostitution, but for persons to visit for the purpose of having “unlawful carnal intercourse”? The latter phrase is defined in section 1(vi) of the Act to mean –

> “carnal intercourse between persons who are not married or who are not partners in a customary union in terms of the traditional laws and customs applied by a particular population group referred to in section 3 of the Representative Authorities Proclamation, 1980 (Proclamation AG. 8 of 1980).”

It is the incorporation of that phrase in the definition of “brothel” that constitutes the basis of the applicants’ contention that the proscription in section 2(1) is overbroad. Mr. Miller submits on behalf of the

applicants that sexual intercourse between persons who are not partners in a civil or customary union is widely accepted and tolerated in society. It is unreasonable, he contends, to penalise those persons for “keeping a brothel” if they use their bedroom regularly for the purpose of having sexual intercourse with one another. He argues that it is anomalous for the Legislature to say that adultery is not an offence but, if you keep a room for you and your lover to visit regularly for the purpose of having sexual relations, you may be charged with and convicted of keeping a brothel.

The Government Attorney, acting on behalf of the respondents in these proceedings, agrees.

To the extent that carnal intercourse between a prostitute and his or her customer falls within the definition of “unlawful carnal intercourse”, the Legislature must have intended to cast the net of what is regarded as a brothel wider by the inclusion of the phrase “for persons to visit for the purpose of having unlawful carnal intercourse” than would have been the case had the definition been limited to “a place kept or used for prostitution”. By using the phrase “unlawful carnal intercourse” the Legislature must have intended for purposes of that definition to refer to carnal intercourse taking place in circumstances other than in the

context of prostitution. The question that falls to be decided is whether the inclusion of those other activities within the sweep of the definition does not render the proscription in section 2(1) unreasonable and for that reason overly broad and constitutionally impermissible.

If the meaning of “unlawful carnal intercourse” in the definition of “brothel” is qualified as I have indicated in the previous paragraph, the difference between a person having such intercourse with another and a prostitute selling her services to a customer is at once apparent. Sexual intercourse of a carnal nature between persons involved in an exclusive relationship (other than marriage or a customary union) will, for example fall within the ambit of the definition. Not only unmarried persons that are living together as husband and wife but also those that are married to one another according to religious rites or practices not recognised by law as a civil marriage or regarded as a customary union (e.g. Muslim marriages) are brought within the scope of the definition. So too, are lovers and mistresses, no matter how discreetly they conduct their relations. There are also other examples.

Including in the definition of “unlawful carnal intercourse” all such sexual interaction as may take place between persons who are not partners in a civil or customary union, may well be justified in respect

of the prohibitions contained in the Act regarding unlawful carnal intercourse with girls under the age of 16 years (section 14(1)(a)); with a female idiot or imbecile in circumstances that do not otherwise amount to rape (section 15(a)); with a female who has been stupefied or overpowered for that purpose by the use of certain substances (section 16) or with a female who is detained against her will at a house or other place for that very purpose (section 13(1)(a). I must, however, immediately add that, given the gender-biased and apparent discriminatory manner in which those sections have been promulgated, I do not wish to be understood to make any finding about the constitutionality thereof.

Other than those, carnal intercourse between persons not bound to one another by civil marriage or customary union does not raise the same moral, social, health and public concerns than those associated with prostitution. No payment is involved that may entice persons to sell their bodies, their dignity or sexuality whether it be for reasons of necessity or avarice. Unlike prostitution, carnal intercourse (as qualified) normally has a substratum of love or affection and rarely involves engagement in indiscriminative sexual relations with numerous strangers.

It is not difficult to imagine a wide range of morally acceptable activities that may fall foul of section 2(1) of the Act. I shall illustrate it by reference to only one example. If, bearing the other definitions in mind, one reads the definition of "brothel" to include any room or premises used for unmarried persons to visit for the purpose of carnal intercourse, virtually every hotel, guest house or other accommodation establishment in Namibia is a brothel for purposes of the Act and every keeper of those establishments (not to mention those who are deemed to keep it under section 2(2)) makes him- or herself guilty of an offence. Whilst I do not agree with Mr. Miller that a single act of "unlawful carnal intercourse" will make the place or house a brothel (compare *S v M*, 1977 (4) SA 886 (A) at 895H: "...where the definition speaks of a house or place '... used for purposes of prostitution...' ... it does not refer to a house or place where a single act, or a few isolated acts, of prostitution may have taken place"), I have no doubt that the type of accommodation establishments mentioned are consistently so used with full knowledge of their respective managements that their occupants are not necessarily married and may have carnal intercourse with one another during their stay. Yet, if one would suggest to them that they are keeping brothels according to the strict letter of the law, they will be appalled. Not to mention their guests who

will be horrified to hear that they have taken up residence in a "brothel"!

By the inclusion of the wide concept of "unlawful carnal intercourse" in the definition of "brothel", the keeping of which is punishable under section 2(1), the Legislature went beyond that which is necessary in a democratic society and required in the interests of public order, decency or morality. Sweeping as wide as it does, it in effect prohibits activities that falls beyond the allowable area of state control and included restrictions not reasonably required for the realisation of the otherwise legitimate objectives of the Act. In short, it falls short of the minimum impairment rule, is not proportional to the interests the Act is seeking to protect and is, for these reasons overbroad and unconstitutional.

"…for any other lewd or immoral purpose"

As regards the meaning of the words "for any other lewd or immoral purpose" in the definition of "brothel", I do not find them to be overbroad on account of vagueness. Those words too, are not terms of art but are commonly used and have frequently been interpreted and applied by our Courts (Compare e.g. *R. v H. and Another*, 1959 (4) SA 427 (AD) at 432G; *S v P*, 1975 (4) SA 68 (T) and *S v D*, 1975 (4) SA 835

(T)). Invited by counsel appearing for the appellants in *S v M*, 1977 (3) SA 379 (C) to interpret those words restrictively or *eiusdem generis* with "prostitution" and "unlawful carnal intercourse", the Court (*per* De Kock J) declined and reasoned (at 381F-382C):

> "It seems to me, however, that to construe the section in such a way would do violence to the ordinary grammatical meaning of the words used by the Legislature. It has often been pointed out that the *eiusdem generis* rule must be applied with caution. Here the language used is so wide that to cut down its meaning in the way that has been suggested can only be justified on the basis that the Court must read into the phrase 'or for any other lewd or indecent purpose' a word such as 'similar', or alternatively, if the Court is to ignore the use of the word 'any' in the section. It is interesting to see that in England where the only word used in the relevant statute is 'prostitution' the argument in favour of a limited construction of the word has also not found favour. The meaning of the word 'prostitution' is not limited to sexual intercourse as such. It has been held that prostitution is proved if it is shown that a woman offers her body or herself for purposes amounting to common lewdness in return for payment. (See *R. v Webb*, (1963) 3 All E.R. 177 (C.A.).) This case is persuasive authority for the proposition that, even if the word 'brothel' in our Act had been defined only as a house or place kept or used for purposes of prostitution, it would not have been necessary for the State to prove acts of sexual intercourse or some activity akin to it, in order to obtain a conviction. But our Act goes further

> than the English statute by adding to the definition the words ‘or for any other lewd or indecent purpose’…
>
> If acts of the nature charged before the Court in those cases are covered by the statute in that they fall under the words ‘any other lewd or indecent purpose’ it shows that the words in question do not refer only to acts that are related to or necessarily associated with carnal intercourse. The Legislature has used wide language and I do not think that there are circumstances present which would warrant the Court in giving a restrictive interpretation to the words under consideration. The appellant, in my view, by staging the performances revealed by the evidence, kept or used his house for a lewd or indecent purpose and was rightly convicted of keeping a brothel.”

So applied, massage parlors where pelvic massages had been given and clubs where stripteases had been performed were all considered to fall within the definition of “brothel” and those keeping them have been punished accordingly. Whilst Milton and Cowling, *op. cit.*, at E3-121 questions whether “other forms of lewdness or indecency (such as the obscene exhibition of persons or films to viewers) would serve to render a place a brothel”, I find it difficult to see on which principle the presentation of an obscene strip show can be distinguished from the showing of a pornographic film or, for that matter, the showing of a collection of obscene pictures, paintings or other objects. Does this mean that every theatre regularly visited by the public because it

screens films with pornographic scenes and every shop that sells pornographic material such as sex aids, “girlie” magazines, triple x-rated videos and the like must be regarded as a “brothel” because it is frequented by persons with lewd or immoral purposes? On the interpretation given to those words in *S v M*, *supra*, it seems to me that the answer must be in the affirmative.

Many of those activities are otherwise perfectly lawful or regulated under other statutes, but these examples again illustrate why, by the inclusion of those words, the Act imposes a constitutionally impermissible restriction. The prohibition is formulated in a manner that allows for application far wider than that necessary to attain the objectives of the Act.

Given the lack of constitutional restraint when the Act was promulgated, it is not surprising that the Legislature failed to tailor the words used in the prohibition with the preciseness required for them to only address the social evil the statute was aimed at but that it encroached into areas of conduct that, since Independence, have been constitutionally protected. Had the words “lewd or immoral purpose” been qualified by words such as “involving indecent sexual interaction

with another person against payment", the result might have been different.

The conclusion of the Court on the constitutional challenge to section 2(1) read with section 1(i) of the Act is that section 2(1) is constitutional only to the extent that the definition of "brothel" can be limited to "any house or place kept or used for purposes of prostitution". To the extent that it includes the words "or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or immoral purpose", it is unconstitutional. For the sake of completeness, I should add that I have also considered the other grounds on which the constitutionality of section 2(1) has been attacked (such as the right to freedom of association, equality or privacy) but do not find that any of those rights have been detracted from in any unconstitutional manner if the prohibition is limited to the keeping of a brothel for the purpose of prostitution.

Severability

I am mindful that the respondents have not argued that section 2(1) is constitutional to the extent that I have found it to be. Although the Court will give due consideration and weight to admissions, uncontested allegations and submissions as to the alleged

unconstitutionality of a particular law, they are not binding in any way. Whether or not a statute is constitutional is ultimately a question of law to be determined by the Court. That the Court cannot abrogate that constitutional responsibility or leave it to the litigants to agree on, is evident from Article 25(1)(b) of the Constitution – it only allows for judicial interference "(i)f a competent Court is of the opinion that such law is unconstitutional".

This Court may and will only strike down a law to the extent that it is unconstitutional. Article 25(1) makes it clear that "Parliament or any subordinate legislative authority shall not make any law …which abolishes or abridges the fundamental rights and freedoms conferred … and any law …in contravention thereof shall *to the extent of the contravention be invalid*…" (emphasis added). If the Court holds that any part of a law is unconstitutional, it is obliged to consider whether that part can be severed from the rest without changing the statutory scheme that the Legislature had in mind. The test for severability adopted by the Supreme Court in *Government of the Republic of Namibia and Another v Cultura 2000 and Another*, 1994 (1) SA 407 (NmS) at 424F is that laid down in the case of *Johannesburg City Council v Chesterfield House (Pty) Ltd*, 1952 (3) SA 809 (A) at 822C-F:

> "(W)here it is possible to separate the good from the bad in a statute and the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute . . . Where, however, the task of separating the bad from the good is of such complication that it is impractical to do so, the whole statute must be declared ultra vires. In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test."

Severance is inappropriate when the remaining "good" part of the statute is so inextricably bound up with the unconstitutional part that what remains does not give effect to the statutory scheme - or, as Kentridge AJ and Langa J more eloquently remarked in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*, 1995 (4) SA 631 (CC) at 649A: "Their roots are entangled too tenaciously in the surrounding soil for a clean extraction to be feasible."

The position in this case is slightly different to the one that the Supreme Court dealt with in the Cultura-case: The statute under consideration in that case was promulgated after Independence, whereas the Act is part of the body of pre-independence legislation

that survived succession. Dealing with pre-constitutional South African legislation in the *Coetzee*-case, Sachs J (par. [75]) qualified the test slightly:

> "Severability is an important concept in the context of the relations between this Court and Parliament; like 'reading down', it is an instrument of judicial restraint which reduces the danger of producing an overbroad judicial reaction to overbroad legislation. I agree with Kriegler J's analysis of the matter, subject to one methodological qualification I feel worth mentioning. It is the following: in deciding whether the Legislature would have enacted what survives on its own, we must take account of the coming into force of the new Constitution in terms of which we receive our jurisdiction and pay due regard to the values which it requires us to promote. We must, accordingly, posit a notional, contemporary Parliament dealing with the text in issue, paying attention both to the constitutional context and the moment in the country's history when the choice about severance is to be made. It is in this context that we must decide whether the good can be separated from the bad. In the instant case the excisions which my Colleague proposes would leave a statutory provision that in my view is linguistically sustainable, conceptually intact, functionally operational and economically viable; I agree with them."

The part of the definition of "brothel" that I have found to be unconstitutional serves only one purpose: to extend the range of

activities that defines a house or place as a brothel beyond that of prostitution. They can be severed without in any way affecting the main legislative concern, i.e. that of keeping a house or place for the purpose of prostitution. That, so it appears from the respondents' affidavits, would also have been the concern of a post-independence Parliament. If the unconstitutional part of the definition is excised, the remainder will still be "linguistically sustainable, conceptually intact (and) functionally operational".

Section 10(a) of the Act

Section 10(a) of the Act makes it an offence for a person to knowingly live wholly or in part on the earnings of prostitution. I have pointed out earlier with reference to S v H, *supra*, that the section does not prohibit a prostitute to live of the income of his or her trade. Whilst counsel for the applicants concedes that the section is aimed at third parties living on the earnings of prostitution, he contends that the section is unconstitutional because it conflicts with the applicants' rights to equality, privacy, freedom of association and to carry on any trade or occupation. He also submits that the section is vague and overbroad, amongst other, because it may be construed to include those persons that the prostitute is in common law obliged to maintain.

I shall deal with the latter argument first. Considered in its historical context, the prohibition is intended to target persons who exploit prostitutes for a living. Referring to a similarly worded provision in the old Transvaal ordinance (No. 46 of 1903) Wessels J said in *R v Seligman,* 1908 TS 390 at 393:

> "The section refers to anybody who takes money from a prostitute for the purpose of furthering prostitution. That, after all, is the test of the whole question - was the money paid by the prostitute for the purpose of furthering her trade, and was it received by the accused for the purpose of aiding and abetting her in her trade and helping her to carry it on? If he receives money from a prostitute for that purpose, he must be said to live on the proceeds of prostitution."

The focus is therefore on those paid by the prostitute to further his or her trade. Typical of those are pimps who manage, support, protect and further prostitutes' businesses for a share of the earnings and landlords who knowingly allow the use of their premises for prostitution against payment (Milton and Cowling, *op. cit*., E3-97). In *Shaw v Director of Public Prosecutions*, [1961] 2 All ER 446 the House of Lords had to interpret the same expression. In his opinion Lord Reid referred to the normal meaning of the words "living on" saying that, in the context, it connotes living parasitically (at 454B-C). Although the words

could have a wider meaning, one should remember that the statute is a penal one that must be construed restrictively.

It is the parasitic preying on the sexual services rendered by a prostitute that characterises the relationship and brings it within the ambit of the prohibition. It is also this characteristic that distinguishes it from the natural obligation a parent has to maintain a child, or for that matter, a person receiving payment for professional or other services rendered and goods supplied that is not linked to the support or promotion of the prostitute's trade, such as her lawyer or greengrocer.

Hence, the words do not have the wide meaning Mr. Miller contends for in support of the applicants' constitutional attack based on overbreadth. In any event, even if they are ambiguous but nevertheless capable of interpretation supportive of their constitutionality, the Court is obliged to favour such interpretation by reading down the section (See: Chaskalson *et al.*, *Constitutional Law of South Africa*, p9-5 para 9.3 (a)) – especially in the case of penal laws. It is in the nature of language, where the same word may have different meanings depending on syntax and context, that it always leaves scope for interpretation. The mere fact that a word or sentence does

not only bear one meaning, does not make it impermissibly vague or constitutionally assailable. I do not find such vagueness or uncertainty in the provisions of section 10(a).

Except in the case of a prostitute who both manages (“keeps”) and uses a house or place to prostitute only herself, there is in principle little difference between the person “living wholly or in part on the earnings of prostitution” and a person “keeping a brothel for the purpose of prostitution”. Both are using prostitutes to generate an income for themselves. For the same reasons that I have found that Article 21(1)(j) of the Constitution does not afford the brothel-keeper a right to generate an income in that manner, I also hold that it does not protect a person living parasitically off a prostitute’s earnings. But even if such a right is protected under Article 21(1)(j), the limitation thereof in the manner contemplated by section 10(a) of the Act is justified for the same reasons that I have earlier mentioned in relation to section 2(1) of the Act. I need not repeat them.

The other constitutional grounds on which the applicants are seeking to assail the section are either without merit or irrelevant. The attack on the constitutionality of section 10(a) of the Act must therefore fail.

Section 2(2) of the Act

Section 2(2) of the Act lists a number of acts that "are 'deemed' to amount to the keeping of a brothel" (per Corbett JA in *S v M and Another*, 1977(4) SA 886 (AD) at 896A). It reads:

> "(2) The following persons shall for purposes of sub-section (1) be deemed to keep a brothel, namely-
>
> (*a*) any person who lives in a brothel unless he proves that he was ignorant of the character of the house or place;
>
> (*b*) any person who manages or assists in the management of any brothel;
>
> (*c*) any person who knowingly receives all the money or any share of the money taken in a brothel;
>
> (*d*) any person who is a tenant or occupier of any house or place and who knowingly permits it to be kept or used as a brothel;
>
> (*e*) any person who is the owner of any house or place and who lets it or allows it to be let or to continue to be let, with a knowledge that such house or place is to be kept or used or is been kept or used as a brothel;
>
> (*f*) any woman found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof;
>
> (*g*) any person whose spouse keeps or lives in or manages or assist in the management of a brothel, unless such person proves that he or she was

> ignorant thereof or that he or she lives apart from the said spouse and did not receive all the money or any share of the money taken therein."

As Milton and Cowling, *op. cit.*, at E3-110 concludes with reference to a number of authorities in point, "(t)he effect of this section is not to create a presumptive conclusion that a person mentioned in it has committed the offence of keeping a brothel, but rather to list the persons who can be dealt with as brothel-keepers". If the Prosecution alleges that the accused is a person "deemed to keep a brothel" (not one "keeping a brothel"), it will have to charge the accused accordingly with reference to the specific paragraph of section 2(2) allegedly contravened. It cannot charge the accused with "keeping a brothel" in contravention of section 2(1) and then, by proving that the accused acted in the manner contemplated in one of the paragraphs under section 2(2), secure a conviction on that charge. The "deeming" provision in section 2(2) does not assist the Prosecution's case against an accused charged with a contravention of section 2(1) of the Act.

The applicants are not charged with a contravention of section 2(2) of the Act. For the reasons I have mentioned , they are therefore not in jeopardy of a conviction thereunder and that subsection cannot be construed as a presumptive conclusion that they have contravened

section 2(1) of the Act. That being the case, the *locus standi* of the applicants to attack the constitutionality of section 2(2) must be questioned.

In common law a person who claims relief from a Court in respect of any matter must, as a general rule, establish that he or she has a "direct interest in that matter in order to acquire the necessary locus standi to seek relief" (*per* Rabie ACJ in the case of *Cabinet of the Transitional Government for the Territory of South West Africa v Eins,* 1988 (3) SA 369 (A) at 388A).

When it comes to constitutional matters, the common law position was drastically altered in the Republic of South Africa, firstly, by the promulgation of s 7(4) of the interim Constitution and, later, s. 38 of the final Constitution. This was pointed out in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*, 2000(1) SA 997 (C) at 1028J - 1030B. On account thereof Chaskalson P, dealing with the interim Constitution in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*, 1996 (1) SA 984 (CC) at para [165], adopted a broad approach to legal standing on such issues, stating that:

> ''Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of s 7(4) of the Constitution . . .''

(Compare also the judgment of O'Reagan J at paras [229] and [230]; *Beukes v Krugersdorp Transitional Local Council and Another,* 1996 (3) SA 467 (W); *Coetzee v Comitis and Others,* 2001 (1) SA 1254 (C) at 1264A-C; *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another*, 2001 (2) SA 609 (E) 619A-E)

Whilst I respectfully agree with the general tenor of that approach, I must immediately point out that our Constitution does not expressly authorise standing to persons acting as a member of, or in the interest of, a group or class of persons or acting in the public interest - as the South African Constitution does. It provides in Article 25(2) that

“(a)ggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom…”.

It is not necessary for purposes of this judgment to grapple with the question whether class actions or public interest suits may be brought to determine the constitutionality of legislation or governmental actions. Suffice it to say that the applicants did not seek to bring the application on that basis. Moreover, no case has been made out in their founding papers that any of their rights or freedoms has either been infringed or threatened by the provisions of section 2(2) of the Act. It is clear that they are not being charged with a contravention under any of the paragraphs of that subsection or that that they are in jeopardy of being deemed to be brothel-keepers thereunder. They do not say in their affidavits that they have or intend to perform any of the acts referred to in section 2(2)(a)-(g) of the Act. Hence, the determination of the constitutionality of those provisions will, as far as they are concerned, only be of academic interest. No case has been made out that the provisions affects any of their rights or freedoms nor are there any facts apparent from the papers on account of which it

can be said that they may be regarded as “aggrieved” by the existence of those provisions on the statute book.

Whether in a constitutional or common law context, the person seeking relief from the Court, bears the burden to prove his or her standing (See *Gross and Others v Pentz*, 1996 (4) SA 617 (A) at 632D “The general rule is 'that it is for the party instituting proceedings to allege and prove (my emphasis) that he has locus standi, the onus of establishing that issue rests upon the applicant. It is an onus in the true sense; the overall onus. . .'. (*Mars Incorporated v Candy World (Pty) Ltd*, 1991 (1) SA 567 (A) at 575H-I)”). The applicants have failed to do that in so far as they challenge the constitutionality of section 2(2) of the Act.

Section 10(b) of the Act.

Section 10(b) of the Act makes it an offence to “in public or in private in any way assist… in bringing about, or receive… any consideration for, the commission by any person of any immoral act with another person”. Mr. Miller concedes that the applicants are not charged with a contravention of this section and are not in danger of being convicted of a contravention thereof. With that concession in mind, the Court

raised with him the applicants' standing to take issue with the constitutionality thereof. He immediately conceded that the applicants have failed to establish such *locus standi* and referred the Court to the Supreme Court's endorsement of the approach to constitutional issues adopted by Bhagwati J (as he then was) in *M M Pathak v Union* (1978) 3 SCR 334: "It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case."

Section 2(3) of the Act

The same cannot be said for the presumptions in section 2(3) of the Act. The subsection contains presumptive conclusions that "reverse" the onus of proof in relation to the presumed facts once the State has proven the other threshold facts for the presumption to become operative. The section provides as follows:

> "(3) When in any prosecution in terms of this Act it is proved-
>
> (*a*) that any house or place is kept or used as a brothel and that, having regard to the locality and accommodation thereof, the rent to be paid or paid or being paid for the house or place concerned is exorbitant, it shall be presumed, until the contrary is proved, that the accused knew that the house or place concerned was kept or used as a brothel;

(*b*) that a notice in writing has been given to the accused by a police officer of or above the rank of sergeant or by two householders living in the vicinity of the house or place concerned, that the house or place concerned is kept or used as brothel, it shall be deemed that the accused knew that the house or place concerned was kept or used as a brothel."

Mens rea being one of the elements of the offence created by section 2(1) (see. Milton and Cowling, *op. cit*. at E3-108), the purpose of section 2(3) is presumably to assist the State in discharging the burden of proof it bears. These presumptions, Mr. Miller contends, diminishes the applicants' right to be presumed innocent until proven guilty according to law as guaranteed by Article 12(1)(d) of the Constitution.

The right to be presumed innocent lies at the very heart of our criminal justice system. Its objective is to protect the innocent and to ensure that it is only those proven guilty beyond reasonable doubt that will be punished. In *R v Oakes*, (1986) 26 DLR (4th) 200 the Canadian Supreme Court (per Dickson CJC) examined the reasons underlying the presumption and said at 212-213:

"The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State

> of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice."

The presumption, so Dickson CJC held at p. 214 of the same judgment, contains three fundamental components: (a) the *onus* of proof lies with the prosecution; (b) the standard of proof is beyond reasonable doubt; and (c) the method of proof must accord with fairness. A reverse *onus* provision detracts from the right to the benefit of that presumption to the extent that it relieves the prosecution from proving one or more of the elements of the offence. As Madala, Sachs and Yacoob JJ pointed out in *S v Manamela and Another (Director-General of Justice intervening),* 2000 (3) SA 1 (CC) at para [25] "…reverse onuses of this kind impose a full legal burden of proof on the accused. Accordingly, if after hearing all the evidence, the court is of two minds as to where the truth lies, the constitutional presumption of innocence is replaced by a statutory presumption of guilt." The result is that such a provision

allows for a conviction even if the Court entertains a reasonable doubt as to the accused's guilt.

This Court held in *Freiremar SA v Prosecutor General of Namibia and Another*, 1996 NR 18 at 25E, that a reverse onus provision may be justified 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" (at 26B-C). The test thus far applied by this Court is whether there is a rational connection between the proved fact and the presumed fact and whether the presumed fact is one that is rationally open to the accused to prove or disprove (See also: *Namibian National Students' Organisation and Others v Speaker of the National Assembly for South West Africa and Others*, 1990 (1) SA 617 (SWA), *S v Titus*, 1991 NR 318 (HC) and the *Freiremar* –case, supra).

The first steps this Court took after Independence to examine and define criteria for the constitutional assessment of reverse onus-provisions were mainly based on Canadian and, to a lesser extent, US authorities. I am not altogether convinced that, in adopting that approach, the Court was mindful of the differences between our Constitution and the Canadian Charter of Rights. One of the most

fundamental differences is that the presumption of innocence protected under section 11(d) of the Charter is, like all the other fundamental rights protected therein, subject reasonable restrictions "prescribed by law as can be demonstrably justified in a free and democratic society" (see: section 1 of the Charter), whereas our Constitution does not expressly allow for a limitation of the right to be presumed innocent.

The majority of the Canadian Supreme Court (*per* Cory J) considered the constitutionality of statutory presumptions in *R v Downey,* (1992)2 SCR 10. After distinguishing between (a) permissive presumptions, (b) presumptions that merely cast an evidentiary burden on the accused and (c) reverse *onus* provisions that cast a legal burden on the accused and analysing a number of authorities in point (*Dubois v. The Queen*, [1985] 2 S.C.R. 350; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Oakes*, *supra; R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Kowlyk*, [1988] 2 S.C.R. 59 and *R. v. Keegstra*, [1990] 3 S.C.R. 697), he extracted seven principles (at 29):

> "I - The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

II - If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11(*d*). Such a provision would permit a conviction in spite of a reasonable doubt.

III - Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.

IV - Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11(*d*) if it requires the trier of fact to convict in spite of a reasonable doubt.

V - A permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11(*d*).

VI - A provision that might have been intended to play a minor role in providing relief from conviction will nonetheless contravene the *Charter* if the provision (such as the truth of a

> statement) must be established by the accused (see *Keegstra*, *supra*).
>
> VII - It must of course be remembered that statutory presumptions which infringe s. 11(*d*) may still be justified pursuant to s. 1 of the *Charter*. (As for example in *Keegstra*, *supra*.)"

The rational connection-test which this Court seemingly adopted is based on an application of the criteria of reasonableness and proportionality in assessing the justifiability of a limitation contemplated in Article 1 of the Charter (c.f. *R v Oakes, supra* at 681 and *R v Downley*, *supra* at 41. Those are criteria applicable to the limitation of Article 21-freedoms but not to the right to a fair trial entrenched in Article 12. I must caution judicial restraint before entrenched fundamental rights are eroded by the application of criteria set for the limitation of the Article 21 protected freedoms. The right to a fair trial is, as is the case with the right to human dignity entrenched in Article 8, not subject to statutory limitation. Dealing with the rights protected under Article 8, the Supreme Court said in *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State*, 1991 (3) SA 76 (NmS) at 86D-E:

> ‘Although the Namibian Constitution expressly directs itself to permissible derogations from the fundamental rights and freedoms entrenched in chap 3 of the Constitution, no derogation from the rights entrenched by art 8 is permitted. This is clear from art 24(3) of the Constitution. The State's obligation is absolute and unqualified. All that is therefore required to establish a violation of art 8 is a finding that the particular statute or practice authorised or regulated by a State organ falls within one or other of the seven permutations of art 8(2)(b) set out above; 'no questions of justification can ever arise' (Sieghart The International Law of Human Rights at 161 para 14.3.3).”

Given these fundamental differences, it may be prudent to revisit the earlier criteria laid down by this Court to justify reverse *onus* provisions. It is, however, not necessary to do so for purposes of this case because, even if I were to accept in favour of the respondents that the presumption of innocence may be limited by rational, reasonable and fair reverse onus provisions, I am nonetheless satisfied that the presumptions created by sections 2(3) and 12 cannot survive the rational connection-test.

Does proof that a house is used as a brothel and an exorbitant rent is being paid for it rationally tend to prove that the accused knew that the house was used as a brothel – as section 2(3)(a) of the Act presumes? I think not. The section does not require knowledge on the

part of the accused that an exorbitant rent is being or has been paid for the presumption to become operative. If the accused does not have such knowledge, there is no rational connection between the payment of an exorbitant rent and presumed knowledge on the part of the accused that the place is being used or kept as a brothel.

The presumption of that the accused knew a place is being kept or used as a brothel created by in section 2(3)(b) of the Act can be approached similarly. A mere notice to the accused that a place is being used as a brothel cannot without more justify a rational inference that the accused knew that that is indeed the case. The section does not require the person(s) giving such notice to state reasons for the allegation. In the absence of such reasons, the recipient is at a distinct disadvantage to consider or investigate the veracity of the allegation. If, for instance, unbeknown to an hotel's manager, a prostitute has taken up temporary residence and discreetly render her services in one of a hundred hotel rooms, on what rational basis can it be presumed that the manager knowingly kept a brothel just because he or she had received a notice?

For these reasons, I find that the statutory presumptions created by section 2(3) of the Act constitute an impermissible derogation of an

accused person's right to be presumed innocent as guaranteed by Article 12(1)(d) of the Constitution.

Section 12 of the Act

Section 12 of the Act creates three presumptions:

> "(1) When in any prosecution in terms of this Act the question arises whether any carnal intercourse between a male and a female was unlawful, such intercourse shall be presumed, until the contrary is proved, to have been unlawful carnal intercourse.
> (2) When in any prosecution in terms of this Act a person is proved to live in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, it shall be presumed, until the contrary is proved, that such person lives wholly or in part on the earnings of prostitution.
> (3) When in any prosecution in terms of section 6 it is proved that the accused has performed any act or has done anything or has furnished any information, which was calculated or likely to enable any male to communicate with or to establish the whereabouts of or to trace any female in respect of whom the accused had reason to suspect to be a prostitute, it shall be presumed, until the contrary is proved, that the accused have performed such act or have done such thing or have furnished such information as the case may be, with intent to enable such male to have unlawful carnal intercourse with such female.

The applicants are not charged with a contravention of section 6 of the Act and, insofar as the presumption created by section 12(3) only applies in the case of such a prosecution, it will not have any bearing on the applicant's prosecution. The applicants, therefore, do not have *locus standi* to challenge the constitutionality of section 12(3) of the Act.

In view of the findings I have made regarding the constitutionality of the phrase "or for persons to visit for the purpose of having unlawful carnal intercourse" in the definition of "brothel", the issue concerning the constitutionality of the presumption in section 12(1) of the Act has become a moot one. The presumption does not otherwise bear on the applicants' prosecution. In the eventuality that another Court in this jurisdiction may find that this Court erred in its conclusion in respect of the definition of "brothel", it may be of relevance to record that there is in my view no rational justification for the presumption that all carnal intercourse between a male an female person, whenever that may arise as an issue in a prosecution under the Act, has been unlawful. It is a "presumption without basic facts": a factual conclusion that is being drawn without the need for the State to prove any basic facts that rationally allows for an inference of the presumed fact. The effect of the presumption is that the accused will have to prove that it was

lawful for him or her to have carnal intercourse with the other person by reason of marriage or customary union with such person. Irrational, unreasonable and unfair as the presumption is, its unconstitutionality is apparent.

In terms of section 12(2) a person who has no visible means of substance and who is living in a brothel or with a prostitute or is habitually in the company of a prostitute is deemed to be living wholly or in part on the earnings of prostitution. Given the difficulty to get prostitutes to testify about the identity of and arrangements they may have with their pimps, the manifest purpose of the presumption is to assist in the successful prosecution of those who, like parasites, are living of the earnings of prostitutes - such as pimps and brothel-keepers.

The constitutionality of a similar presumption (albeit a factual and not a legal one) in section 195(2) of the Canadian Criminal Code was the subject matter of the Canadian Supreme Court's judgment in *R v Downey*, *supra*. All the judges concurred that the presumption violated the right to be presumed innocent in section 11(d) of the Charter but the Court was divided on whether or not the violation was nevertheless a permissible restriction under section 1 of the Charter. It eventually

held (with a 3 to 4 majority) that it was justified. But, as McLachlin J pointed out in a dissenting judgment (at 41-42), the majority judgment focused on the external rationality of the presumption, i.e. the rationality of its connection to the legislative purpose behind its enactment. Of more relevance to the position in Namibia is his opinion on the question of internal rationality, in the sense there must be a rational connection between the substituted fact and the presumed fact. The latter requires that proof of the substituted fact must make it likely that the presumed fact is true.

He held the view that it cannot be said that it is likely that one who lives with or is habitually in the company of a prostitute is parasitically living on the avails of prostitution. Although it may be true in some instances, spouses, lovers, children, parents or room-mates may live with or be habitually in the company of a prostitute, which is not a criminal offence, without living on the avails of prostitution. Concluding that a presumption which has the potential to catch such a wide variety of innocent people in its wake is arbitrary, unfair and based on irrational considerations, he found that is was unconstitutional. I agree.

Conclusion

In summary, I find section 1(i) of the Act unconstitutional in so far as it includes the words “…or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or immoral purpose” in the definition of “brothel”, but that those words can be severed from the rest of the definition. I also find that the presumptions in sections 2(3) and 12(1) and (2) of the Act constitute an impermissible derogation of the applicant’s right to be presumed innocent. I do not consider section 2(1) - read with section 1(i) in a more truncated form, i.e. after excision of the impermissible part – or section 10(a) unconstitutional on any of the grounds advanced by the applicants. Lastly, I hold the view that the applicants failed to show that they had the required standing to challenge the constitutionality of sections 2(2), 10(b) and 12(3) of the Act.

In the premises, the Court’s conclusions do not preclude continuation of the applicant’s prosecution on the charges brought under sections 2(1) and 10(a) of the Act and I must decline to grant a final interdict against such prosecution. The items seized by the police may be required as exhibits in the prosecution and I must, therefore, also refuse the prayer for the immediate return thereof. The parties are agreed that it will not be appropriate to make an adverse cost order in the case.

In the result, the following order is made:

1. Section 1(i) of the Combating of Immoral Practices Act, 1980, is declared unconstitutional only to the extent that the words “...or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or immoral purpose” appear therein as part of the extended definition of “brothel” and the inclusion of those words are unconstitutional, void and of no effect and are therefore struck from the definition.

2. Sections 2(3) and 12(1) and (2) of the Combating of Immoral Practices Act, 1980 are declared unconstitutional and of no force or effect.

3. The application, insofar as it relates to the alleged unconstitutionality of sections 2(1), 2(2), 10 and 12(3) of the Combating of Immoral Practices Act, 1980; for a stay of prosecution and for the return of the seized articles and money, is dismissed.

4. Each party shall bear his/her/its own costs of suit.

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MARITZ, J.

I agree.

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TEEK, JP.

ON BEHALF OF THE APPLICANT:

Instructed by:

ON BEHALF OF RESPONDENT:

Instructed by: