CASE NO. A 159/96

THE HIGH COURT OF NAMIBIA

In the matter between:

FANTASY ENTERPRISES CC	
t/a HUSTLER THE SHOP	**Applicant**
and	
THE MINISTER OF HOME AFFAIRS	**First Respondent**
THE COMMANDING OFFICER,	
DRUG ENFORCEMENT SQUAD	**Second Respondent**

and

CASE NO. A 158/96

in the matter between:

LOUIS NASILOWSKI	**Fist Applicant**
CHRISTINE JACOBA NASILOWSKI	**Second**
ROLF SCHRÖDER	**Applicant**
	Third Applicant
and	
THE MINISTER OF JUSTICE	**First Respondent**
THE ATTORNEY GENERAL	**Second Respondent**
THE PROSECUTOR GENERAL	**Third Respondent**
THE MINISTER OF HOME AFFAIRS	**Fourth Respondent**

CORAM: HANNAH,J., GIBSON, J. AND MARITZ, A.J.

Heard on: 1996-11-27

Delivered on: 1998-04-

JUDGMENT

1. **MARITZ, A.J. :** The applicants are dealers in a variety of "adult videos, toys, magazines and novelties". Advertising the nature of their business by using trade names such as "Hustler The Shop", "Adult Entertainment Centre" and "Passion House II" at Windhoek, Walvis Bay and Swakopmund, they not only drew the attention of the public but also aroused the unwanted interest of the Namibian Police. The police, claiming that most of the videos and magazines being offered for sale by the applicants were "indecent or obscene photographic matter" defined in section 1 of the Indecent and Obscene Photographic Matter Act, 1967 (Act 37 of 1967) and that some of the "adult toys and novelties" were intended for use "to perform unnatural sexual acts" proscribed by section 17(1) of the Combating of Immoral Practices Act, 1980 (Act 21 of 1980), seized and removed most of the applicants' stock. Criminal charges for having contravened s. 2(1) of Act 37 of 1967 and s. 17(1) of Act 21 of 1980 were either preferred against some of the applicants or were being contemplated against the others. Aggrieved by the actions of the police and facing prosecution on those charges, the applicants brought these applications.

2. Their primary object is to obtain orders declaring section 2(1) of Act 37 of 1967 and section 17(1) of Act 21 of 1980 unconstitutional and, for that reason, to be of no force and effect. Ancillary to that relief, the applicants are also seeking orders setting aside the search warrants, the seizure of their stock (with or without such warrants) and for the return of the seized articles. The respondents did not oppose any of the applications. Reluctant to pronounce on the constitutionality of statutory provisions without the benefit of the Government's submissions, the court requested the Government Attorney to present us with his views *amicus curiae.* Like counsel for the applicants, he presented the court with extensive heads of argument evidencing thorough research and substantial effort. The court recognises their industry and is grateful for their assistance.

The applicants challenge the constitutionality of section 2(1) of Act 37 of 1967 on the grounds that it imposes an unreasonable and unjustifiable restriction on their right to freedom of speech, expression and to carry on any trade as guaranteed by paragraphs (a) and (j) of Article 21(1) of the Constitution and, in addition; that it infringes their right to privacy entrenched in Article 13(1) of the Constitution.

Promulgated by the South African Parliament prior to Namibia's independence and retained as part of the body of Namibia's statutory law by the transitional provisions in our Constitution, the legislative purpose that Act is reflected in the provisions of s. 2(1) thereof. It reads as follows:

> *"Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand Rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment."*

Not satisfied with the ordinary import and meaning of the expression "*indecent or obscene photographic matter*", the South African Legislature by definition extended the scope and ambit thereof to include –

> *"photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, Lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature".*

Furthermore, s.1 of the Act extended the meaning of "*photographic matter*" to include "*any photograph, photogravure and cinematograph film, and any pictorial representation intended for exhibition through the medium of a mechanical device*" and defined "*cinematograph film"* to include "*any magnetic tape or other object consisting of material of whatever nature, on which any image or images have been recorded in such a manner that such image or images will be capable of being exhibited as a moving picture or otherwise through any mechanical, electronic or other device*".

Whilst admitting the video tapes and the magazines found in their possession contain "*indecent or obscene photographic matter*" as defined by the Act and acknowledging (correctly so in my view) that it is constitutionally permissible to limit the right to freedom of speech and expression, the freedom to carry on any trade and the right to privacy by regulating and restricting the possession, sale or exhibition of certain categories of sexually explicit material, the applicants content that s. 2(1) is doing so in an overly broad and impermissible manner.

It is clear from the facts in all the applications that the applicants possessed the material in question for the purpose of wholesale or retail, rather than for private use. Although the applicants also rely on legislative overbreadth infringing their constitutional right to privacy guaranteed by Article 13 of the Constitution (and I express no opinion on their standing to do so or the validity of the contentions advanced by them in that regard), it seems to me that in the context of these applications, the constitutionality of s. 2(1) more appropriately falls to be decided on the basis of whether that section infringes or derogates from the applicants' right to freedom of speech and expression or their freedom to carry on any trade or business and, if so, whether it was done in a constitutionally permissible manner.

Article 21(1)(a), (j) and (2) of the Constitution entrenching those freedoms and prescribing the permissible limitations thereof reads:

> *"(1) All persons shall have the right to:*
>
> > *(a) freedom of speech and expression, which shall include freedom of the press and other media;...*
> >
> > *(j) practise any profession, or carry on any occupation, trade or business.*
>
> *(2) The fundamental freedoms referred to in subarticle (1) hereof shall be exercised subject to the law of Namibia, insofar as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said subarticle, 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.*

The need to jealously protect the right to freedom of speech and expression and the value thereof in a democratic society has been stated and restated over many decades in many jurisdictions all over the world. Those values have recently been echoed by the Supreme Court in **Kauesa v Minister of Home Affairs and Others** 1996 (4) SA 965 (NmS), when it quoted the moving speech of Justice Brandeis reported in **Whitney v California** 274 US 375-6 (1927) and applied it to the democratic and social values which Namibians cherish and have died for. To that, I would like to add the exposition of one of the leading commentators on the First Amendment of the Constitution of the United States, Prof. T Emerson in **The System of Freedom of Expression** (at 6-7):

> "*First, freedom of expression is essential as a means of assuring individual self-fulfilment. The proper end of man is the realisation for his character and potentialities as a human being. For the achievement of this self-realisation the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature. Moreover, man in his capacity as a member of society has a right to share in the common decisions that affect him. To cut of his search for truth, or his expression of it, is to elevate society and the State to a despotic command over him and to place him under the arbitrary control of others.*
>
> *Second, freedom of expression is an essential process for advancing knowledge and discovering truth. An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgement by exposing it to opposition, and make full use of different minds. Discussion must be kept open no matter how certainly true and accepted opinion may seem to be; many of the most*

widely acknowledged truths turned out to be erroneous. Conversely, the same principal applies no matter how false or pernicious the new opinion appears to be; for the unaccepted opinion may be true or partially true and, even if wholly false, its presentation and open discussion compel a re-thinking and re-testing of the accepted opinion. The reasons which make open discussion essential for an intelligent individual judgement likewise make it imperative for rational social judgement.

Third, freedom of expression is essential to provide for participation in decision making by all members of society. This is particularly significant for political decisions. Once one accepts the premises of the Declaration of Independence – that Government 'derive their just power from the consent of the governed' – it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgement and by informing the common judgement. The principle also carries beyond the realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge.

Finally, freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This follows because suppression of discussion makes a rational judgement impossible, submitting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and because suppression conceals the real problems

> *confronting a society, diverting public attention from the critical issues. At the same time the process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process. Moreover, the State at all times retains adequate powers to promote unity and to suppress resort to force. Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying society. It is an essential mechanism for maintaining the balance between stability and change.*"

I am convinced that, in general, the right to an important freedom, such as the freedom of speech and expression guaranteed by Article 21(1)(a) of the Constitution, should be construed purposefully. On that premise, I hold that the concept of "*speech and expression*" extends also to "non-political" discourse; includes graphic expressions; contemplates not only the act of imparting but also of receiving information and ideas and is not limited in content to that which can be regarded as pleasing, inoffensive or indifferent, but extends also to that which disturb, offend or shock (**The Sunday Times v The United Kingdom (no 2)** (1992) 14 EHRR 229 at 241 par 50; **Martin v City of Struthers** 319 US 141 at 143; **Stanley v Georgia** 394 US 357 at 364; **Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others** 1996 (3) SA 617 (CC) at 629A). It follows that s. 2(1) of the 1967 Act in so far as it proscribes possession of certain defined categories of photographic matter, detracts from the general right to freedom of speech and expression.

I do not suggest that all categories of speech or expression have the same value. However, unlike the judicial exclusion of certain categories of speech from the First Amendment's protection in the United States on the basis that "*such utterances are no essential part of the exposition of ideas and are of such slight social value as a step to truth that any benefit derived from them is clearly outweighed by the social interest in order and morality*" (per Brennan J in **Roth v United States** (1957) 354 US 476 at 484-5), our Constitution only authorises legislative and common law limitations of that freedom which falls squarely within the corners of the authorised restrictions contemplated in Article 21(2). That Article "*creates a restriction purposely enacted to soothe the relationships between those exercising their constitutionally protected rights and those who also have their own rights to enjoy*" (**Kauesa** case, supra at 980J).

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.

The permissible legislative objects expressly contemplated in Article 21(2) are those "*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*". If one is to consider the legislative history of the 1967 Act summarised by Mokgoro J. in paragraphs [6] to [12] of her judgement in **Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others,** *supra,* at 622B to 625B) and he provisions of the Act itself, the objective is to introduce measures to uphold standards of decency and morality in society. That is a permissible objective of sufficient importance to justify a limitation of the right to freedom of speech and expression. The indignity and outrage suffered by women as a class of persons when senseless sexually explicit scenes of rape and other forms of sexual violence are depicted as normal in pornographic material and the social and moral dangers of exploiting children in such material for the sexual gratification of certain adults, are but two of the reasons why it is imperative for any responsible Legislature to promulgate adequate measures to address those evils in the interest of decency and morality.

In assessing the reasonableness of the measures employed to achieve a permissible statutory objective, this Court and the Supreme Court have adopted the now well known “rationality”, “proportionality” and “minimum impairment” requirements of reasonableness referred to by Dickson CJC in **R v Oakes** (1986) 26 DLR (4th) 200 at 227. I do not intend to repeat it for purposes of this judgement. Somewhat differently stated and emphasising the importance of democratic values in the process of assessing the reasonableness of the limitation, is the approach of Chaskalson P in **S v Makwanyane** 6 BCLR 665 at 708 [104]:

> *“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularity where the limitation has to be necessary, whether the desired ends could reasonably be*

> *achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the constitution, bearing in mind that, as a Canadian judge has said, 'the roll of the court is not to second-guess the wisdom of policy choices made by legislatures.'"*

With the principles I have referred to above and by applying these criteria, I now turn to assess the rationality and reasonableness of the limitation brought about by s. 2(1) of the 1967 Act.

The nature of the right limited in the present case is the right of freedom of speech and expression. That freedom is, as I have remarked above, one of the more (if not the most) important freedoms in open and democratic societies all over the world. "*Freedom of thought and speech... is the matrix, the indispensable condition of nearly every other form of freedom*" (per Cardozo J in **Palko v Connecticut**, 302 US 319 (1937) quoted with approval by Levy J in **The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa** 1987 (1) SA 614 (SWA) at 623H. Compare also: **Mandela v Falati** 1995 (1) SA 251 (W) at 259F).

The problem with section 2(1), as I see it, lies not in the objective the Legislature sought to achieve, but in the manner it went about doing that. If one is to consider the words of s.2(1) and extended meanings thereto, it is not surprising that courts recognised long before the advent of the present human rights-based constitutional dispensation that the South African Legislature intended the proscriptive provision to have a wide and sweeping ambit (compare for example: **S v R** 1971 (3) SA 798 (T) at 804A-C). This has been recently been expounded on in the analysis of Mokgoro J. in the Chase judgement, *supra*, at 643H to 645A:

“...we must read the text as a whole, assigning a meaning to every word and phrase, and not permitting any portion of the text to be rendered redundant. Thus, the various forms of sexual conduct, appetite, and inclination (‘sexual intercourse, licentiousness, lust, homosexuality . . .’), listed in the purported definition in s 1 of the Act must each be accounted for, and assigned distinct meanings. That exercise renders a prima facie already very inclusive list much broader still. The same procedure must be attempted in giving meaning to each of the various transitive verb forms preceding the list of forms of sexual conduct, appetite and inclination. Proscribed material is defined to include photographic matter 'depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse. . .'. The terms ‘displaying’, ‘portraying’ and ‘exhibiting’ are not immediately problematic, but ‘manifesting’ and ‘representing’ are capable of yielding an almost unlimited set of potential references.

[58] Thus, for example, the verb ‘manifest’ is defined in ‘The Oxford English Dictionary’ as synonymous with 'display'. Seeking an alternative meaning that will render both terms non-redundant in context forces us to assign the broader dictionary meanings of ‘display’, such as ‘evince’, ‘be evidence of’ and ‘attest’. Similarly, the dictionary gives to the verb ‘represent’ a primary meaning of ‘bring clearly and distinctively to mind, esp. by description or imagination’. But since that denotation appears already to be captured in the verbs ‘depict’, ‘display’ and ‘portray’, we are thrown onto the broader, alternative meanings, such as ‘symbolise’, ‘be an equivalent of’, and ‘correspond to’. Examples could obviously be multiplied. Consider, to take just one, the scope of the prohibition if we apply the transitive verb form ‘symbolise’ to the noun ‘lust’.

> *[59] As the definition stands, it could thus fairly be read to classify a virtually limitless range of expressions, from ubiquitous and mundane manifestations like commercial advertising to the most exalted artistic expressions, as 'indecent' or 'obscene', simply because they contain oblique, isolated or arcane references to matters sexual, or deal frankly with a variety of social problems. Thus, a television documentary treating safe-sex and the causes of Aids may be construed as a 'manifestation' of 'licentiousness'. Cinematic versions of the work of South Africa*'*s most acclaimed playwrights and novelists may be labelled exhibitions or portrayals of 'lust', 'masochism' or 'sadism'. An illustrated public-service brochure dealing with incidents of sexual assault upon women could potentially be outlawed as a 'depiction' of 'rape'. A photograph of persons of the same gender in tender embrace could fairly be construed as 'manifesting homosexuality' or 'lesbianism'.*
>
> *[60] As if the already sweeping implications of the purported definition are not enough, the phrase 'or anything of the like' appended thereto seems calculated to invest prosecutors and courts with unlimited discretionary power over photographic and cinematic expression*. "

In addition, it is evident that the section criminalises unsolicited and innocently acquired possession for a short duration (**S v Brick** 1973 (2) SA 571 (A) at 580B to 581A); that no distinction is made as to the maturity, personality or profession of persons who might come into possession of such matter (historians, medical practitioners or psychiatrists are treated with the same sweeping brush as juveniles or children); that the proscription is one in principle rather than designed by degree or purpose (treating the sexual abuse of children for pornographic purposes on the same basis as sexual intercourse by consenting adults for educational purposes); that no

distinction is made between possession for private purposes and for purposes of commercial exploitation and, in general, that the prohibition by definition covers much which is intrinsic and commonplace in daily life (remarked on by Joubert AJ in **S v R,** *supra,* at 804A and commented on by Nicolas J within the context of the Publication and Entertainment Act, 1963 in **Mame Enterprises (Pty) Ltd v Publications Control Board** 1974 (4) SA 217 (W) at 222A-G).

Instead of addressing the legislative object with precision, caution and sensitivity to the fundamental rights of those who would be affected by the law, it was written with the bold and sweeping strokes of a legislative pen unconcerned with constitutional censure by the Courts. The section was written into the law books by a Legislature foreign to the Namibian people at a time in history when they were denied the right of self-determination in their own State under their own Constitution. I am mindful that when Independence was gained many years later, all the laws in force at that time, continued to be in force - except those repealed by the Constitution itself. That, however was mainly done for the sake of order, good government and continuity. By providing that their continued application would only be until "repealed or amended by Act of Parliament or until they are declared unconstitutional", the founding fathers of our Constitution expressly foresaw that those laws would be subject to legislative and judicial review.

In reviewing the constitutionality of Acts promulgated by the South African Parliament prior to Independence, this Court is entitled to have regard to those historical facts in evaluating the reasonableness of provisions in those laws which detracts from the constitutional rights entrenched and democratic values expressed in our Constitution. In relation to such provisions, there is little or no reason to allow a margin of parliamentary appreciation when

considering the reasonableness of the measures adopted by that lawgiver at that time to restrict a particular fundamental right and I do not fell myself constrained by such a consideration.

I do not think that s. 3 of the 1967 Act which provides that no prosecution for an offence shall be instituted except on the written authority of the Prosecutor-General limits the wide and sweeping scope of s. 2(1) or that it constitutes a reasonable limitation within the contemplation of Article 21(2) of the Constitution. That section affords cold comfort to person found in possession of photographic material which falls within the ambit of the definition and who faces prosecution, not to mention the "chilling effect" such a provision must have on the exercise of the freedom in question. It is no safeguard at all and renders constitutional guarantees vulnerable to the personal attitudes and disposition of a particular incumbent of that office. I am reminded by Mr Mouton in his heads of argument of the remarks by Lord Edmund-Davies in **Attorney-General v British Broadcasting Corporation** [1980] 3 All ER 161 (HL) when he commented on the requirement of the Attorney-General's consent before a prosecution for contempt of court can be instituted (at 171 J to 172 A):

> "*My Lords insofar as the Attorney-General invites the courts to rely on his* ipse dixit *in the confidence that all holders of that office will always be both wise and just about instituting proceedings for contempt, acceptance of this invitation would involve a denial of justice to those who on occasion are bold enough to challenge that a particular holder has been either wise or just.*"

Nor do I regard s. 2(2) of the Act, which excludes the application of s. 2(1) in respect of certain categories of material (approved, exempted or declared not to be undesirable under the Publications

Act, 1974 by a committee or other competent body), to be a proper restriction. I find it unnecessary to express any opinion on the constitutionality of the provisions of that Act, but must within the context of this case refer to some concerns I have in that regard. Firstly, the committees which have to determine whether certain material is indecent or obscene or is offensive or harmful to the public morals under that Act are bound by the strictures of section 1 of that Act which provides:

> *"In the application of this Act the constant endeavour of the population of the Republic of South Africa to uphold a Christian view of life shall be recognised."*

I doubt whether such a consideration in a secular constitutional dispensation, provided for in Article 1(1) of the Namibian Constitution, is permissible. Secondly, in a society as heterogeneous as Namibian society with a variety of religions, cultures, languages, traditions it is difficult to imagine that bodies constituted under the Publications Act can adequately reflect those values and whether in those circumstances it is permissible for Parliament under Article 21(2) to leave it entirely to administrative bodies to determine the parameters of a person's freedom. The decision of the Ontario High Court of Justice in **Re Ontario Film and Video Appreciation Society and Ontario Board of Censors** (1983) 147 DLR (3d) 58 is particularly instructive on this issue. That decision concerned the validity of the Theatres Act which gave the Board of Censors the power to censor any film and to approve, prohibit or regulate the exhibition of any film in Ontario. The court observed at 67:

> *The Charter requires reasonable limits that are prescribed by law; it is not enough to authorise a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of*

authority is not legal for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as 'law'. It is accepted that law cannot be vague, undefined and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of any official; such limits must be articulated with some precision or they cannot be considered to be law. There are no reasonable limits contained in the statute or the regulations."

In view of my finding that the provisions of s. 2(1) of the 1967 Act has been formulated in an overly broad manner not intended or carefully designed to prohibit possession only of such sexually explicit material as may be proscribed under Article 21(2), but that it also prohibits the possession of graphic material which may be acquired or distributed in the exercise of a person's right to freedom of expression under Article 21(1)(a), that section unreasonably restricts the legitimate exercise of that constitutional right in a manner not authorised by Article 21(2) of the Constitution. For that reason it is unconstitutional.

The constitutionality of s.17(1) of the 1980 Act is being challenged on essentially the same grounds as the attack on s. 2(1) of the 1967 Act – except that the emphasis has shifted slightly from applicants' primary reliance on paragraph (a) of Article 21(1) to their reliance on the right to the freedom to carry on any trade or business entrenched in paragraph (j) thereof. That subsection reads as follows:

"17(1) Any person who manufacturers, sells or supplies any article which is intended to be used to perform an unnatural sexual act, shall be guilty of an offence and liable

> *on conviction to a fine not exceeding R2 000,00 or imprisonment for a period not exceeding two years or to both such fine and imprisonment.*"

The difficulty with the section is twofold: Firstly, in ascertaining the meaning of "an unnatural sexual act" (for only if and when such meaning is clear may the manufacturer, seller or supplier determine what he or she may manufacture, sell or supply) and, secondly, in determining whose "intention" the court should have regard to when considering whether the manufacture, sale or supply of a particular article falls within or outside the scope of the prohibition.

Precisely what is an "unnatural sexual act"? Is a "natural" sexual act limited to only those sexual acts performed between two consenting human beings of the opposite gender in a manner suitable for procreation? Is everything else "unnatural"? If that has been intended, the result would be absurd. The manufacture, sale and supply of a number of devices employed during sexual intercourse for birth control and to prevent infection by certain sexual transmittable diseases would fall squarely within the prohibition. Even the free supply of condoms as one of the important means to combat the transmission of the still-incurable AIDS virus during sexual intercourse would be an offence if the word "unnatural" is being used in that context. The sale of sexual aids prescribed or recommended by qualified therapists to married couples for clinical reasons could result in convictions. Many more examples of such absurdities which could never have been intended by the Legislature can be mentioned.

3. If it is intended by the Legislature to refer to the same acts which have in common law been referred to as "unnatural offences" or "unnatural assaults", one would have expected it to have referred to it in those terms. But even if that is what has been intended, the expression remains vague. Precisely what is meant by "*an unnatural assault*" within that context received some attention in **S v C**, 1988 (2) SA 398 (ZH) when the Zimbabwean High Court had to deal with the clarity of a condition to a suspended sentence that the accused should not "*commit an unnatural assault"* during the period of suspension. At p 399 the learned Judge held:

> 4. *Similarly, I am in considerable doubt whether the accused would have understood the particular condition that he should not commit an* '*unnatural act*' *within the period specified.... In fact, the word used in early Roman-Dutch law was* '*sodomy*' *and this term, at that time, encompassed virtually any form of aberrant sexual behaviour. The crimes now known as sodomy and bestiality were included under this term, and some authorities also included acts such as self-masturbation, oral intercourse, lesbianism, and many other such practices. Some jurists even regarded normal coitus between a Jew and a Christian as* '*sodomy*'.

5. *This very broad base was later narrowed so that any sexual act* '*contrary to the order of nature*' *fell into one of three categories. These were sodomy, bestiality, and a third category into which fell certain residual, sexually abnormal acts which were classified generally as* '*unnatural offences*'*. (See R v Gough and Narroway 1926 CPD 159; R v K and F 1932 EDL 71.) These classifications are still operative today, but the nature and number of acts presently accepted as* '*unnatural offences*' *are far more limited than they were. It is in respect of this third category that difficulties arise in modern practice, for it is not possible to define with precision what types of sexually deviant acts constitute this crime. Hunt,* *__South African Criminal Law and Procedure,__* *2nd ed, includes a definition of an* '*unnatural offence*'*, but the learned author appreciates the problems of interpretation that arise. As he says (at 276)*

> 6. *'the adjective* '*unnatural*'' *involves a value judgment varying from country to country, race to race, and age to age: it has little if any objective content*'*.*

7. *In seeking clarification of the term it does not help to contrast an* '*unnatural act*' *with a* '*natural*' *act. Many acts have been held not to constitute an unnatural offence although the act in question could hardly be described as* '*natural*'*. (For example, sodomy on a female R v M G 1969 (1) SA 328 (R); oral intercourse R v K and F (supra); one male fondling the private parts of another male - R v S 1950 (2) SA 350 (SR).) I have been unable to locate any cases which concern allegedly unlawful sexual acts between two or more females. The question is still open, therefore, as to whether such acts would constitute* '*unnatural offences*' *in our law.*

> *From the foregoing it is evident that the limits of the crime called* '*an unnatural offence*' *are by no means clear."*

I agree with those remarks. Whilst it is accepted that absolute certainty in the formulation of statutes cannot always be achieved and that some scope should be allowed for judicial interpretation in certain instances, the words employed in a penal provision which limits the exercise of a fundamental freedom must at least provide an intelligible standard from which to gain an understanding of the act enjoined or prohibited so that those to whom the law apply know whether they act lawfully or not. A law which does not comply with that standard, is vague and the danger of tolerating such penal laws within the sphere of Article 21 freedoms is all too evident: Those to whom the law apply does not know whether a particular act is legal or not; it has a chilling effect on the exercise of those freedoms; enforcement of such a law may criminalise conduct which the Legislature did not contemplate or intend; it lacks the required standard of intelligibility to allow a considered enquiry into the constitutional reasonableness of the limitations therein.

Vagueness of any law which limits a right to exercise of any freedom guaranteed by Article 21(1) of the Constitution can be raised under Article 21(2) within the context that such a law does not impose "reasonable restrictions" on the exercise of those rights and freedoms. The element of "proportionality" implicit in the requirement of reasonableness requires that the limitation of a fundamental freedom should be structured in such a manner that it impairs that freedom "as little as possible" (**R v Oakes**, *supra*¸ at 227). The effect of vagueness as it relates to the "minimum impairment" consideration, is essentially the same as and "merges with the related concept of overbreadth" (**R v Novia Scotia Pharmaseutical Society** 10 CRR (2d) 34 at 47-48).

In the premises I find that s.17(1) of the 1980 Act is so vague in its scope and application that it does not constitute a reasonable limitation of the Applicants' freedom to carry on any trade or business required by Article 21(2) and that it is for that reason unconstitutional.

Counsel submitted that in relation to s.2(1) of the 1967 Act it is not practical to separate the good from the bad and that in relation to s.17(1) of the 1980 Act the question of severance does not arise at all. I agree with those contentions and also with the proposition that it is not appropriate in the circumstances of this case to refer those Acts back to Parliament for the purpose contemplated in Article 25(1)(a) of the Constitution.

In the result, the rule *nisi* issued in the application of Fantasy Enterprises CC is confirmed and, in the application of Nasilowski and two others, I make the following order:

1.
2.