

SOUTH AFRICA / JUDGMENT

Viking Fishing A Division of Sea Harvest Corporation (Pty) Ltd and Others (AC16/2024),
Ex parte [2024] ZAWCHC 283 (30 September 2024)
[2024] ZAWCHC 283

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

AC16/2024

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Source record

In
the High Court of South Africa
(Western
Cape Division, Cape Town
(In
the exercise of its admiralty jurisdiction)
Case
No: AC16/2024
In

the ex parte application
of:

VIKING
FISHING A DIVISION OF
SEA
HARVEST CORPORATION (PTY) LTD
First
Applicant
ANTHEA
MELISA THOMPSON
Second
Applicant
GAIL
CHARLEEN KLEINSMIDT
Third
Applicant
LYLE
LILIAN COETZEE
Fourth

Applicant
ALISON
MINNIES
Fifth
Applicant
GERTRUDE
FARO
Sixth
Applicant
ELMINA
TATUM TITUS
Seventh
Applicant
FAIEKE
CHARLES
Eighth
Applicant
JENOBIA-LEE
SWIERS
Ninth
Applicant
VERONICA
FRANCES BOUKERS
Tenth
Applicant
EDINE
BENELIZE SIAS
Eleventh
Applicant
LENA
ISSACS
Twelfth
Applicant
In
re: application for an order presuming the death of the below
mentioned seafarers ("the missing crew") onboard
mfv LEPANTO on 17 May 2024: -
Ashwell
Solomon Peter Thompson
Christian
Steven Kleinsmidt
Jeremia
Coetzee
Jeremy
Neil Minnies
Johan
Faro
Marshall
Titus
Mohammad
Faadiel Groenewald

Wilfred
Johannes Swiers
William
Frank Boukers
Eusibio
Cornelius Sias
Johnwill
Leonard Issacs

Heard: 18 September 2024
Delivered
(electronically): 30 September 2024

JUDGMENT

LEKHULENI J

1.

Introduction

[1] This is an ex parte application for the presumption of death of eleven crew members who were on board the mfv Lepanto when this Vessel suddenly capsized and sank at sea on 17 May 2024 at approximately 14h30 about 34 nautical miles off Hout Bay. The applicants pray for a final order declaring that the missing seafarers in respect of this application be presumed dead. In the alternative, the applicants sought an order that a rule nisi be issued, calling for interested parties to appear on a date to be determined by this court and say why an order for final relief should not be granted.

2. Background Facts

[2] On 17 May 2024, the seafarers ("the missing crew") of the mfv Lepanto disappeared at sea when their Vessel suddenly capsized and sank at 14h30 approximately 34 nautical miles off Hout Bay. Pursuant thereto, the applicants brought this application for an order that the missing crew on board the Vessel be presumed dead. The first applicant is Viking Fishing, a division of Sea Harvest Corporation (Pty) Ltd, a company duly incorporated in accordance with the company laws of South Africa, with its registered address at South Arm Road, Table Bay Harbour, Cape Town, Western Cape. Sea Harvest is the registered owner of the Vessel that disappeared on 17 May 2024 with the missing crew. Viking operated the Vessel at the time that it capsized and sank.

[3] At the time of their disappearance, the missing crew were employed by Viking in terms of temporary employment contracts. Given that the missing crew were employed on board the Vessel of Viking, Viking brought this application to assist the missing crew's families to obtain a final order from this Court presuming the missing crew dead so that death certificates can be obtained from the Department of Home Affairs. The second to the tenth

applicants are the respective family members of the missing crew in respect of this application.

- [4] The applicants assert that the missing crew set sail from Table Bay Harbour on 14 May 2024. The survivors of the tragedy on board the Lepanto reported that after the fishing operations were completed on Friday, 17 May 2024, and at approximately 14h30, the crew were working the fish away, and the Skipper was steaming. The Vessel thereafter suddenly listed to starboard, capsized and then sank at the stern. The surviving crew inflated one of the life rafts and made their way into it before the Vessel sank.
- [5] According to the National Sea Rescue Institute ("NSRI") report dated 22 May 2024 and the South African Maritime Rescue Coordination Centre ("MRCC") report dated 21 June 2024, when this tragedy unfolded, the FV ARMANO was approximately 1 nautical mile away and saw the Lepanto Vessel sink. The FV ARMANO radioed the MRCC a mayday relay. At 15h39, the NSRI received a call from the Emergency Operations Centre regarding a Mayday radio message. The MRCC immediately triggered an emergency response, with all vessels in the vicinity of the sinking vessel proceeding to the location of the casualty to carry out a search. The MRCC provided the Vessels with a search pattern and deployed life rafts and fishing boats in the area to search for survivors. More fishing Vessels responded to assist with the rescue.
- [6] Around 16h03, the FV ARMANO reported that more fishing Vessels responded to assist with the rescue. At 16h06, it was reported that of the 20 total crew in the sinking Vessel, 9 had been recovered onto the FV ARMANO, and 11 were still missing or unaccounted for. At 16h48, the FV ARMANO reported that the crew rescued from the Vessel had been removed from the life raft and were on deck. The search for the missing crew continued diligently until 18 May 2024 by the MRCC and NSRI, and the missing crew were not found. The MRCC and NSRI reports show that an extensive search and rescue operation was activated following the Mayday relay received from the FV ARMANO.
- [7] All fishing Vessels in the immediate vicinity of the Lepanto and helicopter services were utilized during the search and rescue operation. No sign of life for the missing crew was found during the search and rescue operation, and only a few pieces of debris were spotted and retrieved. Despite an extensive two-day search and rescue operation, there was no sign of the missing crew. The search and rescue operation were called off at 21h00 on 18 May 2024.

3. Principal submissions by the Applicants' Counsel

[8] At the hearing of this matter, the applicants' Counsel implored the court to grant a final order so that the applicants can have closure. Counsel submitted that a rule Nisi would lead to a delay in the registration and administration of the estate of the missing crew. Counsel further submitted that this matter is different in that it is known that the missing crew perished at sea, and it is unlikely that the missing crew are alive. The applicants' Counsel prayed that the court grant the final order sought in the notice of motion.

4. Applicable Legal Principles

[9] This is a maritime claim as contemplated in section 1(1)(f) and (s) of the Admiralty Jurisdiction Regulation Act 105 of 1983. This Court accordingly has jurisdiction in terms of section 2(1) of this Act. More so, it is common cause that the missing crew with respect to this application were domiciled within the jurisdiction of this Court.[1] This is the appropriate court with jurisdiction to consider this application and grant the relief sought.

[10] The applicants seek an order that the missing crew be presumed to have died on 17 May 2024. A court may, in certain circumstances, upon the application of any interested party, presume the death of a missing person and grant an order to that effect. The Court requested to presume the death of a person will not do so unless it is satisfied that such can rightly and should, therefore, be inferred on a preponderance of probabilities from the evidence adduced in the proceedings.[2] Whether the inference can rightly be drawn in any given case is always a question of fact, the answer to which depends on its own particular circumstances. The applicant must prove on a balance of probabilities that the missing person is dead.[3]

[11] A person's death is not presumed lightly, and it is thus required that the applicant bring all relevant facts and circumstances to the attention of the court.[4] Whether an order presuming the death of a person will be granted depends on the circumstances of each case. Factors which may be of importance in this regard are the age, occupation of the missing person, the risk to which he was exposed and the circumstances under which he disappeared.[5] The fact that a person disappeared in an intrinsically dangerous situation or area will usually tip the scale in favour of granting a presumption order that he is dead.

5. Discussion

[12] It is common cause that the missing crew in this matter were on board Lepanto Vessel when it sunk and disappeared 34 nautical miles off Hout Bay. Their names appear on the crew list marked TR1 attached to the applicants' application. They worked for the first applicant, and their employment contracts were also attached to the application.

From the available evidence, 20 crew members were on board the sunken Vessel and 9 of them survived the tragedy. Despite the diligent

search, to date, no other Vessel or person has reported any sighting of any of the missing crew, nor have their bodies been sighted or retrieved. When the Vessel sank, the surviving crew managed to inflate one of the life rafts and made their way into it before the Vessel sank. However, the missing crew were not located following the sinking of the Vessel.

[13] In my view, it is extremely unlikely that the missing crew would have survived a swim to shore, particularly in the very cold water. It has been four months since the tragedy, and no one has seen them. No sign of life was found during the search and rescue operation, and only a few pieces of debris were spotted and retrieved. The missing crew, in my view, disappeared at sea, an intrinsically dangerous area. They were involved in an occupation that endangered life. In my view, their disappearance at sea tips the scale in favour of granting the applicants' application.

[14] At the hearing of this application, I thought of acting *ex abundanti cautela* by granting an interim order calling upon interested parties (if any) to show cause on the return date why a final presumption order of death regarding the missing crew should not be granted. However, after considering the circumstances of this matter, the crew list attached to the application, their employment contracts, and the reports of the MRCC and NSRI, I am of the view that such an order would only serve to delay matters and would serve no purpose other than incurring further expenses associated with the publication and the second appearance of Counsel on the return date. From the available evidence, it is apparent that the missing crew were together with the surviving crew at sea when the disaster occurred. The applicants, with the assistance of the surviving crew, have explicitly explained how the accident leading to the disappearance of the missing crew occurred.

[15] Despite the extensive search at sea that lasted for two days, there was no sign of life for the missing crew. The overwhelming evidence from the surviving crew is that after fishing operations were completed on Friday, 17 May 2024, at approximately 14h30, the crew were working the fish away, and the Skipper was steaming. Their Vessel, suddenly listed to starboard, capsized and sank at the stern. Evidently, the missing crew were exposed to a dangerous and life-threatening accident. In my view, the probabilities are irresistible that the missing crew were sadly lost with the Vessel when it sank on 17 May 2024 at 14h30 in the afternoon. There is overwhelming evidence, in my opinion, to infer on a preponderance of probabilities that their death has, in fact, occurred when their Vessel sunk.

[16] Consequently, the only reasonable conclusion to be drawn in the circumstances is that the missing crew perished at sea.

6. Order

[17] In the result, the missing crew listed hereinabove are presumed to have died at sea on 17 May 2024.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Adv Cooke

Instructed by: Edward Nathan Sonnenbergs Inc

[1] Ex Parte Maclean 1968

(2) SA 644 (C) at 645-6).

[2] Ex Parte Govender 1993

(3) SA 721 (D) at 722G.

[3] Ex Parte Rungasamy 1958

(4) SA 688 (D) at 690-691.

[4] Ex Parte Parker 1947

(3) SA 285 (C) at 287.

[5] Ex Parte Pieters 1993

(3) SA 379 (D) at 382.

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