

A PRACTICAL OVERVIEW ON ENFORCEMENT AND DEFENCE OF MARITIME CLAIMS IN SOUTH AFRICA (INCLUDING CASUALTIES AND CARRIAGE OF GOODS BY SEA)



Shepstone & Wylie, established in 1892, and strategically placed with certain of our offices situated in major port cities such as Durban, Cape Town and Richards Bay, is privileged to be able to draw on over a 120 years of experience and expertise in the specialized field of maritime law, as well as many other related fields including transport and logistics, marine insurance, customs, excise, VAT and trade.

The firm is recognised by Legal 500 as a "market leader" in shipping and transport law, "thanks to the presence of 'well regarded' and immensely experienced partners



The information set out herein is brief in nature and is not intended to be an exhaustive treatise on the enforcement and defence of [maritime claims](#) in South Africa. Where necessary, readers are encouraged to seek further information and advice, particularly when contemplating or embarking upon litigation within the South African admiralty judicial system as the facts of the matter may determine the remedies available.

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A BRIEF HISTORICAL OVERVIEW OF SOUTH AFRICAN MARITIME LAW



South Africa is an Anglo-American jurisdiction; a legal system where the law is a combination of statute (codified law promulgated by parliament) and the common law (law developed over time through the courts). It is furthermore a precedent based system where the law, both statute and common law, is administered by the courts who pronounce on issues relating to the interpretation and enforcement of statutes as well as developing the principles of the common law.

Our common law is predominantly a combination of Roman Dutch and English law. The British established our court system which was predominantly presided over by English judges. These judges, being trained in England, were inclined to base their decisions on English law even when interpreting Roman Dutch law. Over time of course, and as legal systems have become less insular, our courts in developing the common law have also had regard to foreign decisions, predominantly from Anglo-American jurisdictions, as well as other sources of international law, such as treaties and conventions in developing our common law.

English admiralty law and practice was introduced into the South African legal system with the enactment of the Colonial Courts of Admiralty Act, 1890 which imbued every court of law within a British possession with admiralty jurisdiction, derived in the main from the Admiralty Court Acts of 1840 and 1861 ("the old heads of jurisdiction"). The position, prior to the enactment of our [Admiralty Jurisdiction Regulation Act, Act 105 of 1983](#) ("the [Admiralty Act](#)"), was that English statutes pertaining to admiralty matters as at 1891 had force of law in South Africa and our courts ought to, although they did not always, apply English admiralty law as developed by the English courts and the Privy council.

The [Admiralty Act](#) has altered the position; broadening the ambit of our admiralty courts through the introduction of new heads of claim(s) ("the new heads of jurisdiction"), introducing the application of English common law in force up until November 1983, providing a mechanism for the enforcement of [in personam](#) claims as well as providing ancillary relief, such as the ability to obtain security for claims (including claims to be litigated in other jurisdictions) and to obtain evidence for proceedings both locally and abroad.

HOW CAN ONE ENFORCE A MARITIME CLAIM IN SOUTH AFRICA?

- The claim in question must be a '[maritime claim](#)' as defined in the [Admiralty Act](#).
- Proceedings in South Africa can be instituted by a foreign entity against another foreign entity either through arrest of property (an [action in rem](#)) or through the attachment of property (an [action in](#)

[personam](#)). In addition, it is possible to obtain security for proceedings outside of South Africa through the arrest of property in South Africa by means of a [security arrest](#).

- From a practical perspective one needs to select the correct procedure for the enforcement of the [maritime claim](#).
- A litigant's claim is secured through the arrest or attachment of property. In order to obtain release of the property, the defendant/respondent would be required to put up [security](#). Should security not be established for the release of the property, then ultimately it may be necessary to sell the property by [judicial sale](#).

MARITIME CLAIM.

- One can only rely on the provisions of the [Admiralty Act](#) in respect of maritime claims as defined in the Admiralty Act. An extensive list of maritime claims is provided for in section 1(1) of the [Admiralty Act](#). This list does not constitute a *numerous clauses* (closed list) of claims, in fact section 1(1)(ee) extends the ambit of the [Admiralty Act](#) by including a 'catch all' subsection which provides for ; "*any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs.*"

ACTIONS IN REM

A distinctive feature of the South African action *in rem* is that the purpose is to bring the property in question before the court. The property constitutes the defendant and accordingly the security that one can obtain is, in respect of a particular [maritime claim](#), limited to the value of the property arrested.

An [action in rem](#) can only be enforced through the arrest of maritime property to enforce claims based on:

- maritime liens OR
- if a claimant is able to establish that it has a [claim in personam](#) against the owner of the maritime property that it seeks to arrest and that the claim in question relates to that property (what we refer to as a statutory right *in rem*).

Maritime property includes the ship or an [associated ship](#), bunkers, freight, cargo (including containers) and a fund constituted by the sale of maritime property.

Following English law South Africa only recognizes the following claims as maritime liens:

1. Damage by ships;
2. Salvage;
3. Seaman's wages;
4. Bottomry;
5. Respondentia; and
6. Master's wages and disbursements.

An arrest *in rem* can be affected through the issue of a simple summons without the need, in most instances, to seek sanction from the court. Depending on the complexity of the matter it may be possible to issue papers within a matter of hours after receipt of complete instructions.

ACTIONS IN PERSONAM

Actions *in personam* constitute proceedings against a named person, debtor or wrongdoer. This covers claims both in contract and delict (tort). This procedure is available to both local and foreign plaintiffs. In circumstances where the debtor or wrongdoer is not resident within South Africa it will be necessary to attach property of the debtor or wrongdoer in South Africa to establish jurisdiction. Unlike [actions in rem](#), any property of the debtor or wrongdoer is susceptible to attachment, whether such property is corporeal or incorporeal. In order to avoid the attachment of property a debtor or wrongdoer may submit to the court's jurisdiction, but such a submission would have to take place prior to any attachment.

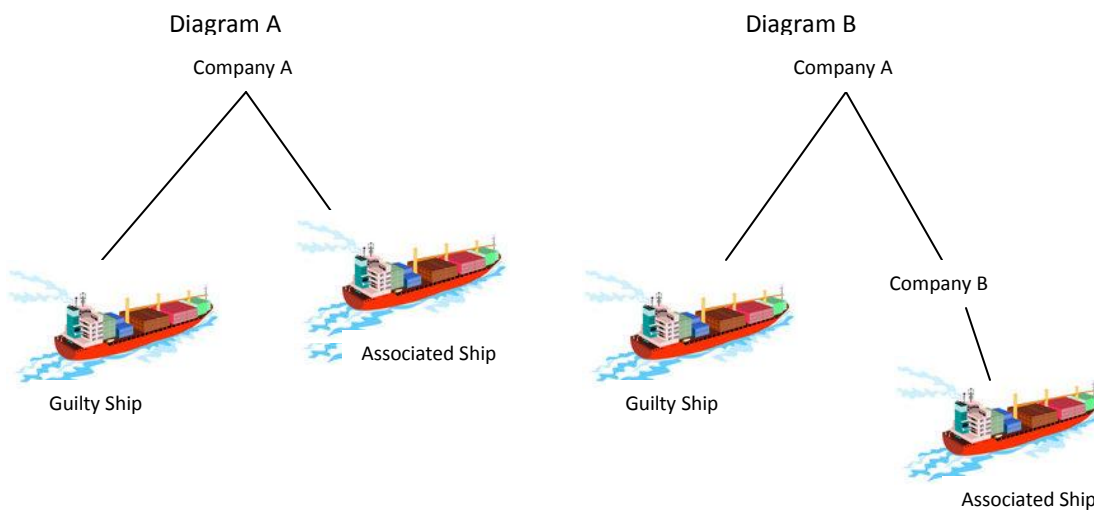
A formal application for the attachment of the debtor or wrongdoer's property is required. This is brought on affidavit to which must be attached all relevant documentation. Being a formal application which must be brought

before a judge (usually *ex parte*) counsel is usually briefed. Depending on the complexity of the matter one may need significantly longer to prepare the necessary application to court, although it is not impossible to move such applications on fairly short notice following receipt of complete instructions.

An advantage of *in personam* proceedings is that, unlike *in rem* proceedings, the defendant / respondent is required to establish security to the full value of the plaintiff/applicant's claim as well as interest and costs, notwithstanding that the value of the property attached may be less.

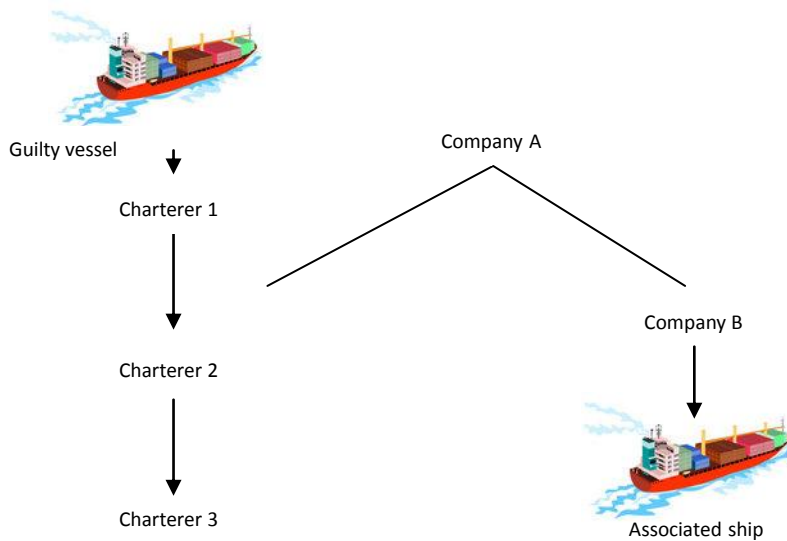
ASSOCIATED SHIPS

The associated ship provisions have been described by certain South African authors as the 'nuclear weapon' of South African admiralty jurisdiction. Essentially it expands the ambit of the classic sister ship arrest. An arrest of an associated ship is permitted in circumstances where common control as opposed to common ownership can be established. The diagram below provides a simplified graphic depiction of the distinction between the classic sister ship concept and the associated ship concept.



The ambit of the associated ship provisions have been significantly extended by virtue of the deeming provision in the [Admiralty Act](#) which provides that for the purposes of establishing an association the charterer of a ship shall be deemed to be the owner of the chartered ship in respect of any relevant [maritime claim](#) for which the charterer or sub-charterer and not the owner is alleged to be liable. This is illustrated graphically below.

DIAGRAM 'C'



This provision is particularly significant in providing owners with alternative recourse for the recovery of debts due by a charterer which generally does not have substantial assets. Establishing control for the purposes of the associated ship provisions is a matter of fact and accordingly needs to be assessed on the particular facts of each case. In extremely broad terms however, control of a company is defined as the ability to determine its ultimate destiny.

SECURITY ARRESTS

A mechanism often used by claimants wishing to obtain security for proceedings in other jurisdictions (although security arrests can be affected for litigation in South Africa as well) are the security arrest provisions contained in the [Admiralty Act](#). These provisions permit a claimant to arrest any property of a debtor or wrongdoer, including in certain circumstances an [associated ship\(s\)](#). In order to obtain a security arrest a claimant must demonstrate that;

- It has a claim enforceable by an [action in personam](#) against the owner of the property concerned or an [action in rem](#) against such property;
- It has a *prima facie* case in respect of such claim which is *prima facie* enforceable in the nominated forum; and
- It has a genuine and reasonable need for security in respect of the claim.

The claim which one is seeking to obtain security for must be recognised as a [maritime claim](#) in terms of South African law. The determination of whether a claimant has a *prima facie* case however depends on the law applicable to the claim in question. Accordingly one would therefore have to rely on the advice of foreign lawyers where the claim is not subject to South African law. Determining whether or not one has a genuine and reasonable need for security is to a large extent a factual enquiry and will depend upon a consideration of the particular facts of each case. The quantum of the security which can be obtained through a security arrest is limited to the value of the property arrested.

SHIPWATCH

Shepstone & Wylie offer a free shipwatch service to our clients seeking recourse against a particular vessel(s). This service covers all the major ports in South Africa.

RELEASE OF VESSELS AND OTHER PROPERTY

In circumstances where a ship or other maritime property has been [arrested in rem](#) or any property has been [arrested for security](#) the owner of the property or the debtor / wrongdoer (if they are not one and the same person) can obtain release of the property by posting security to the value of the property arrested. The value of the property will be determined on an "as is where is" basis.

What parties sometimes find anomalous in South Africa is that in order to obtain release of property from an attachment to found or confirm jurisdiction in respect of a [claim in personam](#) the owner of the property or the debtor is required to establish security to the full value of the claim.

Where the value of the property exceeds the claim there is generally not much of an issue in this regard. It is not uncommon however for the value of the claim to far exceed the value of the property. It has been suggested that requiring an owner or debtor to put up security far in excess of the value of the property to obtain its release may not withstand constitutional muster in that it arguably constitutes an arbitrary deprivation of one's property - but this has never been the subject of a judicial decision.

As to the form of security which is accepted in South Africa the two recognised forms of security, apart from cash deposits with the Registrar of the High Court – which is very rarely (if ever) done is;

1. security in the form of a bank guarantee from a first class South African Bank, or
2. a letter of undertaking ("LOU") from a Protection and Indemnity (P&I) Club of good financial standing.

It is always open for the parties to agree alternative forms of security but if the owner of property arrested or attached or the debtor offer security in the form of a bank guarantee or a Club LOU in the usual wording then the arresting party will be obliged to release the property.

COUNTER-SECURITY

It is open for the owner of the property arrested or the debtor to approach our court for counter-security. In principle our courts would be disposed to order counter-security for legal costs in opposing the principle claim as well as security for direct counter-claims which the debtor may have against the claimant. If a court is disposed to order the arresting party to put up counter-security for any claim by the owner of the property or the debtor then the validity of any security put up by the debtor/wrongdoer or owner of the property is generally made conditional on the provision of counter-security by the arresting creditor.

JUDICIAL SALES

In terms of our law a court may at any time order that any property which has been arrested or attached in terms of the [Admiralty Act](#) be sold and the proceeds of the sale held as a fund in the court.

Litigation may take some years to be concluded. Where an owner elects not to provide security for the claim, the property will remain under arrest or attachment pending the outcome of the litigation. In certain circumstances it may be possible to obtain the sale of the property prior to final determination of the matter. This usually occurs in circumstances where the owner of the vessel fails to preserve or maintain the vessel, or where it is determined that the value of the vessel will substantially depreciate pending the outcome of the matter.

The courts are naturally willing to grant orders for the sale of property in execution of any judgment.

THE EFFECT OF THE JUDICIAL SALE OF THE VESSEL

Where a ship or other maritime property is sold by judicial sale pursuant to a court order in terms of the [Admiralty Act](#), such sale discharges all liens and encumbrances. Therefore a court sale is one of the few ways in which a mortgage is deemed to be deleted as an encumbrance over the ship (It is important to note that sale does not expunge the debt, it merely breaks the link between the debt and the vessel). A [judicial sale](#) also extinguishes maritime and possessory liens, and all other maritime and other claims for which the ship may have stood security.

RANKING OF CLAIMS

The [Admiralty Act](#) sets out the ranking of [maritime claims](#). There are complex rules regarding the ranking of claims, particularly the ranking of claims *inter se*. Generally, claims for the preservation of the vessel whilst under arrest rank above all other claims, followed by claims for salvage, wreck removal, and possessory liens. There are also a number of claims, most notably claims for necessities and insurance premiums or calls, which rank above the claims of a mortgagee in South Africa on condition that legal proceedings in respect of these claims have been

commenced within one year of the claim arising. In order to make the South African ship's registry more attractive to mortgagee banks, this provision is currently under review.

RANKING IN RELATION TO ASSOCIATED SHIPS

In addition to the ranking of the claims themselves, there is a further system of ranking which applies.

When a fund is created by the sale of a ship, two queues are formed. Claims which lie directly against the vessel sold are paid first under the system of ranking set out above. Thereafter claims which lie against associated vessels (i.e. vessels in the same beneficial but indirect ownership as the vessel sold) are paid out from the fund then remaining where after any surplus is paid back to the owners of the property sold, or, if the ship owning company is in liquidation, to the liquidator.

CASUALTY RESPONSE

Shepstone & Wylie, as the legal correspondent for numerous P&I Clubs, has been involved in most of the casualties which have occurred along the South African coast over the past 100 years.

Our practitioners are not only well versed in the legal aspects associated with casualties but have vast practical experience in dealing with such matters and have over the years forged excellent relationships with the relevant authorities as well as members of the salvage industry and surveyors. Our practitioners are accordingly sensitive to the needs and requirements of the crew, the owner, and all other interested parties.

There are a number of facets to the management of casualties, but these can be broadly broken down into two categories:

- liaising with the authorities; and
- the preservation of evidence.

LIAISON WITH AUTHORITIES

The [South African Maritime Safety Authority](#) ("SAMSA") is the authority to which most powers in respect of safety of life at sea, [pollution, salvage and wreck removal](#) under local legislation and/or conventions has been delegated. SAMSA have wide powers pursuant to various pieces of legislation to give directions to the master and owner of a vessel (as well as other interested parties) following on from an incident which gives rise or may give rise to a casualty.

SAMSA also has powers in terms of the [Merchant Shipping Act No. 57 of 1951](#) ("the MSA") to convene a preliminary enquiry into any casualty in circumstances where;

- when the ship is lost, abandoned or stranded;
- when there is an accident on board or the vessel is damaged (by whatever means) or another vessel is damaged by the ship concerned;
- where there is loss of life or serious injury to any person on board the vessel;
- if allegations of incompetency or misconduct are made against the master or officers of that vessel.

Following on the preliminary enquiry SAMSA may, if justifiable, convene a court of marine enquiry.

SAMSA's jurisdiction overlaps in certain circumstances with that of the [National Ports Authority](#) and the [Department of Environmental Affairs](#) which have certain statutory powers over vessels in distress, stranded or abandoned pursuant to the [National Ports Act No. 12 of 2005](#) and the [National Environmental Management Act No. 107 of 1998](#). The [National Ports Authority's](#) powers are confined to the geographical limits of the ports, while the [Department of Environmental Affairs](#) powers are limited to designated reserve areas or sanctuaries.

POLLUTION, SALVAGE AND WRECK REMOVAL

South Africa, in 2005, acceded to the [International Maritime Organisation](#) (IMO) Protocol of 1992 which amended both the [International Convention on Civil Liability for Oil Pollution Damage](#) ("[the CLC Convention](#)") and the [International Convention on the Establishment of an International Fund for Oil Pollution Damage](#) ("[the Fund Convention](#)").

It is only recently that the [CLC Convention](#) and the [Fund Convention](#) have acquired force of law in South Africa through the enactment of the necessary enabling legislation. The above conventions apply to ships carrying oil in bulk. The powers provided to the state in terms of these conventions are administered by [SAMSA](#).

The enabling legislation referred to above has not repealed all the provisions of the [Marine Pollution Civil Liability Act](#) in South Africa which, prior to the enactment of the above conventions, applied to all vessels. This Act now has application in respect of vessels other than tankers, and provides [SAMSA](#) with wide powers to avert pollution by hazardous and noxious substances.

South Africa has enacted the provisions of the [International Convention on Salvage, 1989](#) as an annexure to our [Wreck and Salvage Act No. 94 of 1996](#). The [Wreck and Salvage Act](#) provides [SAMSA](#) with wide discretionary powers in dealing with and seeking to prevent 'wrecks' as defined. Certain powers in respect of wrecks are also provided to the [National Ports Authority](#) in terms of the [National Ports Act](#). South Africa is however considering accession to the [Nairobi Convention on Wreck Removal](#).

PRESERVATION OF EVIDENCE

Our [Admiralty Act](#) makes provision for the preservation of evidence. In order to avail oneself of the relevant provisions it would have to be demonstrated that should the court not intervene, there is a likelihood that relevant evidence in respect of a particular matter will be lost.

One can avail oneself of the provisions both for proceedings in South Africa and abroad, however, in respect of the latter, one will have to demonstrate 'exceptional circumstances'. There has been no definitive ruling as to what constitutes 'exceptional circumstances' which depends largely on the facts of each matter.

Our courts have repeatedly held that the purpose of the provision is not to circumvent the ordinary rules in respect of discovery of documents, the inspection or examination of property, or the rules of evidence. The object of the provision, so it has been said, is to preserve specific evidence; (i) which is known to exist, and (ii) which, *prima facie*, constitutes vital substantiation of a known cause of action and (iii) where there is a real concern that unless an order is granted the evidence may be lost or destroyed.

In relation to the preservation of documentary and physical evidence accepted practices have been developed in our jurisdiction. In respect of the former, the attorney representing the party who is in possession of the documents will retain copies thereof and provide an undertaking to deliver these either by agreement or in terms of an order by a competent tribunal or court as the case may be. In respect of physical evidence, access to such evidence by the parties' surveyors is usually granted under supervision and restricted to relevant evidence.

It is in respect of oral evidence that matters can become somewhat contentious. In a succession of recent decisions in the Western Cape Division of the High Court the court has ordered a commission of enquiry to be established to take the evidence of crew members following upon a casualty. This effectively amounts to a trial within a trial, albeit with distinct disadvantages for the party demanding same. This approach has not been adopted in the Kwazulu Natal local division of the High Court.

CARGO CLAIMS AND CARRIAGE OF GOODS BY SEA

South Africa has incorporated the provisions of the Hague-Visby Rules through our Carriage of Goods by Sea Act (COGSA"). The Hague-Visby Rules are in terms of our COGSA mandatorily applicable to all outbound shipments from South Africa.

Our COGSA also provides for a local receiver of goods to institute proceedings within South Africa notwithstanding the inclusion of an exclusive law and jurisdiction clause in the relevant contract of carriage.

The transfer of rights and obligations through the negotiation of bills of lading, including title to sue, is governed by our Sea Transport Documents Act.

