



MARITIME LAW PRIMER

South Africa has a unique geographical position: we are effectively the gateway to the east and our shores not only provide a perfect halfway station for vessels to refuel and provision but also the opportunity to avoid the expensive fees payable for transiting the Suez Canal, as well as catering for vessels that are too large to pass through the canal.

The other aspect that makes South Africa unique in the world of maritime law is the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act") and its introduction of the concept of the associated ship.

It is for this reason that South Africa continues to be a popular jurisdiction for maritime creditors seeking security for their claims. Several other features also contribute to the unique efficacy of the Act. The associated ship provisions allow a claimant to proceed against a ship that is unrelated to the claim but which is related through common ownership or control to the vessel to which the claim relates. This goes beyond the traditional sister ship arrest which is to be found in most other jurisdictions.

The South African arrest regime encompasses many solutions to creditors in the current depressed market. Creditors are not obliged to commence an admiralty action in South Africa to pursue a maritime claim, but

may proceed to arrest property in South Africa to obtain security for a claim which is or may be the subject of arbitration or any other proceedings elsewhere.

There is no restriction on the ability to obtain security in South Africa, provided that the court is satisfied that the claimant's claim falls within the definition of a maritime claim, has a *prima facie* case which is enforceable in the nominated country of its choice, and demonstrates a genuine and reasonable need for security. It is not necessary for the claimant to

have commenced its claim already; it is sufficient that proceedings are merely contemplated. This means that a claimant may avoid the expense of commencing proceedings until it is certain that it has security in place, which gives the claimant immediate leverage over the debtor. Further, the claimant need not put up counter-security as a precondition for commencing arrest proceedings in South Africa. While the usual targets of arrest are ships, bunkers and sometimes cargo, a claimant is

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NEW PREMISES UPDATE

The move to our new premises in the Glass House Office Park on uMhlanga Rocks Drive, which was scheduled for 1 July 2018, has been delayed until 1 September 2018. We look forward to welcoming our clients to our new offices in the spring!



Seen on site are, from left, Ishara McKenna, Anisa Govender, Hlengiwe Skosana, Craig Anderson, Subashnee Moodley, Barry Lewis and Charne Goosen.

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free to arrest any property owned by the defendant within the jurisdiction of the South African court for the purpose of providing security only for a maritime claim.

The nature of the underlying claim seldom imposes a restriction on the claimant. South African legislation recognises 32 categories of maritime claim, including a 'catch-all' provision which gives the court admiralty jurisdiction over any matter which, by virtue of its nature or subject matter, is a marine or maritime matter. Issues such as the place where the claim arose, the flag of the vessel, the residence, domicile or nationality of its owner or of the claimant, are irrelevant to the question of whether the South African courts have admiralty jurisdiction.

The 'associated ship' provisions may be utilised to arrest ships as security for claims not only against shipowners, but also against charterers. In regard to claims against owners, a claimant may look behind the confines of the owning entities of the ships in question (i.e. the 'guilty' ship and the 'target' ship) until a common owner or controller is found. An array of intelligence resources is available to a claimant to unearth evidence of association, much of which is now freely available on the Internet or accessible through research intelligence entities.

As regards claims against charterers, the associated ship provisions have been used to good effect by parties looking to secure claims for unpaid hire and early re-delivery following market collapses. In short, South African legislation deems the charterer of the guilty ship to be the 'owner' of that ship for the purposes of establishing an association with the target ship.

While the owner of an arrested vessel may apply

to set aside an arrest, it does not follow automatically from a subsequent setting aside that the arrest was wrongful. The onus is on the affected party to prove that the claimant obtained the arrest without reasonable and probable cause and that the affected party suffered loss or damages as a result. For this reason, arrests in South Africa seldom give rise to actions for damages. The arrested property may be released on the giving of security, which may include a protection and indemnity club letter of undertaking, a bank guarantee and, increasingly, an escrow arrangement.

Where the shipowners find themselves in trouble and cannot lift the arrest by providing security, a judicial sale of the arrested ship is merited. The procedure involves an application before a judge for an interim order to be made final on the return day.

The application sets out the reasons for the sale, the form of the sale, and the process for the submission of claims against the fund to be formed from the proceeds of the sale. In the absence of any objections the court will make the sale order final, subject to it being in the interests of the general body of maritime creditors. The vessel is sold free of all liens and encumbrances and the registrar of the high court will issue a bill of sale allowing for fresh registration of the vessel.

After the ship has been sold, whether by public auction or private treaty, the funds are placed under the control of the court and a referee (usually an advocate) is appointed to receive and review the claims and to report to the court on the ranking of those claims against the fund.

The ranking is set out in the Admiralty Act and the referee's report is usually made an order of court and the fund is then distributed in accordance with that order.

*Submitted by Anisa Govender,
Senior Associate, Maritime Department*



NEW APPOINTMENTS



New appointments are, from left, Anja Schramm (Consultant, Matrimonial Department), Anisa Govender (Senior Associate, Maritime Department), Charne Goosen (Associate, Conveyancing Department), and Kirsty Steytler (Associate, Conveyancing Department).

CORRUPTION – THE MODERN SCOURGE

The media bombards us with a constant barrage of bad news about bribery and corruption on the part of government, parastatals, business, and individuals and the negative effect it has on the economy of the country and the wellbeing of its citizens. But how much do we really understand about bribery and corruption and what it entails?

In recent years there has been a heightened focus both nationally and internationally on these crimes and legislation has been enacted in an attempt to curb this scourge. In South Africa we, too, have legislation to deal with corruption although to date there have been very few successful prosecutions. There does appear to be, however, a new willingness and commitment to tackle this pervasive problem.

Some examples of applicable legislation include:

- The Prevention and Combatting of Corrupt Activities Act, which is the key statute on corruption in South Africa, provides for the general offence of corruption.

In terms of this Act, corrup-

tion is the abuse of power for private gain and has the following elements:

- o Someone giving (offering to give) and someone receiving (or agreeing to receive);
- o Someone in a position of power;
- o The use of that power illegally or unfairly;
- o Gratification.

Corruption is essentially a 'two-way street'. Both the person who offers to give or do something for someone to use their power unfairly, as well as the person who agrees to accept gratification to use his power in an unjustified manner, will be guilty of the crime of corruption.

Gratification can take many forms and includes money, a donation, a fee, a reward, property, the avoidance of loss, the discharge of a loan, a privilege, and a discount.

Besides the general offence of corruption, the Act sets out various specific offences including corrupt activities relating to public officers, foreign public officials, agents, members of the legislature, judicial officers, members of the prosecuting authority, sporting activities, auctions, and the procuring and the withdrawal of tenders.

Conviction of an offence under the Act can have serious consequences with penalties ranging up to life imprisonment.

- Section 217 of the Constitution requires organs of State in the national, provincial or local sphere of government to contract for goods and services with a system that is fair, equitable, transparent, competitive and cost effective.

This requires the State to take positive steps to ensure transparency of all public procurement processes including the investigation of allegations of corruption or improper conduct in procurement processes.

- In terms of the Competition Act, certain prohibited conduct also amounts to corruption. The manipulation of a tender process by way of cover pricing or other forms of collusion in contravention of the Act may be a contravention of the Prevention and Combatting of Corrupt Activities Act. Bid rigging, cartels or engaging in cover pricing to favour one or more firms in exchange for a loser's fee amounts to an offence.

In an effort to highlight and eradicate the problem of corruption, many companies have adopted bribery and corruption policy documents which employees are required to sign.

*Submitted by Barry Lewis,
Director,
Conveyancing Department*



NEW APPOINTMENTS



New appointments are, from left, Ishara McKenna (Associate, Commercial Law Department), Mags Mothilal (Associate, Litigation Department) and Dane Elson, Chloe Naidoo and Nelson Xaba (Candidate Attorneys).

REASONS WHY YOUR WILL MIGHT BE OUTDATED

We often think that once we have signed our Will, it is done and dusted and need only be taken out again when we pass away. However, as our lives and financial circumstances change, it is just as important to regularly review your Will as it is to have drafted and signed it in the first place.

Consider asking yourself the following questions:

1. Does your Will list your children by name as heirs?

If this is the case, children who were born after your Will was signed will not be entitled to inherit. Unless you intend to give specific items to specific children, or you do not plan to have more children, it is advisable to use the term "my children", which includes all biological and adopted children but excludes step children. It is also recommended that you use the term "my grandchildren" to avoid having to update your Will every time a grandchild is born. It is advisable to identify your spouse or partner by name as opposed to "my spouse/partner" as this phrase leaves your intentions open to interpretation, which could result in costly litigation.

2. Does your Will refer to "children born of our marriage"?

Following on from the first question, if your marriage has been dissolved since the signing of your Will and you have subsequently had another child, that child will unfortunately not be entitled to inherit in terms of your Will. If the

child is under the age of 18 and was financially dependent on you, then the child (or his/her guardian) may be able to claim maintenance from your estate.

3. Does your Will create a Trust for minor beneficiaries?

In terms of the Children's Act, the age of majority has decreased from 21 to 18 since 2007. You are, however, free to exercise your discretion in your Will concerning what age your child or grandchild may inherit. If your Will does not include a Trust in favour of any heir that may be under that age of 18 at the time of your passing, his or her inheritance will be paid to the Guardian's Fund which is a fund administered by the Master of the High Court. The heir can access the capital once he or she reaches the age of 18. Prior to that date, maintenance can be claimed from the fund on behalf of the minor child for education expenses etc.

4. Does your Will nominate a guardian in the event that both natural guardians die?

It is important to nominate a person or persons you trust and who will accept your nomination. A guardian would deal with the day-to-day wellbeing and care of the child, unlike a trustee who would deal with the administration of the Trust assets for the benefit of the child.

5. Does your Will name specific items like an immovable property or motor vehicle?

There is no problem with identifying assets by the property description or year and model, however provision should be made if these identified assets are no longer registered in your name at the date of your passing. It is advisable to either create a Codicil, which would amend the clause referring to the specific asset

and leave the rest of your Will unchanged, or you can include a default provision, for example: "I leave my 2015 Toyota Hilux to my son, or any other motor vehicle which may be registered in my name at the date of my death".

6. Does your Will make a bequest to a Family Trust?

It is important that the Family Trust nominated is still in existence and will continue after your passing. The Family Trust also needs to have the legal capacity to receive the inheritance. It is advisable to make provision for alternative heirs should the bequest to the Trust fail for whatever reason. If no provision is made for an alternate heir, the bequest to the Family Trust will fall to the residuary heirs or, failing provision for residuary heirs, will devolve in terms of the laws of intestate succession.

7. Have you changed your Will within three months of your divorce?

In terms of Section 2B of the Wills Act, if you die within three months of the date of your divorce and your now ex-spouse is named as a beneficiary in terms of your Will, he or she will be deemed to have died before you. This means that his or her inheritance will be forfeited to the alternate heirs in terms of your Will or in terms of the laws of intestate succession. This situation can be avoided if your Will explicitly provides that your ex-spouse is to inherit despite a divorce or by signing a new Will altogether.

Should you die at any time after three months of the date of the divorce and you have not updated your Will, your ex-spouse will be entitled to inherit provided they are named as a beneficiary in your Will.

Should you wish to review and update your Will, kindly contact Mike Nolan (031 536 7520, mnolan@livingston.co.za) or Claudia Harris (031 536 7516, charris@livingston.co.za)

Submitted by Claudia Harris, Associate, Estates Department



ADDRESS
www.livingston.co.za

1ST FLOOR, BUILDING NO. 3,
GLASS HOUSE OFFICE PARK,
309 UMLANGA ROCKS DRIVE,
LA LUCIA RIDGE, 4051
PO BOX 4107, THE SQUARE, 4021
TEL: 031 536 7500
FAX: 031 566 2470
EMAIL: info@livingston.co.za