

THE MARITIME LAW ASSOCIATION OF SOUTH AFRICA

Affiliated to the Association of Law Societies of SA
Member of the Comite Maritime International



From the office of the Secretary

18th Floor, No. 2 Long Street
Cape Town, 8001
PO Box 7452, Roggebaai, 8012
Docex 272, Cape Town
Phone : +27-21-419 6495
Fax : +27-21-418 1974
e-mail : mackenzie@wylie.co.za

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Comite Maritime International
Mechelsesteenweg 196
B-2018 Antwerpen
BELGIUM

Via e-mail: admini@cmi-imc.org

Dear Sirs

CMI INTERNATIONAL WORKING GROUP ON THE FAIR TREATMENT OF SEAFARERS: QUESTIONNAIRE

We refer to your letter of 22 December 2004.

Set out below is our response to that questionnaire.

SOUTH AFRICAN LEGAL FRAMEWORK

We thought it would be helpful to briefly explain South Africa's position with regard to the relevant legislation.

South Africa's legal system is based to a large degree on common law with its roots in the Roman Dutch system. The significant relevant exception is that our criminal procedure system is based to a large degree on English criminal procedure. All legislation is subordinate to the Constitution and its bill of rights. The Constitution, which is contained in Act No. 108 of 1996, provides at Section 2 that it is the supreme law of South Africa and that any law or conduct inconsistent with the constitution is invalid. That Section further provides that the obligations imposed by the constitution must be fulfilled. This obligation applies to organs of the Government as well as to citizens and companies.

Section 35 of the Constitution contains an extensive list of rights enjoyed by arrested, detained or accused persons. A copy of Section 35 is enclosed.

South Africa is a signatory to the following relevant pollution conventions:-

1. Marpol 73 and Protocol of 78 annexures I, II, III and V;
2. London Convention of 72 and Protocol of 1996;
3. Intervention Convention of 1969 and Protocol of 1973;
4. CLC Convention of 69 and Protocol of 92;
5. Fund Protocol of 92

Questionnaire

PART 1

Question 1

The South African Safety Maritime Authority ["SAMSA"] is responsible for administering and enforcing maritime safety and marine pollution prevention and control legislation in South Africa. SAMSA is a statutory body to which has been delegated the rights, duties

and obligations of the Marine division of the South African Department of Transport.

Question 2

The Merchant Shipping Act No 57 of 1951 provides in chapter six for various accident investigation processes.

1. Section 264 provides that SAMSA in its discretion may hold a preliminary enquiry:

1.1 In respect of a South African registered ship whenever:-

1.1.1 An allegation of incompetence or misconduct is made against the owner, the Master or any member of the crew; or

1.1.2 A ship has been lost, abandoned or stranded, an accident has occurred on board a ship, the ship has been damaged, the ship has caused damage to another ship or there has been loss of life or serious injury to any person on board the ship at any place whatsoever.

1.2 In the case of a foreign flag vessel whenever any of the events referred to in sub paragraph 2 above has occurred within the territorial waters of South Africa.

1.3 In respect of any ships whenever an allegation of incompetence or misconduct is made against an employer or any person on board the ship while within South African territorial waters:

1.4 In respect of a foreign flagged vessel whenever one of the events referred to in sub paragraph 1.1.2 occurs outside of the territorial waters and the ship subsequently arrives in South Africa and an enquiry into the casualty has not been held by any competent port or, in the event of a treaty ship evidence is obtainable in South Africa as to the circumstances in which the ship proceeded to sea or was last heard of.

A preliminary enquiry merely produces a report which is considered by SAMSA.

In the event that the Minister of Transport deems it necessary and regardless of whether or not a preliminary enquiry has been held a Court of enquiry can be convened to hold a formal investigation into any of the allegations referred to with regard to a preliminary enquiry.

This Court of marine enquiry only has jurisdiction over foreign flagged vessels in the event that the casualty occurs within South African territorial waters or the flagged state requests South Africa to carry out a marine enquiry.

The general practice adopted by SAMSA in respect of casualties is that they conduct a preliminary investigation into a casualty and very rarely proceed with a preliminary enquiry or a marine enquiry. This is partly because SAMSA suffers from both financial and staff constraints.

Question 3

A Court of marine enquiry may cancel the Certificate of Competency of service of the Master or member of the crew, or suspend it for a stated period or prohibit his or her employment in any stated capacity in a ship for a stated period or impose a fine not exceeding R2 000 (US\$300) upon that person or reprimand that person. This power is restricted to South African flagged ships or ships registered outside of South Africa, but only if they trade solely along the South African coast.

The Marine Pollution Control and Civil Liability Act no.5 of 1981 relating to the protection of the marine environment from pollution by oil and other harmful substances stipulates that contravention of certain of the provisions of that Act constitutes an offence, which offence attracts a fine of up to R200 000 (US\$30 000) or a period of imprisonment up to 5 years, or both the fine and imprisonment.

The most severe of these penalties is reserved for the following offences:

1. Discharge of an oil from a ship, tank or an off-shore platform unless such discharge was for the purposes of securing the safety of the ship, preventing

damage to the ship, or of saving life and the discharge of the oil was a necessary and reasonable step to take in the circumstances. Or if the oil in question escaped from the ship as a result of damage to the ship and all reasonable steps were taken to prevent or reduce the escape of the oil, or the oil in question escaped by reason of leakage, and neither the leakage nor the delay in its discovery was due to lack of any reasonable care. The onus of proving any of the exemptions is on the accused.

2. Entry or departure from a South African port carrying more than 2000 tons of oil in bulk as cargo and not holding a CCL Certificate.
3. Wilfully failing to comply with an order or requirement of SAMSA relating to unloading, transferring or disposing of any harmful substance.
4. Wilfully failing to comply with an order of SAMSA relating to harmful substances involved in a salvage operation.

The Marine Pollution (Prevention of Pollution from Ships) Act no. 2 of 1986 which gives effect to Marpol 73 and the 1978 Protocol, incorporates the text of Marpol 73 and 78. The Act provides that any person who contravenes any provision of the Act or the Convention is guilty of an offence.

The owner and the Master of a ship that has not complied with the requirements of the Act and the Convention are each guilty of an offence. The Act further provides that no person is guilty of an offence if he or she can show that he or she took all reasonable steps to ensure that the provisions of the Act and the Convention were complied with. If convicted of an offence, the person shall be liable to a fine not exceeding R500 000, or to a period of imprisonment not exceeding 5 years or to the fine and such imprisonment.

Question 4

As mentioned in response to question 2, the general practice is for SAMSA to carry out a preliminary investigation into any casualty that occurs along the South African Coast. To our knowledge the only enquiries that have taken place in the last 20 years relate to

incidents involving loss of life on South African flag ships.

Question 5

Any person charged with a criminal offence may be arrested.

Safeguards are set out in Section 35 of the Constitution which enshrines, amongst other things, the following rights:

1. To remain silent;
2. To be informed promptly of the right to remain silent and of the consequences of not remaining silent;
3. Not to be compelled to make any confession or admission that can be used in evidence against the person;
4. To be brought before a Court as soon as reasonably possible but not later than 48 hours of the arrest or the end of the first Court day after the expiry of the 48 hours;
5. To be charged at the first Court appearance after being arrested or to be informed of the reason for the continued detention or to be released;
6. To be released from detention if the interest of justice permit.

Every accused person has the right to a fair trial which includes the rights to:

1. Be informed of the charge with sufficient detail to answer it;
2. Have adequate time and facilities to prepare a defence;
3. A public trial before an ordinary Court;

4. Have the trial begin and conclude without unreasonable delay;
5. Be present when being tried;
6. To chose and to be represented by a legal practitioner;
7. Have a legal practitioner assigned to the person by the state and at the state's expense;
8. Be presumed innocent, to remain silent and not testify during the proceedings;
9. To lead and challenge evidence;
10. Not be compelled to give self incriminating evidence;
11. Be tried in a language that the accused person understands or, if that is not practical, to have the proceedings interpreted in that language.

People detained have the same rights along with the rights to communicate with and be visited by their spousal partner, next of kin, chosen religious counsellor and chosen medical practitioner.

Question 6

No legislation specifically governs this issue. In the normal course however, foreign accused persons would not be entitled to leave South African pending a trial. Procuring their attendance at the trial after they have left the country would be impossible in many circumstances and impractical in most of the other circumstances. Where a seafarer is not an accused person, they are permitted to leave South Africa. In practise, SAMSA's preliminary investigations take place immediately and often before the salvage operation itself is concluded (where applicable).

Where a casualty has taken place, P&I Clubs' local representatives are generally

cooperative with SAMSA and the Clubs' persuade the shipowners to allow their employees to remain pending the preliminary investigation.

In the absence of cooperation by the owners and their P&I Club, SAMSA are only entitled to detain a person by way of an arrest where a charge is brought against them.

Question 7

A provision for financial security does not exist in the legislation. In practice, to date, despite several severe casualties the P&I Clubs' local representatives have advised that SAMSA have never requested security or any guarantees to secure the return of foreign nationals.

Question 8

SAMSA is not given general legal responsibility for the protection of the rights and welfare of all seafarers. Miscellaneous acts provide for inspection of ships by SAMSA, Department of Immigration, Health Authorities and the South African Police Services. These generally relate to safety and health issues and not specifically to the welfare of the seafarer.

PART 2

Question 9

The foreign crew of a foreign flagged vessel involved in a serious pollution incident within South African waters will be dealt with in accordance with the responses to the questions set out above. If there is evidence to show that they are guilty of an offence they may be charged and can be arrested. Otherwise SAMSA are not in a position to detain them.

Question 10

Yes.

Question 11

Not applicable.

Question 12

If damage occurs within South Africa's jurisdiction and the ship and crew involved in that incident subsequently enter South Africa's jurisdiction, the owner and crew members will be treated in accordance with the relevant acts and conventions as set out above. In the event that the ship and / or crew do not enter South African territorial waters and therefore remain outside of South Africa's jurisdiction, the only basis upon which seafarers could be charged is in the event that they subsequently enter a country with which South Africa has concluded an extradition treaty covering offences of this nature.

The only exception to the above is in the event of an intervention in terms of the Intervention Convention. The enabling legislation in South Africa has not effected any substantial changes to that Convention.

Question 13

- (a) The crew members will not be detained unless they are accused of an offence as set out above.
- (b) The rights of any person accused or detained are identical to that enjoyed by South African citizens and are set out above.
- (c) to (h) Seafarers are not detained and accordingly these questions are not applicable. If they are charged and arrested, then the rights they enjoy are as set

out above.

Question 14

Your covering letter suggests that seafarers in certain countries are detained under the pretext that are being charged or detained for administrative reasons. In theory, the former could occur in South Africa as seafarers can only be detained in South Africa if they are charged with a crime and arrested. The MLA is however confident that this situation would not arise in South Africa. The South African Judiciary is independent, seafarers' rights, as with citizens' rights are protected by the constitution and those constitutional rights have consistently been upheld against government departments.

The P&I Clubs' correspondents in South Africa have advised that in the last 20 years, SAMSA have threatened to arrest ships' Masters involved in pollution incidents but to their knowledge, have never carried out that threat. This is on the basis that SAMSA will accept security from P&I Clubs that are members of the International Group for admission of guilt fines in respect of pollution incidents or as security for cleanup costs. Generally the Club pays the fine following submissions by the owner's and/or Club's lawyers to SAMSA.

The Master of one vessel was arrested after he deliberately ran his vessel aground near the port of Richards Bay. She was sinking at the time and the Court accepted that he did this in order to save the lives of his crew. To our knowledge, this is the only Master who has been arrested in the last 20 years.

This is despite the fact that on average South Africa experiences three or four significant maritime casualties every year. Most of these result in pollution of one form or another. Fortunately, none of the recent casualties have involved oil tankers. Recently a ro-ro / container vessel was abandoned by her crew after a fire broke out. She subsequently ran aground near the mouth of an estuary and lagoon system which has been declared a world heritage site. She was carrying numerous containers of hazardous chemicals and was considered a significant threat to the ecosystem. None of her crew members were arrested or detained and SAMSA merely conducted a preliminary investigation into

the cause of the fire and subsequent grounding.

The real test as to whether or not South Africa has joined the general global march towards criminalizing the seafarer will take place if there is a significant oil tanker incident resulting in substantial pollution. The writer's view, which has not been canvassed with the membership of the MLA, is that South Africa's approach to seafarers will remain as set out above.

Yours faithfully

JAMES MACKENZIE
SECRETARY
MARITIME LAW ASSOCIATION OF SOUTH AFRICA