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## **SHIP ARREST IN SOUTH AFRICA**

### **Admiralty Jurisdiction**

It is the High Court of South of Africa that exercises Admiralty Jurisdiction. It is arguable the Magistrates Courts may decide certain limited claims of a maritime nature, but this does not warrant further mention.

The law and practice of Admiralty Jurisdiction in South Africa is regulated by the Admiralty Jurisdiction Regulation Act of 1983 as amended with effect from 1 July 1992 [“The Admiralty Act”]. The area of jurisdiction of any High Court includes the portion of the territorial waters of South Africa adjacent to the coastline of its area of jurisdiction. The territorial waters are those within 12 nautical miles of the coastline.

### **Maritime Claims**

To proceed in Admiralty, one’s underlying cause of action must be based upon a maritime claim. The definition of a maritime claim in the Admiralty Act effectively covers all causes of action relating to ships and the carriage of cargo, and is wide enough to cover matters which are ancillary to shipping matters. Further, there is a “catch all” in the definition of a maritime claim, which is worded as follows:

“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...”.

### **Form of Arrest proceedings**

There are essentially two types of arrest proceedings available under the Admiralty Act:

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## 1. Arrests in Rem

Without prejudice to any other remedy that may be available to a claimant, a maritime claim may be enforced by an action in rem:

- a. If the claimant has a maritime lien over the property to be arrested. The South African Courts restrict the claims that will give rise to a maritime lien to salvage, damage caused by a ship, seaman's wages, master's wages, master's disbursements and bottomry;
- b. If the owner of the property to be arrested [the res] will be liable to the claimant in an action in personam in respect of the cause of action concerned.

The action in rem is instituted by the arrest within the area of jurisdiction of the Court concerned of property of one or more of the following categories against or in respect of which the claim lies:

1. The ship, with or without its equipment, furniture, stores or bunkers;
2. The whole or any part of the equipment, furniture, stores or bunkers;
3. The whole or any part of the cargo;
4. The freight;
5. Any container provided that the claim relates to the use of that container in the ownership or the carriage of goods by sea or water in that container;
6. A fund comprising proceeds of beneficial sale or property arrested or attached.

The procedure for instituting an action in rem is a relatively simple one. A summons, containing simple allegations to support a *prima facie* cause of action, together with a writ of arrest is issued by the Registrar of the High Court. That is, there is no need to substantiate the allegations contained in the summons.

These arrest papers have to be supported by a certificate by the claimant or the claimant's attorney, which states that the claim is a maritime claim, that on effecting the arrest the Court will have jurisdiction, that the property to be arrested is property in respect of which the claim lies or when an associated ship is to be arrested, that the ship is indeed associated in terms of the Admiralty Act and whether or not security has been given and if it has already been given, why the arrest is necessary.

It should be noted however, that should these arrest papers not be served within one year after having been issued, the action in rem will lapse. In the past it has been a relatively straight forward application to obtain an extension of this 1 year period, however, the Courts are now extremely reluctant to grant these extensions in the absence of compelling reasons.

Once the arrest papers have been issued, they are presented to the Sheriff of the Court, whose duty it is to serve them on the property to be arrested. When the property to be arrested is a vessel, service of the arrest papers has to be made on the vessel itself, the Master of the vessel as well as on the Port Captain.

## **2. Security arrest**

Where claimants already have proceedings under way in South Africa or in another jurisdiction [for example, London Arbitration] or intend proceeding there or elsewhere, it is open to them to arrest any property belonging to the Respondents (in the proceedings in the other jurisdiction) which is in South Africa, in order to obtain security for the claim which is the subject of the proceedings under way or contemplated, whether or not the substantive proceedings are subject to the law of South Africa or not.

The party seeking the security must have a maritime claim enforceable by an action in personam against the owner of the property or an action in rem against the property or which would be so enforceable but for the arbitration or other substantive proceedings.

By bringing a security arrest, the claimant does not submit to South African jurisdiction for the determination of the merits of the claim, in respect of which security is sought.

The procedure when bringing a security arrest is to bring a substantive application before a judge (usually in chambers) in which the claimant must establish:

1. That he has a prima facie case with reasonable prospects of success in the substantive proceedings;
2. That the property to be arrested on the balance of probabilities is owned by the defendant in the other proceedings;
3. Why the claimant requires the assistance of the South African Court;
4. That the claimant has a genuine and reasonable need for security, that is, it will have to be shown that he does not already have any more sufficient security and that he is unable to obtain security in the other pending or contemplating arbitration or proceedings.

## **Associated ship arrest**

Where the maritime claim arises in respect of a ship, it is possible to bring the action by arresting an associated ship instead of the ship in respect of which the maritime claim arose. In the Admiralty Act the term “associated ship” includes the concept of a “sister” ship.

An associated ship is a ship, other than the ship in respect of which the maritime claim arose, which is

1. owned, at the time when the action is commenced, by the person who owns the ship concerned when the maritime claim arose;
2. owned, at the time when the action is commenced by a person who controlled the company which owned the ship concerned when the maritime claim arose;
3. owned, at the time when the action is commenced by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

Ownership is deemed when the majority of the shares [either in number or of voting rights or value] in the ship is owned by the same person. Furthermore, a person is deemed to control the company if he has power directly or indirectly to control the company. The essential element in determining association is that of 'control'.

It is usually not possible to obtain (in the time available before an arrest) direct evidence of share-holdings of holding and owning companies. In these circumstances, it is necessary to build up a case for association, based on as much circumstantial evidence as possible, in an effort to satisfy the Court on a balance of probabilities that the guilty ship, and vessel to be arrested, are associated. Typical evidence which will assist in convincing the Court that the vessels are associated would include:

- Common managers
- Common operators
- Fleet entries with P&I Clubs
- Common share-holding
- Common signatories to financial documentation
- Common attorneys-in-fact
- Similar or related ship names

### **Wrongful Arrest**

Where an arrest is made "without reasonable and probable cause" or any person makes an excessive claim or claims excessive security and thereby causes loss or damage to someone else, the arrestor will be liable for damages suffered in consequence thereof.

It seems that in order to prove a wrongful arrest, one would need to show that the arresting party did not have an honest belief founded on reasonable grounds that the institution of proceedings was justified. This is therefore both a subjective and objective test.

