

## SEAFARER SUBJECT GUIDE

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### PERSONAL INJURIES AND DEATHS IN SOUTH AFRICA

This Guide explains national law when seafarers are injured or killed in a port in South Africa or on a South African flagged ship. This document is not intended to be legal advice, nor does it constitute legal advice. If a seafarer is injured or killed, then the seafarer or his relatives are strongly advised to consult a lawyer qualified to practise in South Africa.

\*A full text version of this Subject Guide including footnotes will become available for subscription in due course. In the meantime if there is a specific inquiry on any Subject Guide, please contact SRI.

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#### 1. If a seafarer is injured or killed in a work related incident, does South African law allow a claim for compensation to be brought?

- 1.1 The South African High Court is vested with jurisdiction to hear admiralty matters in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the Admiralty Act'). That Act provides the procedural framework for enforcing maritime claims, which are defined in the Act and include 'any claim for, arising out of or relating to loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship.'
- 1.2 The Admiralty Act provides for both *in rem* and *in personam* proceedings and for security to be obtained for claims to be heard in South Africa or elsewhere in the world.
- 1.3 With regard to a seafarer employed on a South African ship or employed in South Africa on a foreign ship, if that seafarer is ordinarily employed inside South Africa, the situation is somewhat different. The Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('the Compensation Act') provides for compensation for disablement caused by injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases, and establishes a scheme of compensation which is based on strict liability.
- 1.4 The Compensation Act absolves the employer from liability and excludes common law remedies, but assists the injured employee by not requiring him to prove negligence and by ensuring compensation even where the employer may be impecunious. Delays occur in dealing with claims however and inconsistencies in the amount of compensation awarded are commonplace. With regard to seafarer's claims the Compensation Act is more of a hindrance than a help as it deprives the seafarer of the rights he would otherwise have to pursue a claim against the owner by way of an

## SEAFARER SUBJECT GUIDE

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arrest of the vessel. But the Compensation Act is not often applicable, since it will, as indicated, only apply when there is a close link to South Africa, and it will not be of any application to a claim for the injury or death of a foreign seafarer employed on a foreign flag vessel if that claim is enforced in South Africa.

### **2. What is the basis for recovery of compensation for personal injury or death claims?**

2.1 The basis for a claim for personal injury can be contractual or delictual (otherwise known as a claim in tort in other jurisdictions). If the contract of employment provides for compensation in respect of injury or death the South African court will recognise and give effect to those provisions. In the absence of such provisions the cause of action will be delictual and it will be necessary to establish that:

- (a) a person or employee or an organisation was negligent; and
- (b) the negligence resulted in the injury or death in question.

2.2 Negligence is a degree of care or action or inaction which is below the standard expected by what the courts describe as the 'reasonable man test.' In certain circumstances, such as the operation of a ship or aircraft, the 'reasonable man' becomes skilled, and a higher, more specific level of competency may be required.

2.3 Once this causal aspect has been established, the next aspect that the Admiralty Court would consider is the necessary compensation (quantum of damages) to restore the injured seafarer to the same position as before the incident took place.

### **3. Are South African laws for compensation for personal injury or death of a seafarer applicable only to South Africans, or are the laws applicable to foreigners also?**

3.1 South African national law relating to personal injury is applicable regardless of the nationality of the seafarer, and is subject only to the distinction arising from the Compensation Act, mentioned above, regarding seafarers employed on South African flagged vessels or seafarers employed in South Africa on foreign flagged vessels if they are also ordinarily employed in South Africa.

3.2 Accordingly, the same law would be applicable to a South African seafarer employed on an ocean-going foreign flagged vessel as a non-South African seafarer employed on an ocean-going foreign flagged vessel if the maritime claims were enforced in South Africa in respect of the injury or death of those seafarers.

## SEAFARER SUBJECT GUIDE

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### 4. **Is South African law the same throughout the country, or does it change from state to state or from province to province or for any other political or geographical area?**

4.1 The law in South Africa is the same throughout the country, and does not change from province to province.

### 5. **Is South African law the same for all types of seafarers, such as blue water seafarers engaged in international trade, seafarers employed in coastal waters, or fishers?**

5.1 South African law is the same for all types of seafarers, and no distinction is made on the basis of whether the seafarer is employed in international trade, coastal waters or on a fishing vessel. As mentioned above, the Compensation Act draws its own distinction based on the flag of the vessel and the place of employment of the seafarer, but not on the different types of seafarers. That Act defines a seaman as 'an employee employed in any capacity on board a ship by the owner or person in command of the ship,' and thus makes no distinction between types of seafarers.

5.2 Similarly, the Admiralty Act defines 'ship' as 'any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not;' and, therefore, no distinction is made between different types of seafarers with regard to the procedural processes and options available to them in enforcing a claim for injury or death.

### 6. **Which court would have jurisdiction over a claim for compensation by a seafarer who was injured or killed: (1) on a South African vessel, or (2) on a foreign flagged vessel in a local port of South Africa or in the territorial seas of South Africa?**

6.1 If a seafarer is injured or killed on a South African flagged vessel a claim for compensation will be determined in terms of the Compensation Act. The claim process is administered by the Department of Labour and is financed mainly by annual assessments levied on employers on the basis of the annual earnings of their employees. Claims must be lodged with the Claims Commissioner, who will consider the claim and decide if a hearing is required, in which case the parties must attend. Seafarers may also lodge claims with the person in command of the ship concerned.

## SEAFARER SUBJECT GUIDE

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- 6.2 The compensation payable to successful claims is calculated on the basis of formulae stipulated in the Compensation Act.
- 6.3 With regard to seafarers employed on foreign flag vessels two possible scenarios arise:
- (i) if the seafarer is ordinarily employed in South Africa then the Compensation Act will apply, as in 6.1 above; and
  - (ii) if the seafarer is not ordinarily employed inside South Africa, then the claim will be heard in the High Court, exercising its Admiralty jurisdiction and the Admiralty Act will be applicable to those proceedings.
- 7. Would the South African court uphold a jurisdiction and/or law clause in the employment contract of a seafarer who had been injured or killed in a work related accident?**
- 7.1 A jurisdiction clause in the employment contract of a seafarer will not oust the jurisdiction of the High Court of South Africa. In terms of the Admiralty Act the South African High Court, exercising its Admiralty Jurisdiction, is empowered to hear and determine any maritime claim, irrespective of:
- (a) the place where it arose;
  - (b) the place of registration of the ship concerned; or
  - (c) the residence, domicile or nationality of its owner.
- 7.2 If, however, the Admiralty Court is of the opinion that another court will exercise jurisdiction in respect of the same proceedings and that it is more appropriate that the proceedings be adjudicated on by such other court, the Admiralty Court may decline to exercise such jurisdiction. The Admiralty Court will only grant a stay of proceedings if it is convinced that the other available forum is more appropriate rather than simply merely convenient. A choice of jurisdiction clause will be one of the factors taken into account, but the Admiralty Court retains a discretion.
- 7.3 Even if the Admiralty Court is convinced that the other forum is more appropriate, it may still elect to resolve the dispute if special circumstances exist. In deciding this point the Admiralty Court will have regard to what 'connecting factors' are present. Such connecting factors have included the availability of witnesses, the places where the parties reside or carry on business, the extent of expenses and costs which will be incurred, the law governing the situation, and the likelihood (or otherwise) of the arresting party obtaining justice in that other forum. The very nature and object of the remedies afforded to a seafarer in admiralty law have also been regarded as an

## SEAFARER SUBJECT GUIDE

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important consideration favouring the assumption of jurisdiction in the case of a foreign seafarer's claim against a foreign ship for arrear wages. This approach is consistent with the advantage afforded to seafarers in which the entire crew of a ship may join in one action.

- 7.4 The Admiralty Court will not lightly exercise its discretion against the assumption of jurisdiction in respect of a foreign seafarer's claim for wages. It will certainly not do so if such refusal might have the effect of rendering illusory the rights that flow from the seafarer's lien against the ship or cause the seafarer to lose the security which the arrest of the ship has given him. The Admiralty Court will enquire whether the application of the forum non-convenience doctrine will result in undue hardship, expense or inconvenience to the seafarers.
- 7.5 As a result of this policy, the Admiralty Courts have seldom chosen to decline jurisdiction in respect of a seafarer's claim for wages where the seafarer has arrested the guilty ship in a South African harbour.
- 7.6 With regard to a choice of law clause in a contract of employment, the Admiralty Jurisdiction Regulation Act provides, with regard to the law to be applied, that the provisions of the Act will not supersede any agreement relating to the system of law to be applied in the event of a dispute.
- 7.7 The Admiralty Court will, therefore, give effect to a choice of law clause contained in a seafarer's employment contract. Where the Admiralty Court has elected to exercise its jurisdiction in such a matter it will require the chosen law to be established by way of expert testimony.

### **8. What is the time limit for bringing a claim after the occurrence of an incident?**

- 8.1 The Prescription Act of 1969 provides that the prescription period for debts will be three years, 'save where an act of parliament provides otherwise.'

In that regard:

- (a) the Compensation Act provides that claims for compensation in terms of that act must be lodged within 12 months of the date of the accident; and
- (b) the Merchant Shipping Act of 1951 provides that:

## SEAFARER SUBJECT GUIDE

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'the period of extinctive prescription in respect of legal proceedings to enforce any claim or lien against a ship or its owners in respect of any damage to or loss of another ship, its cargo or freight, or any goods on board such other ship, or damage for loss of life or personal injury suffered by any person on board such other ship, caused by the fault of the former ship, whether such ship be wholly or partly in fault, shall be two years and shall begin to run on the date when the damage or loss or injury was caused.'

- 8.2 However, as this provision relates only to claims caused by the fault of another ship, it does not apply to claims by seafarers against the ship or the owners of the ship on which they were employed. The prescriptive period for such claims will, therefore, be three years and commences when the debt became payable.
- 8.3 The Prescription Act also provides that the prescriptive period will not be completed against a debtor who is outside South Africa and that on the debtor's return to South Africa the creditor will have either the balance of the original prescriptive period or one year to institute proceedings, whichever is longer.
- 8.4 Another time limit of significance is imposed by the Admiralty Act, which prescribes how claims will rank against the proceeds of the judicial sale of a ship. In such circumstances claims for personal injury or death will rank immediately after crew wages, and before necessaries claims and the claim of the mortgagee, but only if proceedings to enforce that claim were instituted less than one year after the claim arose. If the claim arose more than one year before the institution of proceedings to enforce it, the claim will lose its preferential ranking and rank after that of the mortgagee bank.
- 9. Is a seafarer's claim for compensation for injury or death a maritime claim that can be secured by arrest of a ship? If so: (1) which ship can be arrested; and (2) in what circumstances can the ship be arrested?**
- 9.1 As mentioned above, a claim for personal injury or death caused by a ship or as a result of any defect in a ship or occurring in connection with the employment of a ship is a maritime claim, and may therefore be enforced by:
- (a) an action *in rem* if:
    - (i) the claimant has a maritime lien over the property to be arrested; or
    - (ii) the owner of the property to be arrested would be liable to the claimant in an action *in personam*

## SEAFARER SUBJECT GUIDE

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or:

- (b) an action *in personam* if the person against whom the action is to be instituted:
  - (i) is resident or carrying on business in South Africa or in the case of a company is registered in South Africa;
  - (ii) whose property has been attached within South African to confirm jurisdiction;  
or
  - (iii) who has consented to the jurisdiction of the court.

9.2 An action *in rem* is instituted by the arrest of the vessel, which is then held as security for the claim. An action *in personam* is usually accompanied by an attachment of property owned by the defendant.

9.3 An action can also be instituted by the arrest of an associated ship, instead of the ship in respect of which the maritime claim arose. An associated ship is a ship owned or controlled, at the time of the arrest, by the person(s) or company that owned or controlled the ship concerned when the claim arose.

9.4 If an action *in rem* or *in personam* is instituted in this way then the substantive claim will proceed in South Africa.

9.5 Security can also be obtained in respect of proceedings elsewhere. The Admiralty Act authorises the Admiralty Court to order the arrest of any property (a ship or an associated ship) for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, both in respect of actions *in rem* and *in personam*, which would be so enforceable but for the other proceedings.

### 10. What types of damages are recoverable?

10.1 The damages or compensation recoverable by a seafarer in respect of a claim for personal injury or death differs considerably depending on whether the claim is brought in terms of the Admiralty Act, in which case the common law principles of damages will apply, or the Compensation Act, in which case the principles and formulae provided in that Act will apply.

10.2 In terms of South African common law, applicable to a claim brought in terms of the Admiralty Act, damages are recoverable in respect of:

- (a) Injury:
  - (i) loss of income, both past and future, including potential increased earnings if it can be established that the deceased would have earned more in the future;

## SEAFARER SUBJECT GUIDE

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- (ii) medical expenses, both past and future;
  - (iii) general damages/ loss of amenities/pain and suffering;
- (b) Death:
- (i) loss of support, both past and future, including potential increased earnings if it can be established that the deceased would have earned more in the future;
  - (ii) medical expenses from the date of the incident to the date of death;
  - (iii) funeral expenses.

10.3 If the claim is governed by the Compensation Act the following would be recoverable:

- (a) Temporary total or partial disablement:
- (i) Compensation for temporary total disablement is calculated in terms of a schedule to the Act, and the compensation stipulated therein is 75% of the claimant's monthly earnings at the time of the accident, to a pre-determined maximum currently ZAR 6 064.50 per month.
  - (ii) Compensation for temporary partial disablement consists of a portion of the compensation that would be payable for temporary total disability, as the Claims Commissioner considers equitable.

10.4 Such payments shall continue for as long as the disablement persists, but after 24 months the disablement may be treated as permanent; and for

- (b) Permanent disablement: Compensation for permanent disablement is also calculated with reference to a schedule of the act, as follows:
- (i) Disablement of 30%: a lump sum equivalent to 15 times the monthly earnings of the claimant at the time of the accident to a minimum and a maximum compensation of ZAR 12 375.00 and ZAR 67 950.00, respectively;
  - (ii) Disablement of less than 30%: a lump sum amount in proportion to the compensation which would have been payable in respect of 30% disablement, with reference to the degree of disablement in question;
  - (iii) Disablement of 100%: a monthly pension equivalent to 75% of the claimant's monthly earnings at the time of the accident to a minimum and a maximum compensation of ZAR 618.75 and ZAR 6 064.50 per month;
  - (iv) Disablement of less than 100% but more than 30%: a monthly pension in proportion to the compensation which would have been payable in respect of 100% disablement, with reference to the degree of disablement in question.

10.5 The percentages of permanent disablement are listed in another schedule to the Act.

## SEAFARER SUBJECT GUIDE

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- (c) Death: Compensation payable as a result of the death of a seafarer is determined as follows:
  - (i) If the deceased left a widow or person with whom he was living as husband, a lump sum of twice the employee's monthly pension that would have been payable if the employee had been totally permanently disabled, and a monthly pension equivalent to 40% of the pension that would have been payable to the employee if the employee had been totally permanently disabled;
  - (ii) If the seafarer left children under the age of 18 years, a monthly pension equivalent to 20% of the pension that would have been payable to the seafarer if the seafarer had been totally permanently disabled, to each child;
  - (iii) If the seafarer left other dependants, a lump sum being a percentage of ZAR 28 680.00 calculated with reference to the degree of dependence.
- (d) Medical expenses, for a period of two years from the date of the incident, may be recovered;
- (e) Funeral costs, subject to a maximum of ZAR 5 350.00, may be recovered.
- (f) Additional compensation may be payable if the Claims Commissioner is satisfied that the incident was caused by the negligence of the employer concerned or an employee in authority over the seafarer, in an amount which the Claims Commissioner deems appropriate.

10.6 No general damages or damages for pain and suffering are recoverable under the Compensation Act.

**11. What are the principles for calculating compensation for a claim by a seafarer or his next of kin for: (1) a work related injury; and (2) a work related death?**

11.1 See paragraph 10 above.

**12. What damages might be awarded in the following circumstances:**

- (1) 30 year old seafarer, injured aboard a vessel, who is now totally disabled. Medical expenses of US\$15,000 per year for the remainder of his life?**
- (2) 30 year old seafarer, who dies as a result of an accident on board a vessel, who is survived by a 29 year old wife and 2 children, ages 2 years and 4 years old?**

## SEAFARER SUBJECT GUIDE

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12.1 If the seafarer's contract of employment provided for the amount of compensation payable in the event of injury or death the Admiralty Court would apply the terms of the contract.

12.2 If no compensation was stipulated in the contract of employment and if there was no connection to South Africa, mentioned above, then the damages would be calculated in accordance with the common law, and would be recoverable as follows:

30 year old seafarer, totally disabled:

- (i) Medical expenses in the amount of USD15 000.00 per year;
- (ii) Past medical expenses
- (iii) General damages – for total disability current compensation is in the region of ZAR 2- 4 million;
- (iv) Past loss of earnings; and
- (v) Future loss of earnings, including provision for promotional prospects and inflation.

30 year old seafarer, deceased:

12.3 In respect of a claim by the family of the deceased the Admiralty Court would take into account the seafarer's current earnings and any prospects of increased future earnings. The surviving spouse's earnings, if any, would also be taken into account.

12.4 The basic formula is to combine the earnings and apply two parts to each parent and one part to each child. In this case the formula would be two sixths to the parents and one sixths to each of the children.

12.5 An estimation is then made as to how long each child would need support, including studying prospects beyond majority. An actuary would calculate the loss of support for the wife and each child taking into account the ages of the children and how long the support would be necessary.

12.6 If the seafarer in question was ordinarily employed in South Africa or was employed on a South African flag vessel the Compensation Act will apply. In that case the compensation would be payable as follows:

30 year old seafarer, totally disabled:

## SEAFARER SUBJECT GUIDE

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- (i) A monthly pension equivalent to 75% of the claimant's monthly earnings at the time of the accident to a minimum and a maximum compensation of ZAR 618.75 and ZAR 6 064.50 per month; and
- (ii) Medical expenses for a period of two years.

30 year old seafarer, deceased:

- (i) To the surviving spouse, a lump sum of twice the seafarer's monthly pension that would have been payable if the seafarer had been totally permanently disabled, and a monthly pension equivalent to 40% of the pension that would have been payable to the seafarer if the seafarer had been totally permanently disabled;
- (ii) A monthly pension equivalent to 20% of the pension that would have been payable to the seafarer if the employee had been totally permanently disabled, to each child;
- (iii) Medical expenses from the date of the incident to the date of death; and
- (iv) Funeral costs, subject to a maximum of ZAR 5 350.00.

### **13. How efficient are the local courts and what would be an average estimated time for hearing and ruling on a seafarer's claim for compensation for injury or death?**

- 13.1 South African courts are generally efficient; however, delays can be encountered in obtaining trial dates, particularly for matters that are expected to run several days.
- 13.2 On average, matters are likely to take approximately two years to proceed to trial. Appeal proceedings are available to the full bench of the provincial High Court and thereafter, in certain circumstances, to the Supreme Court of Appeal, and each appeal procedure is likely to add a further year or two to the proceedings.

### **14. On what basis will a lawyer generally charge a seafarer for handling a claim for compensation?**

- 14.1 An attorney will usually charge on the basis of an agreed percentage of the recovered damages, particularly if he is to fund the costs of the proceedings, which is often the case when acting for a seafarer.
- 14.2 If the claim is heard in the Admiralty Court some costs are recoverable by the successful party. However, these costs are specified in a tariff forming part of the court rules and are outdated. The costs recovered only amount to a small portion of the actual costs incurred by the seafarer.