

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN SOUTH AFRICA

This Guide deals with the rights of seafarers of any nationality to arrest a ship for unpaid or underpaid wages in a port in South Africa.

This document is not intended to be legal advice, nor does it constitute legal advice.

If a seafarer intends to arrest a ship in South Africa, he is strongly advised to consult a lawyer qualified to practise in that country.

*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.

- 1. Can a seafarer arrest a ship for unpaid wages regardless of his nationality and regardless of the flag of the ship?**
 - 1.1 A claim by the crew of a ship for unpaid wages is recognized as a maritime claim in the Admiralty Jurisdiction Regulation Act 105 of 1983, ('the 1983 Act') secured and preferred by a maritime lien, and foreign seafarers may, and regularly do, arrest ships for unpaid wages in South Africa, regardless of the flag of their ship.
 - 1.2 Local South African plaintiffs enjoy no greater rights of arrest in terms of the 1983 Act by reason of their nationality
- 2. What is the time limit within which a seafarer must start a claim for unpaid wages?**
 - 2.1 The standard period of prescription according to the Prescription Act is three years, which starts to run 'as soon as the debt is due.' However, 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. In the case of a ship trading international routes, a fresh one year period of prescription therefore commences each time the ship returns to South African waters.
 - 2.2 However, there is another time limit which is of even greater practical consequence than the prescriptive period. Section 11 of the 1983 Act prescribes how the proceeds of the sale of a ship sold by judicial auction are to be distributed. A wage claim which 'arose not earlier than one year before the commencement of proceedings to enforce it' acquires a

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preferential ranking, directly after the costs of the sale and before necessities claims and the mortgage bank. Wage claims which are more than one year old rank after those claims and in practice generally have little prospect of being paid. Furthermore, this period has been held by the court to run from the date that the claim arose, and not the date that the claim became due and payable, which is a somewhat different approach to that taken by the Prescription Act. This means that a claim arises, and the one year period starts to run, when the goods are supplied or services rendered, and not when payment became due for those goods or services. In the case of a seafarer's wages this means that the cutoff date is one year, to the day, from the date that the vessel was arrested or a claim lodged for the recovery of the wages.

3. What documents are required to obtain an arrest of a ship?

- 3.1 An action *in rem* is instituted by the arrest of the ship, the equipment, furniture, stores or bunkers, the cargo, the freight, a container, or a fund created by the judicial sale of arrested property.
- 3.2 The procedure for an arrest *in rem* is relatively simple, necessitating only the submission of a certificate by the seafarer or his attorney, and the issue of a summons and warrant of arrest by the Registrar of the Court. A Practice Directive issued by the Judge President of the KwaZulu-Natal Provincial Division provides that it is desirable that the certificate be issued by an attorney practising in the area of jurisdiction of the Admiralty Court out of which the warrant is issued.
- 3.3 The certificate must state:
 - (1) that the claim is a maritime claim and that the claim is one in respect of which the Admiralty Court has jurisdiction or one in respect of which the Admiralty Court will have jurisdiction on the effecting of the arrest;
 - (2) that property sought to be arrested is the property in respect of which the claim lies or, where the arrest is sought in terms of s. 3(6) of the Act, that the ship is an associated ship which may be arrested in terms of the section;
 - (3) whether any security or undertaking has been given in respect of the claim of the arresting party to procure the release or prevent the arrest or attachment of the property sought to be arrested and, if so, what security or undertaking has been given and the grounds for seeking arrest notwithstanding the existence of such security or undertaking; and

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- (4) that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory, and the source of any such knowledge and information.
- 3.4 The Registrar may refer to a judge the question of whether a warrant should be issued or not. The Practice Directive referred to above also states that in the vast majority of cases such a referral is not necessary, practicable or desirable. However, in order to assist the Registrar, the attorney should, in addition to the certificate, submit a statement to the effect that he knows of no circumstances making it desirable to refer the issue of the warrant to a judge. In the absence of such a statement the Registrar will so refer the matter.
- 3.5 The summons must contain a clear and concise statement of the nature of the claim, the relief or remedy required and the amount claimed, if any. There must be sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim is based. Where an association is alleged, the summons should contain a statement of the facts which form the basis for such an allegation.
- 3.6 The owners of the property arrested may either apply to court to have the arrest set aside or to have the property released on the establishment of adequate security. Such security must be for the amount claimed or the value of the property arrested, whichever is the lesser. Security is usually provided in the form of a letter of undertaking addressed to the claimant by a P&I club, or a bank guarantee from a first-class South African bank in favour of the Registrar of the court, or the claimant.
- 4. What are the costs of the arrest, including court expenses and other expenses?**
- 4.1 The costs of the arrest are limited to the charges of the sheriff. Until recently a nominal fee of approximately USD10.00 was payable to the court but that has been repealed. The sheriff will charge for serving the summons and warrant of arrest in the case of an arrest *in rem*, or the admiralty Court order in the case of a security arrest. For an arrest *in rem*, the usual procedure for wage claims, the costs of the sheriff in affecting the arrest will amount to approximately USD100.00 if the ship is in the harbor, and more if the sheriff has to travel to the outer anchorage.
- 4.2 While the ship is under arrest the sheriff is responsible for the day to day care and custody of the ship. In circumstances where the ship has been abandoned by the owner the sheriff usually has to incur costs in attending to the ship, such as port dues, agency

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expenses and provisions for the crew. The sheriff is required to incur these expenses and then recover them from the arresting party, in order to maintain the arrest.

- 4.3 Where the ship has been arrested by seafarers it is unlikely that they will be in a position to finance the costs of arresting the ship and this usually results in an application for the ship to be sold, in which case the sheriff obtains payment of his costs from the sale proceeds.
- 5. Does the arresting party have to lodge counter-security against wrongful arrest?**
- 5.1 Any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, is liable to any person suffering loss or damage as a result thereof. It has been held that the words 'without reasonable and probable cause' should bear a similar meaning to that given to them in the context of the delict of malicious prosecution, namely that a lack of honest belief negatives the defence of reasonable and probable cause. The question is whether a reasonable person would have believed that the arrest was probably justified. The test is firstly an objective one and if that hurdle is overcome the enquiry becomes subjective.
- 5.2 An Admiralty Court may order that anything done in terms of the 1983 Act be subject to such conditions as to the Admiralty Court appears just. Although the practice is not common, certain judges have on occasion used this section to make arrest and attachment orders conditional upon the establishment of security for wrongful arrest, either on the basis that the arrest or attachment cannot be effected prior to the security being established, or that the arrest or attachment will fall away should such security not be established within a specified period. Furthermore, as mentioned above, an arresting claimant is liable for the sheriff's fees and expenses reasonably incurred in the preservation of the vessel whilst under arrest. The continued arrest of the vessel at the instance of an arresting claimant could also be made conditional upon that claimant reimbursing the sheriff for the latter's reasonable expenses and remuneration.
- 5.3 It is highly unlikely that seafarers arresting a ship for outstanding wages would ever be required to establish security for wrongful arrest.

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6. Once a vessel has been arrested, will the court accept jurisdiction over the substantive claim?

- 6.1 The Admiralty Court has jurisdiction to hear any maritime matter, irrespective of where the claim arose, the registration of the ship or the nationality of its owner. Therefore once a vessel has been arrested the court has jurisdiction to hear the substantive claim.
- 6.2 However, the 1983 Act also provides that the court may decline to exercise this jurisdiction if it is of the opinion that any other court has jurisdiction and that it is more appropriate for the matter to be heard by such other court. The factors taken into account include any agreement as to jurisdiction, the availability of witnesses, the places where the parties reside or carry on business, the law governing the situation, the likelihood of the arresting party obtaining justice in the foreign forum, and any other relevant circumstance.
- 6.3 It is up to the party seeking the stay to persuade the Admiralty Court to decline to exercise its jurisdiction. Once that onus has been discharged, that is to say, once the court is satisfied that there is another available forum which is *prima facie* more appropriate, the onus shifts to the other party, that is the party who made the arrest, to show that special circumstances exist which warrant the dispute being adjudicated in South Africa. The procedure followed is very similar to the English law concept of *forum non conveniens*.

7. Will the crew and vessel be maintained/supported during the arrest?

- 7.1 The crew of an arrested ship will be maintained by the sheriff during the course of the arrest. As indicated above, these costs will be passed on to the arresting creditor by the sheriff, and until recently were restricted to provisions, medical costs and occasionally repatriation. In the recent, as yet unreported, decision in the Eastern Cape Admiralty Court involving the *MV Silver Star*, it was suggested by the court that the wages of the crew also formed part of the costs of maintaining the vessel and that the sheriff may be liable to pay the crews' wages while the ship remained under arrest. It remains to be seen if this decision will be taken any further by the Admiralty Court in other divisions.
- 7.2 In any event, and as indicated above, the costs incurred by the sheriff are recoverable against the arresting creditors. If the vessel has been arrested by the crew it would be nonsensical to require them to place the sheriff in funds so that he can pay the wages, even if they had the funds to do so.

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8. Is the presence of the crew on board the vessel necessary during the course of the legal proceedings or can the crew be repatriated before the ship is sold?

- 8.1 Subject to practical considerations, the presence of the crew is not required and seafarers are regularly repatriated pending the sale of the ship and payment of their wages. Those considerations include the need to ensure that the vessel at all times meets the minimum manning requirements and whether the wage claim has been opposed or not. In some instances the sheriff, usually only in conjunction with the mortgagee bank, will employ a replacement crew for the vessel, in which case the entire original crew can return home.
- 8.2 If the wage claim has been opposed the seafarers may be required to give evidence in support of their claims, and their absence results in practical difficulties in that regard.

9. Do the seafarer's wages continue to accrue during the arrest?

- 9.1 Wages continue to accrue for as long as the seafarer remains on the vessel and carries out his normal duties of maintenance, watch keeping and the like.
- 9.2 Wages will cease to accrue when the seafarer signs off and is repatriated.

10. How long on average does it take for the court to sell the vessel and then distribute the sale proceeds in settlement of the crew's claim?

- 10.1 Ships may be sold pursuant to an order of court in South Africa with relative speed and ease. Section 9 of the 1983 Act provides that the court may at any time order that any property which has been arrested in terms of the 1983 Act be sold, the proceeds of such sale constituting a fund to be held by the Registrar of the court. If an application for the sale of a ship is unopposed, the time period between the date of the first arrest of the vessel and her sale can be as short as six weeks. It is not even necessary for a claimant to obtain a judgment before applying for the sale of the ship.
- 10.2 Following the decision in *The Myrto* it has been held that the length of time a vessel is likely to be detained and the costs involved in maintaining the vessel are often decisive in determining whether a sale before judgment is justified. However, where it appears that the owners are actively and *bona fide* defending the claims against the vessel, that will be a factor against the sale of the vessel *pendent lite*.
- 10.3 Where a ship has been abandoned by her owners and the cost of maintaining the ship has practically fallen on the sheriff and the arresting creditors the Admiralty Court will

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not hesitate to order the sale of the vessel. In such circumstances, the crew can expect to have the ship sold, receive payment of their wages, and be repatriated within six to eight weeks.

11. How are the lawyer's fees for arresting the ship paid?

- 11.1 The costs that can be recovered from the owner of a ship or the fund in the case of the sale of the ship are determined by court rules, and are very limited. The crew will therefore be required to pay their attorney for arresting the ship.
- 11.2 Attorneys that specialize in crew claims will be prepared to wait for payment of their fees until the wages have been recovered.

12. Are there any other procedures to enforce a seafarer's wage claim?

- 12.1 South African seafarers can institute proceedings in the Labour Court. However, being *in personam* proceedings, there is no procedure for obtaining security in that forum and proceedings are far slower than in the Admiralty Court. The relief applicable to seafarers in terms of the 1983 Act, as discussed above, is not available in the Labour Court.
- 12.2 A dispute over wages may, depending on the circumstances, also be decided by a proper officer in the port (an official of the South African Maritime Safety Authority), by a Magistrate's Court, or by a High Court of South Africa. In these instances, the procedures to be followed are different to those applied in the Admiralty Court.