

SEAFARER SUBJECT GUIDE

MARITIME LIEN FOR SEAFARERS' WAGES IN SOUTH AFRICA

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of South African flagged ships, and foreign ships which are in the ports of the South Africa. These rights can be enforced in the Admiralty Court, where they are secured and preferred by maritime liens and enforced by the arrest and forced (judicial) sale of the ships.

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

If a seafarer intends to claim his wages, he is 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.

1. What is the maritime lien for seafarers' wages? How is it enforced?

- 1.1 The maritime lien for wages is designed to improve the prospects of claims for wages being paid. This lien arises, not by contract, but automatically by operation of law, and it springs into existence without seafarers having to take any action, as soon as they render service to the ship and their wages are due and unpaid. Whenever there is a claim for wages, there is a maritime lien, so that the right to wages and the right to a maritime lien are co-existent.
- 1.2 The maritime lien is enforced by arresting the particular ship (and not any other ship) and proceeding against the ship. This is known as an action *in rem*. The maritime lien secures a claim for wages by attaching to the ship (like a mollusc to the hull), its tackle, apparel and furniture or any remaining part of a shipwreck; and travels with the ship into the possession, control or ownership of a third party even if the ship is sold for value to the third party who neither employed the seafarers nor was aware of their maritime lien. The maritime lien also attaches to the freight, but not generally to the cargo.

2. Which courts have jurisdiction over seafarers' wage claims?

- 2.1 A dispute over wages may, depending on the circumstances, be decided by a proper officer in the port (an official of the South African Maritime Safety Authority), by a Magistrate's Court, by a High Court of South Africa or by an Admiralty Court.

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2.2 However only the Admiralty Court has jurisdiction over maritime liens, the arrest of ships as pre-judgment security, and the very high ranking of claims for unpaid wages. This document therefore deals exclusively with seafarers suing in the Admiralty Court.

3. Can the courts refuse to hear seafarers' claims for wages?

3.1 The jurisdiction of the Admiralty Court to hear and determine any maritime claim for wages may be exercised irrespective of the place where the claim arose, of the place of registration of the ship, or of the residence, domicile or nationality of its owner.

3.2 The Admiralty Court may, however, decline to exercise its admiralty jurisdiction over any maritime claim if it is of the opinion that another court in South Africa or any other court will exercise jurisdiction in respect of the claim and that it is more appropriate that the proceedings be adjudicated by the other court.

3.3 However the maritime lien, the right to arrest the ship, and the very high ranking enjoyed by a claim for wages are regarded as legitimate juridical advantages and connecting factors in favour of the Admiralty Court exercising its jurisdiction. It is, therefore, unlikely that the Admiralty Court would decline to exercise its jurisdiction over claims for wages.

4. Who can claim seafarers' wages?

4.1 For there to be a claim for seafarers' wages, the claim must relate to a person employed or engaged in any capacity as a member of the crew of a ship.

4.2 However, the person who may bring the claim for wages is not specified, so that the claim need not necessarily be instituted by a seafarer. It makes no difference so far as the ranking of the claim for wages is concerned whether the claim is made by, or in respect of, the member of the crew. The claimant must, however, have the right to institute legal proceedings in its own name for the recovery of the wages.

5. Which ships are subject to the jurisdiction of the courts?

5.1 A seafarer can only sue for wages if he works on a 'ship', which is any vessel used or capable of being used on the sea or internal waters. It 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.'

5.2 This definition is one of the broadest definitions of its kind in the world.

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6. What is included in the maritime lien for seafarers' wages?

- 6.1 There is no statutory definition of seafarers' wages in South African law. However, the Admiralty Court adopts a liberal approach in broadly interpreting wages and does what is fair and just in order to secure for seafarers what they have earned by service to, and in, the ship.
- 6.2 Wages are recoverable that are due and payable on the scale and in the currency stipulated in the contract of employment. Wages have been held to include: an employer's and employee's contributions to a company pension fund for the benefit of the seafarer and his family irrespective of whether the contributions would be payable in terms of the seafarer's contract of employment or would be payable in terms of statutory provisions; unemployment and insurance and other such benefits; damages for wrongful dismissal; 'emoluments, which are not regular payments that cover bonuses or gratuities obtained in the course of service; notice of termination of service, paid leave and sick leave; and repatriation costs.
- 6.3 However, not every payment made by the shipowner to a seafarer under the contract of employment is a payment of 'wages'. Severance pay (which is a lump sum payable on termination of the contract of employment) is not viewed as wages since it is said to be paid not as remuneration; instead, it is regarded as compensation for the termination of the contract. Penalties for not paying pension contributions are not wages, since they are not payable in connection with the employment of a seafarer on the ship. Finally, the maritime lien probably does not extend to wages for study leave ashore, whether before or after the seafarer's service on the ship, or to wages for previous service in a ship in different ownership managed by the same manager as the ship in question, or for service while in a group pool of seafarers.

7. Can seafarers' wages be claimed if there is no written contract of employment?

- 7.1 The contracts of employment of seafarers on South African ships must be written and in a prescribed form, setting out the terms and conditions of employment. There may also be collective agreements incorporated into individual agreements and the relationship between such contracts may be complex and complicated.
- 7.2 But neither contractual complexity nor contractual complications - or even the absence of any written or oral contracts - deprive seafarers of their right to wages and to the co-extensive maritime lien, provided they render services to the ship.

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7.3 The law thus provides seafarers with the advantage of a maritime lien for wages independently of the personal liability of the employer, who may, for example, be a shipowner, demise charterer or other charterer, manager or operator of the ship.

7.4 Although an employment contract is not essential to the existence of the maritime lien for wages, it does provide written evidence of the amount of the wages. If there is no contract, the amount of wages will be decided by the court, which will assess what is a fair and equitable wage in the circumstances.

8. Must seafarers' services have been rendered on board the ship?

8.1 Seafarers are entitled to wages and to a co-extensive maritime lien if they render the services appropriate to their rank as part of the crew of the ship. They need not always necessarily render the service in or on board the ship, or live on board the ship.

8.2 But the service must refer to the ship, and the service must be rendered during a period when the seafarers can be said to be part of the crew of the ship.

8.3 Seafarers can earn wages while, for example, on shore leave, or waiting in a hotel for their ship, or during sick leave.

9. What is the ranking of seafarers' claims for wages in the event that sale proceeds are distributed?

9.1 When a ship is sold, the ranking of priorities amongst claims attracting maritime liens is governed by the *lex fori*, that is, the procedural laws of South Africa.

9.2 When the ship is sold, a maritime claim given the highest ranking will be paid first, provided there are sufficient proceeds from the sale of the ship to pay the maritime claim. Conversely, a maritime claim ranking last may or may not be paid, depending on whether or not the remaining proceeds are sufficient to pay the claim.

9.3 Maritime claims for wages enjoy a very high priority, depending on when such claims arose. A maritime claim for wages which arose within one year before the commencement of proceedings is paid after only the following claims: (a) a claim in respect of costs and expenses incurred to preserve the ship or to procure its sale and in respect of the distribution of the proceeds of the sale; (b) a claim to a preference based on possession of the ship, whether by way of a right of retention or otherwise'.

9.4 However, a maritime claim for wages which did not arise within the one year period, is ranked far lower than many other claims. It ranks after a claim in respect of any

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mortgage, hypothecation or right of retention, and any other charge on the ship', and in respect of any lien for payments or disbursements by a master, shipper, charterer, agent or any other person for or on behalf of a ship or the owner or charterer of a ship.

10. Can wages be claimed if the employer is not the shipowner or acts illegally?

- 10.1 Given that the personal liability of a shipowner is not necessary for the creation of a seafarer's maritime lien, a seafarer enjoys the advantage that the maritime lien comes into existence even where the employer of the seafarer is not the owner of the ship; or the employer is in unlawful possession of the ship; or the employer has fraudulently obtained possession of the ship; or the employer has mere possession of the ship but not ownership of the ship. In these cases, there is a maritime lien against the ship, even though the seafarer has no claim against the shipowner.
- 10.2 Even where the master uses the ship to commit a crime, seafarers have the right to their unpaid wages as well as a reasonable and proper amount for compensation for the damages they may have suffered due to the acts of the master.
- 10.3 However, seafarers are only entitled to a maritime lien, provided they are not guilty of illegality or otherwise blameworthy, such as being privy to a fraud on the shipowner, or complicit in stealing the ship, or knowing that they are not entitled to board the vessel to carry out the work, or to act in the capacity of a particular rank on board to which they are not entitled, or to force their ship to sail to a particular port, even if for the purposes of claiming their wages.

11. Can the seafarer's maritime lien for wages be abandoned or waived by agreement?

- 11.1 By virtue of legislation, seafarers of any nationality on a South African ship cannot by agreement abandon or waive their maritime lien for wages, or be deprived of any remedy for the recovery of wages to which they would otherwise be entitled, or abandon their right to wages in the case of the loss of the ship. Any agreement with the crew inconsistent with this legislation is void and therefore of no force or effect.
- 11.2 Furthermore, seafarers of any nationality on a foreign ship cannot by agreement renounce their claims to wages, their maritime liens, or any remedy for the recovery of their wages.

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12. When is the seafarer's maritime lien for wages forfeited or not recognised or extinguished?

- 12.1 There is no right to wages and to a maritime lien if the shipowner can show that: the seafarer willfully deserted the ship without the intention to return; the seafarer was absent without leave (part of the wages would be forfeited but not the maritime lien); the seafarer was guilty of gross misconduct or incompetency; the employment agreement, through no fault of either the seafarer or the shipowner, has been frustrated (no wages are payable from the time of the frustration).
- 12.2 If a seafarer has a claim for wages that arises under a foreign law, the Admiralty Court will apply the *lex fori* (that is, the law of the local forum, in effect, South African law) to the recognition of that claim. Therefore, only the maritime liens that arise for seafarers' wages under South African law (as set out herein) will be recognized and enforced by an action *in rem*, and accorded the ranking set out herein.
- 12.3 The maritime lien for wages is extinguished by the payment of the wages; the physical loss of the ship, which must be total and irretrievable; extinctive prescription after a period of three years from the time the wages are due; or laches, which is an unreasonable delay in asserting the right that results in harm to the shipowner.