

SHIP OWNERSHIP AND REGISTRATION IN SOUTH AFRICA

1. Legal Nature of Ship Ownership

- 1.1 Ownership is the aggregate of the rights to use and enjoy property which includes the right to transmit those rights to another. It incorporates complete dominium over the asset, the right to possession, enjoyment and control thereof.¹
- 1.2 Ships are personal property and ownership thereof is governed by the common law. Legal ownership in personal property is based on possession. As with other personal property, legal ownership in ships is acquired by the operation of law. A ship will usually be acquired by contract either as a newbuilding in terms of a shipbuilding contract or in terms of a contract of sale between the owner and a purchaser.
- 1.3 A shipbuilding contract will provide for ownership to pass to the buyer on delivery and payment of the contract price, although in instances where financial assistance is required by the buyer, it may be stipulated that ownership will pass in stages. In the case of a secondhand ship the sale agreement will include provision for ownership to pass on physical delivery after the purchase price is paid and the bill of sale is handed to the buyer.²
- 1.4 In South Africa, any matters relating to ownership and co-ownership issues of maritime property not regulated in terms of local or other relevant legislation, would be subject to English law by virtue of the provisions of Section 6 of the Admiralty Jurisdiction Regulation Act, 1983³ and the fact that these matters were within the jurisdiction of the English Admiralty Court's jurisdiction in 1891. However, with regard to questions of the passing of ownership of ships, as with all movables as being non-maritime matters, Roman Dutch law as the *lex situs* applies. A shipbuilding claim was not subject to the Admiralty Courts jurisdiction in England unless it had been arrested. These claims would therefore also be subject to Roman Dutch law in South Africa.⁴

2. Ship Registration

- 2.1 The nature of ships and aircraft require that their ownership are stricter regulated than other means of transport. Ships can, in particular, cause substantial damage and loss of life both ashore and at sea. Owned by unscrupulous owners and mastered by incompetent and often cruel commanders, the lives of a ship's complement are not always a priority.⁵

¹ G Bowtle and Kevin McGuinness, *The Law of Ship Mortgages*, LLP 2001 p 5.

² *ibid* p 6

³ Hereinafter referred to as the "AJRA". Refer to the Table of Abbreviations at the end of this work.

⁴ J Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Juta & Co, 1999 p 136

⁵ *ibid* p 126

- 2.2 States acquire jurisdiction over ships through their systems of ship registration. Registration systems offer minimum safety standards and control of its subject ships by government bodies. The International Safety Management Code has recently been introduced to detect substandard ships and to set universal minimum requirements for shipping.
- 2.3 Registration of merchant ships and fishing vessels also has specific social and economic benefits for flag states. It introduces foreign exchange to the economy and benefits the fiscus. Shipowners earn freight and charter hire from foreign sources and certain local trades, such as fishing in terms of local quotas, stimulate national interests and related industries. In wartime, merchant ships on the country's register may be requisitioned for national service.⁶
- 2.4 Unregistered ships are not entitled to fly the flag of a state within the comity of nations. As such it enjoys no privileges or protection from a registering state, other than the recognition of basic human rights.⁷ No remedy under private international law is available to it and it does not have the freedom of navigation on the open sea as would a vessel flying the flag of a state.⁸ Article 110(1)(d) of the Law of the Sea Convention 1982⁹ allows unregistered ships to be boarded by warships of any state at any time. International law and almost all national legislation of port states require ships trading in or out of a foreign port to fly the flag of a state with a recognized ship's registry.¹⁰
- 2.5 Registration, not ownership, links a ship to a particular country.¹¹ Upon registration, the flag of the registering state becomes the flag of the ship. In the judgment of *Lauritzen v. Larson* this principle is confirmed when the court determined that nationality is evidenced to the world by the ship's papers and its flag.¹²
- 2.6 Entitlement to fly the flag of a particular state also causes the jurisdiction and law on board the vessel outside the port of another state to be determined by that of the registering state. The LOSCON obliges its Member States to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.¹³ Each Member State is required to maintain a register of ships containing the

⁶ *ibid* p 127

⁷ Section 4 of the SRA makes it compulsory for ships entitled to be registered in terms of the Act, to be so registered if they are to undertake foreign voyages. Failure to do so disentitles the unregistered ship of "any benefit, privilege, advantage or protection enjoyed by a registered ship".

⁸ Hare *op cit* p 128; *The Aysa: Naim Molvan, owner v. Attorney General for Palestine* [1948] AC 351 (PC) at 369.

⁹ Hereinafter referred to as LOSCON.

¹⁰ Hare *op cit* p 129

¹¹ In South Africa, Section 3 of the SRA determines that registered ships and unregistered ships which are entitled to registration, are South African ships and have South African nationality.

¹² 345 U.S. 571, as quoted by D Melunsky, *The Registration of Ships and the South African Ship's Register – Current and Proposed*, UCT Masters minor dissertation, 1998 p 7.

¹³ Article 94.

names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size.¹⁴

- 2.7 The South African regime of registration of ships is governed by the SRA and the Regulations promulgated in terms thereof¹⁵. The legislation comprises seven chapters and three schedules and addresses the establishment of the South African Ship register, the entitlement to register, formalities of registration, charges levied, penalties and offences, private law provisions for registered ships, laws amended by the Act and certain transitional provisions.
- 2.8 The Act establishes one central register which is administered in Cape Town by the Ship Registration Office and its various branch offices under the control of a Registrar appointed from the staff of SAMSA. The Registrar's duties include those prescribed in the SRA and in particular the recording of all information and documents and the issuing of all certificates in terms of the SRA.¹⁶
- 2.9 Section 15 SRA provides for the ownership of a ship to be divided into 64 shares, that the number of persons registered as owners of a ship may not at any time exceed 64, any number of persons not exceeding five may be registered as joint owners of a ship or of one or more shares in a ship, a joint owner of a ship or of one or more shares in a ship may not dispose of his or her interest separately and that a person may not be registered as the owner of a fractional part of a share in a ship.
- 2.10 Ships are divided into categories of those which are entitled to be registered and those in respect of which registration is prohibited. Only South African owned ships, small vessels¹⁷ (other than fishing vessels¹⁸) and ships on bareboat charter to South African nationals are entitled to register, while ships registered in terms of the law of another state¹⁹, wooden ships of primitive build and ships of less than 3 metres in length may not be registered.
- 2.11 Under the previous Merchant Shipping Act dispensation small vessels were not capable of registration on the Ship's Register. In terms of Section 68 of the MSA vessels of less than 25 gross tons were obliged to be licensed, which the Department of Transport regarded as precluding registration on the Register in terms of the provisions of

¹⁴ Article 92.

¹⁵ Hereinafter referred to as the "SRREGS".

¹⁶ Section 10 SRA

¹⁷ "Small vessel" is defined in Section 1(xxxvi) SRA as vessels of less than 25 gross tons and of more than three metres in length; and is qualified by section 16(b) SRA as a vessel wholly owned by South African residents or South African residents and South African nationals or operated solely by South African residents or South African national or by both.

¹⁸ "Fishing vessel" is defined in section 1(x) SRA as a fishing vessel as defined in Section 1 of the Marine Living Resources Act 18 of 1998.

¹⁹ Section 19(1) SRA with the exceptions in Subsections 19(a) and (b) with regard to ships acquired in terms of a judicial sale in terms of Section 9 AJRA and bareboat charters to South African nationals.

sections 11, 12 and 13 MSA. Although this interpretation may have been erroneous²⁰, it meant that these vessels were incapable of being mortgaged.

- 2.12 The SRA retained the licensing provisions, but with amendments to the effect that vessels under 100 gross tons used solely for sport or recreation are not required to be registered or licensed unless they are used or equipped for use as sport fishing vessels and require a recreational fishing license in terms of the Marine Living Resources Act, 1998. If so, they may either be licensed in terms of the MSA or, if they are entitled to, be registered in terms of the SRA.
- 2.13 Dual registration in South Africa of a vessel which has been registered in terms of the laws of another state is not permitted, unless the new owners can prove that the ship is no longer registered as such, that efforts are being made to terminate the foreign registration, that (in the case of a vessel acquired at a judicial sale) all reasonable steps to terminate such foreign registration have been unsuccessful, or that the owner of a ship on bareboat charter and the competent authority of such foreign state have consented to South African registration.
- 2.14 Registration is pre-empted by the requirement that the ship undergoes the necessary inspection²¹, its tonnage measurement is certified in terms of the provisions of the Merchant Shipping Act, 1951²², the ship is marked as directed by the Registrar²³ and such other documents and requirements as stipulated in the Act and the Regulations have been lodged and complied with²⁴.
- 2.15 The SRA requires in Regulation 13 SRREGS documentary proof of *inter alia* the description, ownership and nationality, charterparty (in the case of a bareboat charterparty) and the prescribed marking of the ship to be submitted to the Registrar when application is made for the registration of the ship. Special requirements are stipulated for newbuildings and ships which have not been previously registered.
- 2.16 For prospective mortgagees, the provisions of Regulation 13(8) read with Regulation 13(6) are important. The history of the ownership in the ship is required to be proven by documentary evidence, in the absence of which it may be proven by a solemn declaration by a person acquainted with the facts of the matter setting out the history of the ownership of the ship. Regulation 13(9) goes further to accommodate a lack of such evidence, by providing that the person who signs the application for registration of the ship may, by solemn declaration, state that the person in whose name the ship is to be

²⁰ Hare *op cit* p 152 footnote 138.

²¹ Section 18 SRA. Registration may be refused if it is found that it would be inappropriate to register the vessel having regard to the condition of the ship in respect of its safety or any risk of pollution, or in view of the safety, health and welfare of persons employed or engaged on the ship.

²² Section 17 SRA.

²³ Section 20 SRA

²⁴ The requirements as set out in Regulation 13 SRREGS.

registered, is lawfully entitled to ownership of the ship. As a precaution, Regulation 13(10) requires notice of the applicant's intention to apply for registration on these grounds to be published in the Government Gazette at least 30 days before the application is lodged with the Registrar.

- 2.17 The possibilities of fraud or misrepresentation in proceedings of this nature, not only with regard to lawful ownership, but also relating to current mortgages over the ship, can not be excluded. Prospective mortgagees should therefore be alert when a ship registered in these circumstances is accepted as security for mortgage finance. Although it is to be expected that the Registrar will not be cautious when it considers an application for registration on such grounds, an independent due diligence exercise by any financier will be prudent in these circumstances.
- 2.18 Upon registration of the ship, the Registrar issues a registration certificate to the new owner. The certificate indicates the details of the ship as it is entered on the register. It may only be used for the lawful navigation of the ship and may not be detained as security for a civil claim.²⁵
- 2.19 The Act also provides for a provisional certificate to be issued to a ship which becomes a ship entitled to be registered²⁶ and is in a foreign port where there is a proper officer, or is at sea and but before arriving in a South African port, the ship arrives at a foreign port where there is a proper officer²⁷. Sellers are understandably reluctant to release possession of the vessel without having received payment or satisfactory security for payment of the purchase price. This provision allows for ships being imported to South Africa to be brought onto the register even before the ship has arrived at a local port. A mortgage can thereby be passed over the ship while the ship is still in the seller's possession, enabling the financier to release payment of the purchase price on behalf of the purchaser, against the security of a mortgage.
- 2.20 The registration of a ship has far-reaching consequences, not only for the registered owner, but also for persons with so-called "beneficial interests" in a ship. Section 32 of the SRA imposes a joint and several liability with the registered owner²⁸ on anyone who has a beneficial interest in a ship for any pecuniary penalty due in terms of the Shipping Acts or any other law for which the owner of the ship may become liable. Section 1(iii) defines a "beneficial interest" to include any interest arising under contract, testamentary

²⁵ Section 23 and Section 24 SRA.

²⁶ The requirement of "becoming entitled to be registered" reflects on the provisions of section 16 SRA with regard to ownership thereof by South African nationals and/or -residents.

²⁷ Section 26 SRA provides that if there is a proper office in such foreign port, the proper officer of that port may on application issue a provisional registration certificate which is regarded as a registration certificate until the ship arrives in a South African port or for six months after the date of the provisional certificate, whichever occurs first. Section 27 provides for such provisional certificates to be issued by the South African Registrar in cases where the ship is at sea or where there is no proper officer at the foreign port. In both these instances an application for registration of the ship must have been lodged with the Registrar and must not yet have been dealt with (Section 28 SRA).

²⁸ It should be noted though that the liability does not include all penalties which may be imposed in respect of a ship, as the responsibilities incurred by a master of a ship is not included in this provision.

disposition or otherwise. This liability does not, however, affect the holders of a mortgage over the ship. The Act empowers SAMSA to institute civil proceedings for the recovery of such penalties from the person so interested and from the owner, jointly and/or severally.

- 2.21 Considering that the SRA defines “Shipping Acts” in section 1(xxxv) to include the SRA as well as the Merchant Shipping Act 1951, the Marine Traffic Act 1981, the Marine Pollution (Control and Civil Liability) Act 1981, the Marine Pollution (Prevention of Pollution from Ships) Act 1986 and the Marine Pollution (Intervention) Act 1987, the liability and responsibility of the shipowner and the person so interested is substantial. Not only does it lift the protection afforded by the corporate veil to beneficial owners who are not registered on the Ship’s Register as such²⁹, but it also appears to extend to persons enjoying a beneficial interest in a ship “under contract”.
- 2.22 This public liability of persons with indirect ownership (interest) will account for the reluctance of financiers to finance ships on instalment sale or other forms of asset financing. Where assets are invoiced to financiers who, in turn, sells or leases the asset to a credit receiver and ownership is retained by the credit grantor until the full purchase price is paid by the credit receiver, will effectively constitute a beneficial interest in favour of the financier, making it co-responsible for the aforesaid penalties which may be imposed on the registered owner. Financing a ship by way of mortgage lending is therefore the only acceptable form of commercial maritime lending in view of the exclusion of mortgages from the provisions of section 32.
- 2.23 If a ship is lost or ceases to be entitled to be registered³⁰ the ship’s registration will, subject to the procedure stipulated in section 42 SRA be deemed to be closed. SAMSA is also empowered to remove a ship which it suspects is not entitled to be registered or which would be inappropriate to remain registered to be removed from the Register. Registration of a ship is valid for five years from the date of registration or renewal. Also, if the registration of a ship not renewed within the registration period of five years, the registration of the ship shall similarly be deemed to be closed. In all of these instances the interests of a mortgagee are protected in terms of the provisions of section 42(4) to (6).
- 2.24 Although ships are no longer obliged to register or denied registration, as had been the case with MSA, the new “entitlement to register” privilege carries its punitive consequences when one considers the provisions of sections 44 and 45 SRA. An unregistered ship which is entitled to be registered, may not depart from a South African port to a place outside South Africa. Such a ship may furthermore not depart from a foreign port unless a registration certificate, provisional registration certificate or temporary pass has been issued to it. In both instances the master of the ship and its

²⁹ Which would include persons operating the ship behind the guise of a juristic person through indirect shareholding and control, Melunsky *op cit* p. 85.

³⁰ Where the ship no longer complies with the provisions of section 16 SRA relating to its ownership and chartering requirements.

owner who orders or permits such departure will be guilty of an offence in terms of the SRA.³¹

- 2.25 Ownership in a ship is transferred by registration of a bill of sale in the prescribed form by the Registrar if the ship continues to be entitled to be registered.³² Bills of sale are registered in the order of their lodgment. Transfer of ownership by operation of law³³ or in terms of an order for sale where the ship ceases to be entitled to be registered³⁴ is specifically provided for in the Schedule to the SRA. Item 6 thereof stipulates the procedure to be followed for the transfer where the SAMSA or a Court orders the sale of a ship. The transfer of a ship may also be prohibited by a Court on application by an interested party, which will be binding on the Registrar.³⁵
- 2.26 The passing of legal ownership is delayed until the bill of sale is registered by the Registrar. If the parties agree to any other date for the passing of ownership other than the registration date of the documents by the Registrar, mere beneficial ownership is conferred and not legal ownership. The Ship's Register is therefore conclusive evidence of legal ownership in a ship.³⁶

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³¹ Section 44(3) and section 45(2) both impose fines or imprisonment of up to three years.

³² Item 3 Schedule 1 SRA.

³³ Item 4 Schedule 1 SRA.

³⁴ Item 5 Schedule 1 SRA.

³⁵ Item 7 Schedule 1 SRA.

³⁶ Hare op cit p 154.

TABLE OF ABBREVIATIONS

SRA	Ship Registration Act, No. 58 of 1998
SRREGS	Ship Registration Regulations, 2002 made under Section 56 of the SRA
MSA	Merchant Shipping Act, No. 57 of 1951
SAMSA	The South African Maritime Safety Authority
AJRA	Admiralty Jurisdiction Regulation Act, No.105 of 1983
LOSCON	Law of the Sea Convention, 1982