

SHIP ARREST IN SOUTH AFRICA

By Shane Dwyer*
SHEPSTONE & WYLIE
dwyer@wylie.co.za
www.wylie.co.za
Durban Office, PO Box 305
La Lucia 4153, South Africa
Tel: +27 31 575 7000
Fax: +27 31 575 7300



1. Please give an overview of ship arrest practice in your country.

There are essentially three ways in which one can arrest or attach a ship in South Africa:

(i) An arrest in rem

A maritime claim may be enforced by an action in rem:

- if the claimant has a maritime lien over the property to be arrested; or
- if the owner of the property to be arrested would be liable to the claimant in an action in personam – where he/she would be personally liable in a direct action against them.

(ii) An arrest in personam

A maritime claim may be enforced by an action in personam when the Defendant is a:

- person resident or carrying on business at any place in South Africa;
- person whose property within the Court's area of Jurisdiction has been attached by the claimant to found or confirm jurisdiction;
- person who has consented or submitted to the jurisdiction of the Court;
- company, if the company has a registered office in South Africa.

Note that it is only where the defendant is a foreigner and therefore it is necessary to found jurisdiction that their property has to be attached to establish that jurisdiction. An "attachment" is the term used for this proceeding, borrowed from Roman Dutch law, as distinct from an "arrest" which is the procedure to commence an action in rem, based on the English in rem Admiralty procedure.

(iii) A security arrest

- A court may order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of arbitration or any proceedings contemplated, pending or proceeding, either in the Republic of South Africa or elsewhere, and whether or not it is subject to the law of South Africa.

The Court will have jurisdiction over all matters pertaining to the arrest itself and any security furnished in relation thereto. The claimant, however, does not submit to South African jurisdiction for the merits of the claim in respect of which security is sought.

2. Which International Convention applies to arrest of ships in your country?

South Africa has not acceded to any International Convention related to the arrest of ships. The law and practice in respect of the arrest of ships in South Africa is regulated by the Admiralty Jurisdiction Regulation Act of 1983 as amended with effect from 1 July 1992 ("the Act"). In the drafting of the Act, certain aspects of the Arrest Convention 1952 were taken into account and incorporated into the legislation, such as the provision for the arrest of "associated ships", which is a wider concept than "sister ships". The Act provides the formula to determine what law applies to the substantive merits of a maritime claim, but the arrest procedures are determined by the provisions of the Act itself.

3. Is there any other way to arrest a ship in your jurisdiction?

Apart from the procedure to "attach" a ship in personam there is no other procedure to detain a ship for a maritime claim. The Act is specific in its requirements for the arrest or attachment of a ship, where the claim is a maritime claim as defined in Section 1 of the Act. If the claim is not a maritime claim as defined and the claimant has a claim enforceable in personam against its owner, then subject to certain restrictions such as that the claimant must be domiciled locally and the defendant must be a foreigner, the ship could be attached by order of the High Court in exercise of its parochial (non-admiralty) jurisdiction to found jurisdiction to sue in common (Roman Dutch) law.

4. Are there alternatives e.g. saisie conservatoire or freezing order?

See above. They might have certain similarities, but they are not identical.

5. For which types of claims can you arrest a ship?

The definition of a maritime claim in the Act effectively covers all causes of action in relation to ships, the carriage of cargo and matters maritime. The definitions are also wide enough to cover matters which are ancillary to "shipping" matters. A comprehensive list of maritime claims can be found in Section 1 of the Act.

6. Can you arrest a ship irrespective of her flag?

Yes, a vessel can be arrested within our jurisdiction irrespective of the flag she is sailing under.

7. Can you arrest a ship irrespective of the debtor?

No - the claim must be enforceable in personam against the owner or demise charterer (who is deemed to be the owner for this purpose). However a vessel can also be arrested on an associated ship basis, meaning that where the maritime claim arises in respect of one ship, it is possible to bring an action in rem, or a security arrest, by arresting an "associated ship" instead of the ship in respect of which the maritime claim arose. The ship will be an "associated" one, effectively where the respective companies which own the "guilty" ship and the "associated" ship, are controlled directly or indirectly by the same person or persons.

8. What is the position as regards sister ships and ships in associated ownership?

A sister ship as well as an associated ship can be arrested (in fact the former falls within the definition of the latter) for liabilities of the owner or bareboat charterer of what is termed the "ship concerned" or "guilty ship". An associated ship is one (in simple terms) which is owned by a company which is controlled directly or indirectly by the same person who controlled the company which owned the "guilty ship" (the ship concerned) at the time the cause of action arose.

9. What is the position as regards Bareboat and Time-Chartered vessels?

Bareboat charterers (or "demise charterers") are deemed to have been and to be, the owner of a vessel for purposes of an arrest in rem. As such, if the liability sought to be enforced, is that of the bareboat charterer, the ship can be arrested in rem for the liabilities of the bareboat charterer. The same does not however apply to a time chartered vessel. Nevertheless, for purposes of an associated ship arrest, the charterer (whether bareboat, time or voyage) is deemed to have been the owner of the ship concerned (the "guilty ship") for purposes of the arrest of an associated ship (i.e. one owned by a company which is controlled by a person who controlled the company which was the charterer and therefore the deemed owner of the guilty ship, at the time the cause of action arose)

10. Do your Courts require counter-security in order to arrest a ship?

No, South African courts do not require counter-security as a pre-condition for ordering the arrest of a ship. However, the owner of the ship arrested can seek an order for counter security to be put up, if they can make out a case that the arrest has prima facie been obtained without reasonable and probable cause, or the security demanded to obtain its release, is excessive.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

Yes. The concept of a maritime lien is different to a maritime claim. A ship can always be arrested in rem for the claims recognised by South African law as maritime liens (but not for claims giving rise to a maritime lien in a foreign jurisdiction), even if the ship has been sold. It is a claim which properly lies in rem against the ship, notwithstanding in personam liability of its owner. In addition a vessel can be arrested for enforcement of a maritime claim, as defined in the Act, even if not a maritime lien, where the owner is liable in personam.

12. Does your country recognise maritime liens? Under which International Convention, if any?

Yes, but only those restricted maritime liens recognised in terms of our common law as being so classified, which are in effect those claims recognised by English law. These are those that were recognised by the Colonial Courts of Admiralty in 1890, i.e. claims for bottomry, salvage, seamen's wages, master's wages, disbursements and liabilities, and any claims for damage caused by a vessel.

No International Convention applies and no claim classified as a maritime lien by a foreign law, will be enforced as such.

13. What lapse of time is required in order to arrest a ship from the moment the file arrives to your law firm?

In the case of an in rem arrest, an arrest can generally be effected as soon as the papers are drafted and issued at Court. This can be achieved within a few hours after instructions are received. In the case of a security arrest however, an Affidavit is required to be deposed to and as soon as a Judge is available to hear the application, an order can be granted and the arrest effected. Although a more substantive application therefore, a security arrest can still be effected within a few hours of the receipt of the instruction, subject to the availability of a Judge to hear the matter, but this should be capable of being arranged the same day, including over weekends and after hours.

14. Do you need to provide a POA or any other documents of the claim to the Court?

No power of attorney has to be filed at the time of seeking an arrest order. All that is needed initially in order to place a vessel under arrest is -

- (i) the issuing and service of a Summons that includes a statement of the facts upon which the claim is based, as well as the issuing and service of a Warrant of Arrest; and
- (ii) a Certificate in terms of Rule 4(3) of the Act, deposed to by the attorney representing the claimant, or by the claimant itself, in support of the Summons and the Warrant, which sets out the necessary averments as required by the Act and confirms the accuracy thereof.

If a security arrest is sought however, an affidavit must be filed and this must have the relevant documents in support of the cause of action (if any) attached to it. The owner of the ship can after the arrest is granted, challenge the authority of the attorney who obtained the arrest, in which case a power of attorney must be filed.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

For an arrest no original or notarised or authenticated documents are required. It is permissible to file electronically transmitted documents, whether faxed or scanned and emailed. If however a matter proceeds to trial and documents are required to be submitted in proof of the claim, it may be necessary to produce the original document or a copy thereof, which would then have to be authenticated by notarisation and apostille.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

If an action is commenced before this court in rem or following an attachment to found jurisdiction, in personam then it is the court seized of the matter notwithstanding where the cause of action arose, or where the claimant or the defendant are domiciled and the court will as a matter of domestic law have inherent and statutory jurisdiction. The defendant can however seek an order that the court thereafter decline to continue to exercise jurisdiction, or stay the action on the merits, on the basis of forum non conveniens where e.g. there is a choice of forum clause in a contract or where it is more appropriate that the matter be heard in the jurisdiction where e.g. a collision occurred. The test of when the court should consider deferring jurisdiction in favour of another court or forum, is determined by the common law of South Africa, which however follows the test applied by the English courts.

17. What is the procedure to release a ship from arrest?

Once a ship has been arrested by service through the Court Sheriff of an arrest order or warrant, served on the ship and the harbour master, it can only be released again by service by the Sheriff of a warrant of release issued by the High Court (Admiralty) Registrar, again service being effected on the ship and the harbour master.

The party who arrested the ship must apply to the Registrar for the issue of the warrant of release, either because the claim has been settled, or because security for payment of the claim has been provided, or because the claimant abandons the arrest for any reason.

If the arrest is challenged and the Court upholds the challenge and sets aside the arrest, the release will be ordered by the court and that order will be served on the ship and harbour master.

If agreement on the form of security or the amount thereof cannot be agreed by negotiation between the parties, then again application can be made to the Registrar or the Court for a ruling on what amount or form would be acceptable and if it is provided in that amount and form, either to the claimants lawyers or to the Registrar, the Registrar will issue a release warrant without the arresting party's express agreement.

18. What type of security needs to be placed for the release?

Security has to be provided by cash paid into court (which is unusual), a Bank Guarantee from a South African bank, an Insurance Company or an acceptable P&I Club, Letter of Undertaking. In the case of an arrest in rem, the amount is either for the amount of the claim plus interest and costs, or for the value of the ship or other asset arrested, whichever is the lesser. With an attachment to found jurisdiction in personam however, the full value of the claim has to be secured, whatever the value of the asset attached.

19. Does security need to cover interest and costs?

Yes. For purposes of calculating the amount to be secured in respect of the interest portion, apart from interest already accrued, customarily interest for three or four further years is calculated and provided for, on the basis that this is how long it could take for the action on the merits to be disposed of, if the action is being pursued here. The amount to be allowed for possible costs is a matter for negotiation, or the Registrar can be requested to set a figure.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

Yes, if the P&I Club providing the LOU is a member of the International Group. For non-IG Club's or insurers, it is a matter for negotiation, or an application to court could be required, with the Club or other P&I insurer's financial statements being required to be disclosed to persuade the Court that they will be able to pay any judgment rendered in due course.

21. How long does it take to release the ship?

If the ship is in port and security is provided in normal working hours when the Court Registrar's office is open to arrange the issue of the Release Warrant, the release can be effected within an hour or two. Over weekends, or after normal office hours, it can take longer and if the Sheriff has to then proceed off shore to the anchorage by launch to serve the Release Warrant on the ship, that will obviously delay matters still further.

22. Is there a procedure to contest the arrest?

Yes. Generally the ship owner who wishes to contest the right of the claimant to have arrested the ship on some technical basis (such as that the cited defendant does not own the ship, or that the ship is not an "associated ship" as defined in the Act) will have to make application to court to set aside the arrest, filing affidavits to support the argument that the ship should not be susceptible to the arrest. The court will however not entertain such an application to set aside simply because the owner disputes that the underlying debt is due on the merits and as long as a prima facie case was made out for the claim at the stage of arrest, the owner needs to provide security to release the ship and then defend the merits of the substantive action (or arbitration).

23. What period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

The arrest procedure in rem is itself the commencement of the substantive proceedings on the merits and is not merely a conservatory procedure, as a summons is served simultaneously with the warrant of arrest which has to be answered with a defence on the merits. With an attachment to found jurisdiction in personam the court will normally authorize and direct that particulars of claim be served within one month of the attachment.

24. Do the Courts of your country acknowledge wrongful arrest?

Yes. It is however termed an arrest "without reasonable and probable cause", which is a narrower concept to one of "wrongful arrest".

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

Yes, but strictly speaking only when circumstances of fraud have been proven. The associated ship arrest provisions also allow a measure of piercing the corporate veil, but only where the strict issues of common control of owning companies is proven.

26. Is it possible to have a ship sold pendente lite; if so how long does it take?

Yes. From the time of the order the ship can be sold within 6 weeks but the time period can be longer if the owner or another creditor opposes the sale or the terms for sale stipulated by the Court.

Born 5th April 1946, **Shane Dwyer served with the South African Navy before attending Stellenbosch University and obtaining the BA & LL.B degrees. After serving as a State Prosecutor, he joined Shepstone & Wylie in 1972 and became a partner in 1975. Shepstone & Wylie, although a general service law firm, have been the legal representative of most International Group P&I Clubs for many years. The firm now has some 75 lawyers, with specialist maritime offices in Durban, Cape Town, Richards Bay and Johannesburg. He has specialized in Maritime Law since he joined the firm and has been involved in most, if not all, of the many major shipping casualties along the Southern African coast in the last 40 years. He is recognized as one of the leading international transport lawyers in South Africa and has been published widely on both maritime and air law in numerous international publications.*