BIRTH, MARRIAGE AND DEATH AT SEA IN SOUTH AFRICAN LAW

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Introduction

Birth marks the beginning of a natural person's legal personality; should the person marry[2] personal and proprietary consequences follow;[3] death terminates a person's legal personality.[4]

In South African law the place where a person is born does not affect his or her private-law status. Indeed, the person's domicile is used as the connecting factor to identify the legal system (*lex domicilii*) 'which determines whether and to what extent that person has legal capacity: capacity to act and capacity to litigate'.[5] However, the place where a person is born may affect his or her public-law status because it is one of the factors taken into account for the purpose of granting South African citizenship to an individual. By contrast, the place where a marriage is celebrated does matter for private-law purposes because the *lex celebrationis* is the legal system used in South Africa to test the validity of a marriage.[6] However, the legal relevance of the place where a marriage is celebrated is limited for public-law purposes by the fact that no person can 'acquire or lose South African citizenship by reason merely of a marriage contracted by him or her'.[7] As in the case of marriage, the place where a death occurs matters for private-law purposes to the extent that that fact may have an impact on the formal validity of a will.[8]

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1 DSP Cronjé (updated by M Carnelley) 'Persons' (2010) 20(1) *LAWSA* 432 para 440.

2 For present purposes, the term 'marriage' refers to a marriage solemnised either under the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006, unless the context indicates otherwise.

3 AB Edwards (updated by E Kahn) 'Marriage' (2003) 2(2) *LAWSA* 327–330 paras 308–309.

4 Cronjé (note 1 above) paras 441, 444.

5 Id 448 para 451.

6 *Seedat's Executors v The Master (Natal)* 1917 AD 302.

7 S 14 of the South African Citizenship Act 88 of 1995.

8 S *3bis* of the Wills Act 7 of 1953.

Additionally, the significance of the three events explains their legal implications at the criminal and procedural levels. Here also, the place of birth, marriage or death matters in that it has an impact on whether the relevant South African organs of state have the legal authority to be involved in the affair.

This article discusses whether and, if so, to what extent the legal implications of a birth, marriage or death at the criminal, procedural and status levels are affected by the fact that they occur at sea rather than on dry land as is most often the case. This is done by focusing on each event in turn after the various marine spatial areas have been briefly sketched for the purpose of outlining the scope of South African jurisdiction at sea.

Marine spatial areas

For present purposes the various marine spatial areas are divided into two categories.

The internal waters,[9] the archipelagic waters (if any)[10] and the territorial sea[11] are part of the territory of the coastal state as far as international law is concerned. Whether those areas are part of the territory of a specific coastal state for domestic-law purposes is determined by that state's constitutional law. That decision, in turn, impacts on whether the principle that national legislation applies in the whole territory of the state results in the application of that legislation in the abovementioned areas. The internal waters are indeed part of the territories of coastal states in most, if not all, the domestic laws of those states; the issue is not as straightforward as far as the territorial sea is concerned. Indeed, two different approaches can be adopted in South African law: a narrow approach in terms of which the territorial sea is not part of the national territory and a broad approach in terms of which it is. It has been argued

9 In terms of art 8(1) of the 1982 UN Convention on the Law of the Sea (LOSC), the internal waters are the 'waters on the landward side of the baseline of the territorial sea'. The Maritime Zones Act 15 of 1994 (MZA) defines the South African internal waters as comprising '(a) all waters landward of the baselines; and (b) all harbours' (s 3(1)). See further Y Tanaka *The International Law of the Sea* (2015) 78–84; P Vrancken *South Africa and the Law of the Sea* (2011) 99–138.

10 In terms of art 49(1) of LOSC, the archipelagic waters are 'the waters enclosed by the archipelagic baselines'. South Africa does not have archipelagic waters. See further Tanaka (note 9 above) 111–119.

11 In terms of arts 2(1) and 3 of LOSC, the territorial sea is 'an adjacent belt of sea' not extending beyond twelve nautical miles measured from the baselines. The MZA defines the South African territorial sea as '[t]he sea within a distance of twelve nautical miles from the baselines' (s 4(1)). See further Tanaka (note 9 above) 84–97; Vrancken (note 9 above) 139–155.

elsewhere that the latter approach is the correct one[12] and the present discussion proceeds on that basis.

By way of contrast, the contiguous zones,[13] the exclusive economic zones (EEZs),[14] the continental shelves,[15] the high seas[16] and the International Seabed Area[17] are not part of the territory of any state. In the absence of territorial jurisdiction, state jurisdiction is exercised, for present purposes, on a nationality basis and on a zonal basis. Jurisdiction on a nationality basis takes two forms: flag jurisdiction and personal jurisdiction. As far as the former is concerned jurisdiction is exercised over ships flying the flag of the state, including all natural persons on board those ships irrespective of the nationality of those individuals.[18] In the case of personal jurisdiction, jurisdiction is exercised over the nationals of the state irrespective of the flag flown by the vessel on board of which those individuals find themselves.[19] Another important difference between flag jurisdiction and personal jurisdiction is that the former

12 See P Vrancken 'The marine component of the South African territory' (2010) 127 *South African Law Journal* 207–223.

13 In terms of art 33 of the LOSC, the contiguous zone is 'a zone contiguous to [the] territorial sea … not extend[ing] beyond 24 nautical miles [measured] from the baselines …'. The MZA defines the South African contiguous zone as '[t]he sea beyond the territorial waters …, but within a distance of twenty four nautical miles from the baselines' (s 5(1)). See further Tanaka (note 9 above) 124–126; Vrancken (note 9 above) 157–172.

14 In terms of arts 55 and 57 of LOSC, the EEZ is 'an area beyond and adjacent to the territorial sea' not extending beyond 200 nautical miles measured from the baselines. As far as it is concerned, the MZA defines the South African EEZ as '[t]he sea beyond the territorial waters …, but within a distance of two hundred nautical miles from the baselines' (s 7(1)). See further Tanaka (note 9 above) 127–137; Vrancken (note 9 above) 177–187.

15 In terms of art 76(1) of LOSC, '[t]he continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance'. The MZA defines the South African continental shelf by reference to art 76 (s 8(1)). See further Tanaka (note 9 above) 137–150; Vrancken (note 9 above) 187–194.

16 In terms of art 86 of the LOSC, the high seas consist of 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'. See further Tanaka (note 9 above) 155–177; Vrancken (note 9 above) 207–216.

17 In terms of art 1(1)(1) of the LOSC, the international seabed area consists of 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'. See further Tanaka (note 9 above) 177–192; Vrancken (note 9 above) 216–220.

18 See, for instance, art 92(1) of the LOSC.

19 See, for instance, art 97(1) of the LOSC.

includes legislative, executive and judicial jurisdiction, while the latter only includes legislative and judicial jurisdiction. In other words, a state may not exercise its executive jurisdiction on a personal basis beyond the outer limit of its territorial sea in cases where the individual concerned is on board a ship flying the flag of another state.[20] Jurisdiction on a zonal basis includes jurisdiction over all artificial islands, installations and structures within the EEZ of the coastal state or on or above its continental shelf.[21] As with flag jurisdiction, this jurisdiction includes legislative, executive and judicial jurisdiction and is exercised over all natural persons on the island, installation or structure, irrespective of the nationality of those individuals.

Whether a state actually makes use of the jurisdiction which international law attributes to it beyond the outer limit of its territory depends on the domestic law of that state. South Africa exercises its jurisdiction on all artificial islands, installations and structures within the South African EEZ or on or above the South African continental shelf, that is, for present purposes, all exploration or production platforms and vessels used in or ancillary to the prospecting for or the mining of any substance; all vessels or appliances used for the exploration or exploitation of the seabed and all safety zones around the abovementioned platforms.[22] That means that all laws in force in the Republic, including the common law, also apply on those installations, and the remainder of this paper must be read accordingly.[23] There is no similar general extension of the application of South African law to South African ships or South African nationals when they find themselves beyond the South African territorial sea. Instead, such an extension is provided for in specific pieces of legislation and, therefore, takes place only with regard to those statutory instruments. An example is section 3(4) of the Merchant Shipping Act, 1951 (MSA),[24] which provides that the provisions of the Act 'which apply to vessels which are registered or licensed in the Republic or which in terms of th[e] Act are required to be so licensed [do] so apply wherever such vessels may be'. By contrast, the provisions of the Act 'which apply to vessels other than those referred to in subsection (4) [do] so apply only while such vessels are within the

20 It must also be pointed out that executive jurisdiction on a flag basis may not be exercised within the maritime territory of another state. That is because such an exercise would violate the territorial sovereignty of the coastal state. See, for instance, art 111(3) of the LOSC.

21 Art 56(1)(b)(i) of the LOSC.

22 S 1 of the MZA, read with s 1 of the Marine Traffic Act 2 of 1981.

23 S 9(1) of the MZA.

24 Act 57 of 1951.

Republic or the territorial waters thereof'.[25] Another example is section 3(1)(b) of the Marine Living Resources Act, 1998,[26] which provides that the Act applies 'to fishing activities carried out by means of local fishing vessels ... in [or] on ... waters outside South African waters, including waters under the particular jurisdiction of another state'.[27] A third example is section 15(1)(a) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004,[28] which provides that '[a] court of the Republic has jurisdiction in respect of any specified offence ... if ... the accused was arrested in the territory of the Republic ... or on board a ship ... registered or required to be registered in the Republic'. A final example is the Prevention and Combating of Corrupt Activities Act, 2004,[29] which provides that a court of the Republic has jurisdiction in respect of an offence under the Act even when the person concerned is accused of having committed the act outside the Republic when that person is a South African citizen, 'is ordinarily resident in the Republic' or was arrested 'on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed'.[30]

Birth

Introduction

Birth normally results in the establishment of the legal bond between an individual and a state called 'nationality' or 'citizenship'.[31] Nationality systems fall into two main categories: *ius sanguinis* systems and *ius soli* systems.[32] In *ius sanguinis* systems, nationality is acquired by filiation through descent or blood relationship. In such systems, a child born on a ship would acquire his or her nationality in the same way as he or she would have acquired it had he or she been born on dry land, that is, on the basis that his or her father or mother had that nationality at the time of his or her birth. That is not the case, by contrast, in *ius soli* systems. The reason is, in those systems, nationality is acquired on the basis of

25 S 3(5).
26 Act 18 of 1998.
27 For purposes of the Marine Living Resources Act, the 'South African waters' include the EEZ and, in relation to sedentary species, the continental shelf. See s 1 of the Act.
28 Act 33 of 2004.
29 Act 12 of 2004.
30 S 35(1)(a), (b) and (c) respectively.
31 See F Venter 'Citizenship and nationality' (2013) 3(3) *LAWSA* 336–337 paras 518–519.
32 IM Rautenbach *Rautenbach-Malherbe Constitutional Law* 6 ed (2012) 41.

where the birth took place or, more accurately, the territory within which the child was born.

A consistent application of the territoriality principle would mean that a child born at sea landward of the outer limit of the territorial sea of a coastal state acquires the nationality of that state while another child born seaward of that limit does not acquire that nationality. However, that is not always the case. On one hand it is possible for a state to hold the view that the presence of the mother in the internal, archipelagic or territorial waters of the state is too transient to justify the acquisition of the state's nationality;[33] on the other, many states deem ships flying their flags to be part of their territory for nationality purposes with the result that a child born on a ship flying the flag of a state acquires the nationality of that state even if the birth occurred while the ship was beyond the state's territorial sea.[34]

Citizenship

(i) Position until December 2012

In South Africa the South African Citizenship Act, 1995,[35] in its original form was based on the principle that a person was a South African citizen by birth when he or she was born in the Republic on or after the commencement of the Act.[36] For purposes of the Act the term 'Republic' was defined as 'the Republic of South Africa as referred to in section 1 of the [1993] Constitution'.[37] The latter defined the national territory in terms of magisterial districts, which only included internal waters in specific instances and never included the territorial sea.[38] The result is, although the South African internal waters and territorial sea are part of South African territory, that birth in those areas did not constitute a birth in South Africa for purposes of the Act. However, the Act provided that

> a person born aboard a registered ship [was] deemed to have been born at the place where the ship [was] registered, and a person born aboard an unregistered ship … belonging to the Government of any country [was] deemed to have been born in that country.[39]

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33 V Lowe & C Staker 'Jurisdiction' in MD Evans (ed) *International Law* 3 ed (2010) 323.

34 That is however not the case in the United States, for instance. See L Sohn et al *Law of the Sea in a Nutshell* 2 ed (2010) 71, referring to *Lam Mow v Nagle* (24 F.2d 316 (9th Cir. 1928)).

35 Act 88 of 1995.

36 S 2(1)(b).

37 S 1(1).

38 P Vrancken 'The border … or is it? The territory of the Republic of South Africa' (1999) March *De Rebus* 28–29.

39 S 1(3)(a).

In other words, a person born on a ship registered in South Africa or belonging to the South African government was deemed to have been born in South Africa, and that was the case irrespective of where the ship was at the time of the birth. At the same time a person born on a ship registered in a foreign state or belonging to a foreign government was not deemed to have been born in South Africa even if the birth occurred in the South African internal waters or territorial sea. In terms of section 3(1)(b)(i) of the Act such a person nevertheless could acquire South African citizenship by descent when one of his or her parents was a South African citizen at the time of his or her birth, and the birth was registered in terms of section 13 of the Births and Deaths Registration Act, 1992 (BDRA):[40] the latter requirement entails that notice of birth be given to the head of a South African diplomatic or consular mission or a regional representative of the Republic.

(ii) Position since January 2013

The South African Citizenship Amendment Act, 2010[41] fundamentally changed the position when it came into effect in January 2013. Indeed, the principle is now that a person is a South African citizen by birth when one of his or her parents is a South African citizen at the time of his or her birth, irrespective of whether the person is born in or outside the Republic.[42] As a result, birth in the Republic is only a ground of acquisition of South African citizenship in two specific cases: first, when the person concerned 'does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality';[43] and, second, when a person is born in the Republic to parents who have been admitted into the Republic for permanent residence and has lived in the Republic from the date of his or her birth to the date of becoming a major.[44] In both cases the birth must be registered in the Republic in accordance with the BDRA.[45] It must also be pointed out that the scope of both exceptions is increased by the retention of the deeming provision regarding births aboard South African ships as having occurred in the Republic.[46] The most important consequence of this change of approach is that birth on a ship, registered in South Africa or belonging to the South

40 Act 51 of 1992.
41 Act 17 of 2010.
42 S 2(1)(b).
43 S 2(2)(a). This ground of acquisition already existed before the Act was amended. See s 2(4).
44 S 2(3)(a).
45 S 2(2)(b) and 2(3)(b).
46 S 1(3)(a), now s 1A(2)(a).

African government, now is a ground for the acquisition of South African citizenship only in specific circumstances.

Another consequence flows from the deletion of the definition of the term 'Republic' in the Act. As explained above, the presence of a definition in the Act had the effect of departing from the default position that South African internal waters and territorial sea are part of the South African territory and, therefore, the law which applies on dry land applies also in those areas. In the absence of this departure it therefore appears that the term 'Republic' must now be interpreted as including South African internal waters and territorial sea. The consequence, in the first case described above, is that a child born within the maritime component of the South African territory will acquire South African citizenship even when the birth took place on board a foreign ship, provided that the child did not acquire the nationality of the flag state. In contrast, in the other case described above, a child born within the maritime component of the South African territory will acquire South African citizenship when the birth took place on board a foreign ship even when, as a result, the child acquired the nationality of the flag state.

The above illustrates that the amendments made to the Act do not completely eliminate cases of dual citizenship arising from a birth at sea. Nevertheless, they do have the effect of reducing those cases in that birth on a South African ship is now only a ground of acquisition of South African citizenship in specific circumstances. On the other hand, by providing a new avenue for the acquisition of citizenship when the birth occurs in the state's internal waters and territorial sea, the amendments have the effect of reducing cases of statelessness.

Birth registration

As indicated above the South African Citizenship Act refers to the BDRA as the legislative basis on which a birth must be registered for that birth to be a ground of acquisition of citizenship. That reference is understandable because the Act is the only legislation governing the registration of a birth taking place on dry land. However, that reference raises difficulties in the case of a birth at sea because the BDRA is not the only legislation applicable.

Indeed, section 183(f) of the MSA places a duty upon the masters of South African ships to enter into the official log-book 'every birth happening on board, with the sex of the infant and names of the parents, together with such particulars as may be prescribed'. In turn, section 189(1) of the MSA compels the masters of all South African ships arriving at a South African port to provide to the proper officer at that port the particulars of 'every birth of a child … on board the ship which

has occurred after the last preceding occasion on which the ship left a port in the Republic'.[47] That duty is based on the fact that the master of a ship is in charge or in command of that ship.[48] It is also based on the fact that, as indicated above, South Africa has jurisdiction over ships flying its flag wherever they are and to that end South African ships are deemed to be part of the South African territory for a range of purposes. As far as they are concerned, the masters of foreign ships arriving at a South African port have a duty similar to that of masters of South African ships, but limited to providing the particulars of 'every birth of a child on board the ship whose parents reside or intend to reside in the Republic ..., which has occurred during the voyage'.[49] The limited scope of this duty can be explained by the fact, already mentioned, that in South African law it is the *lex domicilii* which determines a person's private-law status as well as the presumption, if a child has his home with his parents or with one of them, the parental home concerned is the child's domicile.[50] Section 189(1) has not been amended since the Act was promulgated. As explained above, at that time and until 2013, South Africa had a *ius soli* system and birth on a foreign ship was not a ground for acquisition of South African citizenship by birth.[51] However, since then South Africa has a *ius sanguinis* system and there appears to be no reason why section 189(1) should not be amended in such a way that the duty placed upon masters of foreign ships does not apply only in respect of newborns whose private-law status is likely to be governed by South African law, but also in respect of newborns who are entitled to South African citizenship by birth. Such an amendment would result in masters of foreign ships being compelled to provide the particulars of a birth which occurred during the last voyage, not only when the parents reside or intend to reside in South Africa but also when at least one of the child's parents was a South African citizen at the time of the birth. In addition, section 189(1) should place a duty on the masters of foreign ships to provide the particulars of any birth which occurs when those ships are in the South African territorial sea.

A provision for present purposes identical to sections 183(f) and 189(1) of the MSA already existed in the Births, Marriages and Deaths

47 S 189(1)(a). The terms 'master', 'port', 'proper officer', 'ship' and 'South African ship' are defined in s 2(1) of the Act.

48 S 2(1).

49 S 189(1)(b).

50 S 2(2) of the Domicile Act 3 of 1992.

51 A child born on a foreign ship could however acquire the citizenship by descent when one of his or her parents was a South African citizen at the time of the birth (s 3(1)(b)(i) of the Act before it was amended by the 2010 Amendment Act). See also s 6 of the South African Citizenship Act 44 of 1949.

Registration Act, 1923.[52] Indeed, section 36 of the Act placed upon masters not only a duty to make an entry into the official log-book but also a duty to provide the relevant particulars of the birth to the immigration officer at the port of arrival. In addition, section 36 authorised the parents to register the birth.

Because the proper officer is not an official of the Department of Home Affairs the MSA created an additional duty for the proper officer, upon receipt of the information, to transmit that information 'to the registrar or assistant registrar of births and deaths within whose area the port is situated'.[53] Section 36 of the Births, Marriages and Deaths Registration Act was then amended to provide that the receipt by the registrar or an assistant registrar of the information transmitted in terms of the MSA constituted the registration of the birth, and the provisions of the Births, Marriages and Deaths Registration Act did 'thereupon apply as if such birth … had occurred within the district of such registrar or assistant registrar'. The same provision was contained in section 38 of the Births, Marriages and Deaths Registration Act, 1963.[54] However the Act was repealed by the BDRA,[55] which does not contain an equivalent provision, nor does it refer to the offices of registrar and assistant registrar. As a result there is apparently no basis for holding that the transmitting of birth information by a proper officer to the Department of Home Affairs still constitutes the registration of the birth concerned. Other steps therefore must be taken when the Act requires a birth to be registered.

A first case where the BDRA requires a birth at sea to be registered is the case where one or both parents are South African citizens,[56] or have permanent residence status or refugee status in South Africa.[57] The administrative process to be followed might raise a number of difficulties. Indeed, the form by means of which notice must be given must be accompanied by a proof of birth attested to by a medical practitioner, that is to say, 'a person registered as a medical practitioner under the Health Professions Act, 1974[,[58]] and who has a valid practice number issued by the relevant health professions council'.[59] The difficulty resides in that the practitioner must either have attended to the birth or have examined the mother or the child within 48 hours of the birth of the

52 Act 17 of 1923.
53 S 189(2).
54 Act 81 of 1963.
55 S 33(1).
56 Reg 3(1) of the Regulations on the Registration of Births and Deaths, 2014 (GN 128 in *GG* 37373 of 26 February 2014).
57 Reg 7(1).
58 Act 56 of 1974.
59 Reg 3(3)(a) read with reg 1.

child.[60] Those two options might not be available when the birth occurs at sea, especially on a foreign ship.[61] Another difficulty arises from the fact, because a ship is probably not a health institution,[62] that the notice must be accompanied by 'an affidavit attested to by a South African citizen who witnessed the birth of the child'.[63] Once again this requirement might prove to be impossible when the birth occurs at sea, especially on a foreign ship.[64] The fact that the Births and Deaths Registration Act allows the South African father or mother of a child born outside the Republic to give notice of birth to the head of a South African diplomatic or consular mission[65] does not address those issues. That is because the notice must comply with the ordinary formal requirements. [66]

A second case where the BDRA requires a birth to be registered is the case where the child was born in the Republic to parents who are non-South African citizens and who are not permanent residents or refugees.[67] The Act and its Regulations do not define the term 'Republic' and there appears therefore not to be any reason why the internal and territorial waters should not be considered as part of the national territory for purposes of the Act. As a result, it appears that the duty applies not only in the case of a birth on the South African land territory, but also in the case of a birth in South African internal waters or territorial sea. This requirement is too broadly worded. Indeed, it requires a birth to be registered in South Africa even when it occurs on a foreign ship which is merely passing through the territorial waters from a point of departure to a destination both of which are outside South Africa. In that case it is likely that the birth has no connection with South Africa whatsoever. In addition, it is doubtful that the relevant South African authorities have jurisdiction to interfere with a foreign ship exercising its right of innocent passage on the mere ground of enforcing a duty to register a birth.[68]

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60 See part B of form DHA-24/PB in annexure 1D to the regs.

61 S 182(4)(a) of the Merchant Shipping Act requires that, if there is a medical practitioner on board, he or she must sign every entry in the official log-book relating to a number of events, which include 'illness, hurt, injury or death', but not birth. The Ship's Officers Medical Training Regulations, 1992, require that ship officers undergo medical training and hold specific certificates, but they do not require that those officers be registered as medical practitioners under the Health Professions Act.

62 The term is not defined in the Act or the Regulations.

63 Reg 3(3)(b).

64 See also the same provisions in regs 4(3), 5(3) and 8(3).

65 S 13.

66 Reg 11(2).

67 Reg 8(1).

68 See arts 27 and 28 of the LOSC.

Marriage

Introduction

It has already been indicated that the place where a marriage is celebrated is irrelevant for citizenship purposes. The place where the marriage is celebrated is also irrelevant as far as the personal and proprietary consequences of the marriage are concerned. Indeed, they are all governed by the *lex domicilii* of the spouses.[69] By contrast, the place where a marriage is celebrated does matter with regard to the validity of a marriage because the *lex celebrationis* is the legal system used in South Africa to test that validity.

Conclusion of marriage

There is nothing in the Marriage Act, 1961[70] which indicates that it does not apply in the marine component of the national territory. As a result, the Marriage Act applies to all marriages concluded within South African internal waters and territorial sea, irrespective of the flag flown by the ship concerned. It seems to be impossible to comply with the Act at sea because the Act requires that the marriage be solemnised 'in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors'.[71] However, the Marriage Act itself provides that the requirement need not be complied with when the marriage must be solemnised at sea 'by reason of the serious or longstanding illness of, or serious bodily injury to, one or both of the parties'.[72] In addition, if that exception does not apply, the South African courts, always *in favorem matrimonii*, are 'not readily inclined to hold a marriage invalid because of a formal irregularity'.[73] Indeed, the then Durban and Coast Local Division of the Supreme Court held in *Ex Parte Dow*,[74] a case where the entire ceremony took place in the front garden of a private dwelling,[75] that

> the Legislature did not intend strict compliance with the provision that a marriage be solemnized in a private dwelling house, and that where, as in th[e] case, the parties were competent to marry, that is there was no legal impediment to their marriage, the ceremony was performed by a

69 Edwards (note 3 above) 327–330 paras 308–309.
70 Act 25 of 1961.
71 S 29(2).
72 Ibid.
73 HR Hahlo *The South African Law of Husband and Wife* 4 ed (1975) 79.
74 1987 (3) SA 829 (D).
75 830D.

> marriage officer and all concerned *bona fide* intended and believed it to be a valid marriage, the objects of the Act ha[d] been achieved.[76]

On that authority, a court is likely to hold a marriage to be valid when it is concluded in South African internal waters or territorial sea and the four requirements are met. In that regard, it must be pointed out that the master of a South African ship is not a marriage officer in terms of the Marriage Act.[77] Similarly, foreign marriage officers are not marriage officers for the purposes of the Marriage Act and therefore there is no basis for recognising marriages solemnised by such officers in South African waters.[78]

The Marriage Act does not state that it applies at sea beyond the outer limit of the territorial sea. At the same time, the Marriage Act does not exclude its extraterritorial application. Indeed, the Act provides explicitly for the solemnisation of marriages outside South Africa 'in a country'.[79] This term must be interpreted in such a way as to include the internal waters and territorial sea of a foreign state.[80] In other words, the Marriage Act does provide for its extraterritorial application at sea in the internal waters and territorial sea of other states.[81]

The above means that the only area where uncertainty exists with regard to the law to be applied by a South African court in a case involving a marriage at sea concerns marriages concluded in the South African EEZ, in the EEZ of a foreign state or on the high seas. In that respect, '[a]lmost all legal systems regard marriages aboard a ship on the high seas as governed by the law of the flag'[82] and, 'where the flag, such as that of Britain or the United States, covers a number of legal systems, reference would have to be made to the law of the port of registration of the ship'.[83]

A South African court thus will apply, in a matter regarding the conclusion of a marriage on a ship flying the flag of a foreign state, the law of that state. This probably is the case even when the foreign law merely requires that the marriage be celebrated in a form prescribed by

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76 833G–H.

77 See ss 2 and 3. Such a master could be found 'guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment', if he or she were to purport to solemnise a marriage. See s 11(2).

78 *Santos v Santos* 1987 (4) SA 150 (W) 154G, 1987 (3) All SA 60 (W) 64.

79 S 10.

80 See s 233 of the Constitution of the Republic of South Africa, 1996.

81 In terms of s 10(1)(b), s 29(2) also applies in those instances.

82 Hahlo (note 73 above) 594.

83 W Tetley 'The law of the flag, "flag shopping", and choice of law' (1993) 17 *Tulane Maritime Law Journal* 139 160.

a religion or, if such a form is not available or inappropriate, considers a marriage valid when concluded by simple agreement.[84] This approach presents no problem as far as the formal validity of a marriage is concerned, but might raise difficulties as far as essential validity is concerned. That would be the case, for instance, should an issue arise regarding the age of consent of the parties or their capacity to marry. However, it should be possible for a court to address those difficulties by relying on the exception to the general *lex loci celebrationis* rule, namely that acts performed *in fraudem legis* or against public policy will not be recognised.[85]

On the same basis, a South African court will apply South African law in a matter regarding the conclusion of a marriage on board a South African ship while the latter was in an EEZ or on the high seas. As a matter of principle South African law would include the Marriage Act: the latter does not contain any provision on the matter, something which could be interpreted as meaning that the Act does not apply in the case of a marriage concluded in an EEZ or on the high seas.

That would appear to be the position in Australia. The Marriage Act, 1961,[86] governs marriages solemnised in Australia, marriages of members of the Australian Defence Force overseas and the recognition of foreign marriages.[87] The Act does not contain any provision regarding marriages in an EEZ or on the high seas and, for that reason, it has been argued that 'the old common law rules must apply, with the result that on board Australian ships a couple may become husband and wife by an exchange of promises to marry in the present tense'.[88] The same approach could be adopted with regard to the South African Marriage Act. In that regard the 'old' Roman-Dutch law rules provide for three forms of marriage: (a) the exchange of promises to marry in the present tense before a minister of religion, (b) the informal exchange of promises to marry in the present tense and (c) the exchange of promises to marry in the future, followed by consummation.[89] While a South African court

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84 Such an approach appears to be supported by CF Forsyth *Private International Law* 5 ed (2012) 285.

85 Id 286–291. On the large number of marriages solemnised on the high seas off the coast of California to try to evade the requirements of that state's 1895 statute abolishing common-law marriages, see CK Goldberg 'The schemes of adventuresses: The abolition and revival of common-law marriage' (2007) 13 *William & Mary Journal of Women and the Law* 483 509–513.

86 Act 12 of 1961.

87 Parts IV, V and VA respectively. See further ss 23A, 40(1) and 55 of the Act.

88 A Dickey 'Marriage on the high seas' (1988) 62 *Australian Law Journal* 716 716.

89 HR Hahlo & E Kahn *The South African Legal System and its Background* (1968) 448. See also SB Hoffman 'The development of the canon law of marriage' in

asked to apply those rules might have little difficulty with the first form, it is likely to be somewhat reluctant to give effect to a marriage in one of the other two forms. The reason is that such marriages were never given effect in South Africa because executive decrees and later legislation always required that a marriage officer officiates.[90] That does not mean that a marriage by an informal exchange of promises to marry in the present tense, or a marriage by exchange of promises to marry in the future, followed by consummation, is unlikely ever to be held as valid by a South African court when it was entered into on a South African ship in an EEZ or on the high seas. A court might indeed be called upon to pronounce on the validity of a marriage entered into in one of those two ways in circumstances, such as an emergency, which justify a departure from the ordinary requirements *in favorem matrimonii*.[91]

An approach different from the Australian approach can also be considered. That approach is based on the fact, in contrast to the Australian Marriage Act, that the South African Marriage Act does not state expressly that the main part of its provisions applies to marriages solemnised 'in South Africa'. That the Act is meant to apply primarily to marriages solemnised within South Africa is beyond doubt. Nevertheless, as explained above, the Marriage Act does not exclude its extraterritorial application when it provides explicitly for the solemnisation of marriages in a foreign country. The strong link between the marriage and South Africa is however maintained by the requirements that both parties must be South African citizens and must be domiciled in South Africa.[92] A court could reason that a marriage solemnised on a South African ship has a closer link with South Africa than a marriage celebrated in a foreign country. On that basis the court could reach the conclusion that the Marriage Act also applies to a marriage solemnised on a South African ship in the South African EEZ, in the EEZ of another state or on the high seas, provided that the nationality and domicile requirements are met.[93] In that case, the marriage, for it to be valid according to South African law, would have to have been solemnised in accordance with the provisions of the Act.[94]

Whether that is possible is not beyond doubt. Indeed it is not obvious that there is a basis in the Marriage Act for a marriage officer to officiate

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TW Bennett & NS Peart (eds) *Family Law in the Last Two Decades of the Twentieth Century* (1983) 23–38.

90 J Sinclair *The Law of Marriage* (1996) 193–197.

91 See LA Collins et al (eds) *Dicey, Morris and Collins on the Conflict of Laws* 15 ed (2012) 928 paras 17–27.

92 S 10(1)(a).

93 See Hahlo (note 73 above) 594.

94 S 10(1)(a).

in an EEZ or on the high seas. The Act stresses that '[a] marriage may be solemnised by a marriage officer only'.[95] At the same time, the Act makes it an offence for a marriage officer to solemnise a marriage which he or she is not authorised under the Act to solemnise.[96] In addition, the Act stresses that a person can only be a marriage officer for the purpose of the Act when he or she 'is a marriage officer by virtue of the provisions of th[e] Act'.[97] The latter provides for different kinds of marriage officers.

The first category of marriage officers consists of the *ex officio* marriage officers, who are marriage officers by virtue of their offices as long as they hold those offices and only for the district or other area in respect of which they hold office.[98] *Ex officio* marriage officers include '[e]very magistrate'.[99] The Act merely defines the term 'magistrate' as 'includ[ing] an additional and an assistant magistrate'.[100] It would appear that the term must be understood as referring to a judicial officer appointed to preside over a magistrate's court.[101] Magistrates hold office only in respect of the magisterial districts over which the courts over which they preside have jurisdiction. In this regard, it was indicated above that magisterial districts do not extend beyond the outer limit of the South African territorial sea,[102] therefore the Marriage Act does not authorise magistrates to solemnise marriages in an EEZ or on the high seas.

Ex officio marriage officers include 'every special justice of the peace':[103] the Act does not define the term 'special justice of the peace'. One would think that the term must be understood to refer to persons appointed in terms of the Justices of the Peace and Commissioners of Oaths Act, 1963.[104] However the latter makes no provision for *special* justices of the peace. It would appear that the term refers in fact to persons appointed in terms of the Special Justices of the Peace Act, 1957.[105] The latter was in force when the Marriage Act was promulgated,

95 S 11(1).
96 S 11(2) and 35.
97 S 1.
98 S 2(1).
99 Ibid.
100 S 1.
101 S 1 of the Magistrates Act 90 of 1993. That interpretation is supported by the fact that the terms 'additional magistrate' and 'assistant magistrate' are used in s 9(1)(a) of the Magistrates' Courts Act 32 of 1944.
102 See Vrancken (note 38 above).
103 S 2(1).
104 Act 16 of 1963.
105 Act 19 of 1957.

but was repealed a few years later by the General Law Amendment Act, 1968.[106]

Finally, *ex officio* marriage officers include 'every Commissioner'.[107] The Act merely defines the term 'Commissioner' as 'includ[ing] an Additional Commissioner, an Assistant Commissioner, a Native Commissioner, an Additional Native Commissioner and an Assistant Native Commissioner'.[108] The definition provided in the original text of the Act was that of the term 'native commissioner', which was defined as 'includ[ing] an additional and an assistant native commissioner'.[109] Those terms must have referred to the officials appointed by the Governor-General and later the President in terms of section 2(2) of the Native Administration Act, 1927.[110] That provision conferred upon the relevant Minister power to

> appoint for any area in which a large number of Natives reside a Native Commissioner and as many additional Native Commissioners and Assistant Native Commissioners as he may deem necessary, who shall perform such duties as may be prescribed by any law or assigned to them by the Minister.

Those powers included the solemnisation of marriages.[111] The definition was amended in terms of section 100(2) of the Black Laws Amendment Act, 1964,[112] read with section 16(1)(h) of the Bantu Laws Amendment Act, 1962,[113] by the substitution of the words 'Bantu Affairs' for the word 'native'. The definition of the term 'Bantu Affairs

106 Act 70 of 1968.

107 S 2(1).

108 S 1.

109 S 1(iv).

110 Act 38 of 1927. S 2(4) provided that '[e]very native commissioner and every assistant native commissioner in the Transvaal Province shall, within the area for which he is appointed, have the power to solemnize marriages under Law No. 3 of 1897 (Transvaal)'.

111 A Reuter *Native Marriages in South Africa: According to Law and Custom* (1963) 84.

112 Act 42 of 1964. The provision read as follows: 'Where any reference in any law to any expression referred to in section sixteen of the Bantu Laws Amendment Act, 1962 (Act 46 of 1962), must in terms of the said section be construed as a reference to another expression referred to in the said section, the last-mentioned expression wherever it occurs in any such law, is hereby substituted for the first-mentioned expression'.

113 Act 46 of 1962. The provision read as follows: 'Any reference in any law or document to ... (h) a native commissioner, an additional native commissioner or an assistant native commissioner shall be construed as a reference to a Bantu Affairs Commissioner, an Additional Bantu Affairs Commissioner or an Assistant Bantu Affairs Commissioner, respectively'.

Commissioner' was then replaced, in terms of section 1(a) of Marriage Amendment Act, 1970,[114] to read: 'includes an Additional Bantu Affairs Commissioner, an Assistant Bantu Affairs Commissioner, a Native Commissioner, an Additional Native Commissioner and an Assistant Native Commissioner', without any apparent explanation as to why the terms 'Native Commissioner', 'Additional Native Commissioner' and 'Assistant Native Commissioner' were reintroduced in the definition. The words 'Bantu Affairs' were finally removed from the definition in terms of section 17(1) of the Second Black Laws Amendment Act, 1978,[115] but the term 'Native' was retained, again without any apparent reason. In light of the above the continued inclusion in the Marriage Act of the term 'Commissioner' is difficult to explain, especially when one takes into account that section 2(2) of the Native Administration Act was repealed by section 1(1) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005.[116]

The second category of marriage officers consists of the designated marriage officers. Those marriage officers include 'any officer or employee in the public service or the diplomatic or consular service of the Republic' so designated, who are marriage officers by virtue of their offices and as long as they hold such offices, either generally or for any specified class of persons or country or area.[117] Designated marriage officers include also 'any minister of religion of, or any person holding a responsible position in, any religious denomination or organization',[118] the designation of whom may be limited to the solemnisation of marriages within a specified area and/or for a specified period.[119] Every designation of a person as a marriage officer must be by written instrument, which must specify the date as from which it is to have effect and any limitation to which it is subject.[120] Without a copy of each and every such written instrument it is impossible to establish whether designated marriage officers have been authorised to solemnise marriages in an EEZ or on the high seas. As indicated earlier the Act does not exclude its extraterritorial application. What the Marriage Act does, however, is to limit the scope of the authorisation to marriages where both parties are South African

114 Act 51 of 1970.
115 Act 102 of 1978.
116 Act 28 of 2005. The authors are grateful to Ms Annami Language-van Zyl and Ms Edith Viljoen at Juta Law for their assistance in going a long way towards clarifying the legislative history of the definition.
117 S 2(2).
118 S 3(1).
119 S 3(2).
120 S 4.

citizens domiciled in South Africa.[121] Although the Marriage Act contains such a provision only with regard to marriages solemnised in another country, there appears to be no reason why designated marriage officers could not be authorised to solemnise such marriages in an EEZ or on the high seas. In fact, it could be argued that all designated marriage officers are authorised to do so, except those whose designation has been limited to an area which does not include the EEZs or the high seas. As indicated earlier foreign marriage officers are not marriage officers for purposes of the Marriage Act and therefore there is no basis for recognising marriages solemnised by such officers on South African ships in an EEZ or on the high seas.

The position under the Civil Union Act, 2006[122] is similar to that under the Marriage Act. Indeed, although the former contains the same requirements as the latter regarding the place where the union is solemnised,[123] a court is likely to hold a civil union to be valid when it is concluded in South African internal waters or territorial sea, provided that the parties are competent to enter the union, that is, there is no legal impediment to their union, the ceremony was performed by a marriage officer and all concerned *bona fide* intended and believed it to be a valid union.[124] As far as marriage officers are concerned, the Civil Union Act is based on the principle that they have 'all the powers, responsibilities and duties, as conferred upon [them] under the Marriage Act, to solemnise a civil union'.[125] That means that it is possible for a civil union to be solemnised at sea beyond the outer limit of the South African territorial sea provided that both parties are South African citizens domiciled in South Africa.

Registration of marriage

The Marriage Act requires that the marriage officer solemnising a marriage, the parties thereto and two competent witnesses sign the marriage register concerned immediately after the marriage has been solemnised.[126] The officer must then issue a marriage certificate to the parties, free of charge.[127] He or she must also immediately transmit the

[121] S 10(1)(a). The marriage must then be solemnised in accordance with the provisions of the Act (s 10(1)(b)).
[122] Act 17 of 2006.
[123] S 10(2).
[124] *Ex Parte Dow* 1987 (3) SA 829 (D) 833G–H.
[125] S 4(2).
[126] S 29A(1). See further reg 5A.
[127] Reg 5B(1).

marriage register to the Department of Home Affairs.[128] There does not appear to be any reason why those requirements cannot be complied with in the case where the marriage is concluded at sea beyond the outer limit of the South African territorial sea. As far as the Civil Union Act is concerned, it requires each marriage officer to transmit his or her 'civil union register and records concerned to the official in the public service with the delegated responsibility for the population register in the area in question'.[129] It is unclear to what the words 'area in question' refer. If they are referring to the area where the civil union was solemnised, the Identification Act, 1997[130] does not refer to a civil union solemnised outside South Africa and it is not known whether any official in the Department of Home Affairs[131] has been delegated responsibility for the area beyond the territorial sea. If, on the other hand, the words refer to the area where the marriage officer is domiciled and therefore where he or she would probably solemnise most of the civil unions at which he or she is called upon to officiate, no difficulty would arise as a result of the fact that one or more civil unions are solemnised at sea.

In contrast to births and deaths, the MSA does not provide for registration of marriages. However, the Act places a duty upon the master of a South African ship to enter into the official log-book every marriage taking place on board, with the names and the ages of the parties.[132] The log-book must later be delivered to the proper officer at the final port of destination in South Africa within 48 hours after the ship's arrival.[133] It must be pointed out that the Merchant Shipping Act has not been amended to take into account the promulgation of the Civil Union Act. As a result, masters of South African ships have a duty to enter into the official log-book every marriage taking place on board for the purpose of solemnising a civil union, but they do not have such a duty regarding civil partnerships.[134]

Death

Introduction

It was indicated earlier that the place where a death occurs does matter for private-law purposes because it may have an impact on the

[128] S 29A(2). See further reg 5A. The particulars of the marriage must then be included in the population register (s 8(e) of Identification Act 68 of 1997).
[129] S 12(6).
[130] Act 68 of 1997.
[131] S 1.
[132] S 183(g).
[133] S 185.
[134] S 183(g).

formal validity of a will.[135] In addition, the place of death does matter at the criminal and procedural levels in that it has an impact on whether the relevant South African organs of state have the legal authority to be involved in the matter. The registration of deaths at sea, enquiries into the causes of deaths at sea, disappearances at sea, burials at sea and the making of a will at sea are dealt with below.

Registration of deaths at sea

The MSA compels the masters of all South African ships arriving at a South African port to provide to the proper officer at that port the particulars of 'every death of a person on board the ship which has occurred after the last preceding occasion on which the ship left a port in the Republic'.[136] That duty is limited in the case of the masters of foreign ships to 'every death of a person on board the ship who at the time of his death was residing in the Republic, which has occurred during the voyage'.[137] As in the case of a birth, the MSA compels the proper officer, upon receipt of the information, to transmit that information 'to the registrar or assistant registrar of births and deaths within whose area the port is situated'.[138] In this case, too, the repeal of the Births, Marriages and Deaths Registration Act, 1963 by the BDRA has the result that there is today no basis for holding that the transmitting of death information by a proper officer to the Department of Home Affairs still constitutes the registration of the death concerned.

The duty placed on ships' masters by the MSA overlaps to an extent with the duty placed by the BDRA on any person who was present at a death due to natural causes, or who became aware thereof, to give notice of the death to the Department of Home Affairs, as soon as practicable, by means of a certificate issued by a medical practitioner.[139] The duty placed by the BDRA is more onerous than the duty placed by the MSA in two respects. On one hand, in most instances it would be easier for the master physically to reach the proper officer, whose offices normally are within or very near the port precinct, than the Department of Home Affairs. On the other hand, the document to be submitted in terms of the MSA does not require the involvement of a medical practitioner while the document to be submitted in terms of the BDRA does.[140]

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135 S 3*bis* of the Wills Act 7 of 1953.

136 S 189(1)(a). The terms 'master', 'port', 'proper officer', 'ship' and 'South African ship' are defined in s 2(1) of the Act.

137 S 189(1)(b).

138 S 189(2).

139 S 14(1)(a).

140 Compare Annex V of the Forms Regulations, 1961 (GN R890 in *GG Extraordinary*

The extent of the geographical application of the duty of notification of the BDRA is not entirely clear. In fact, section 14(1)(a), which is the source of that duty, does not state expressly whether the duty applies only to deaths occurring in South Africa, that is, for present purposes, to deaths occurring within South African internal waters or territorial sea. However, that would appear to be the case, except for cases of the death of persons who are lawfully and permanently resident in the Republic, where the duty exists also when the death occurs within the territory of another state.[141] That means that the overlap between the notification duty of the MSA and the notification duty of the BDRA exists only in cases where the death occurred in South African internal waters or territorial sea, and in cases of persons who are lawfully and permanently resident in South Africa, where the death occurred in the internal waters or territorial sea of another state. As a result, in the case of a death which occurred in an EEZ or on the high seas, for instance, the Department of Home Affairs might receive information relating to a death submitted to it by a proper officer in terms of the MSA which the BDRA does not require to be submitted. The latter Act does not indicate what course of action is to be followed by the Department of Home Affairs.

Enquiries into the cause of deaths at sea

(i) Introduction

There are bases for enquiries into the cause of deaths at sea in the MSA and the Inquests Act, 1959.[142]

(ii) Merchant Shipping Act

The proper officer is not only required by the MSA to transmit to the Department of Home Affairs information which he or she received regarding deaths which occurred at sea; he or she must also

> inquire into the cause of the death, and … make in the official log-book an endorsement to the effect, either that the statement of the cause of death in the book is in his opinion true, or the contrary, according to the result of the inquiry.[143]

105 of 27 October 1961) and Form DHA1663A, to be issued in terms of s 15(1) of the Births and Deaths Registration Act and reg 23(1) of the Regulations on the Registration of Births and Deaths, 2014 (note 56 above).

141 S 19(1).

142 Act 58 of 1959.

143 S 333(1).

If it appears to the proper officer in the course of his or her inquiry that the death has been caused on board the ship by 'violence or other improper means', he or she must, 'if the emergency of the case so requires, take immediate steps for bringing the offender or offenders to justice', or report the matter to the South African Maritime Safety Authority (SAMSA).[144]

SAMSA may then 'appoint any competent person to hold a preliminary enquiry' in the case where the death occurred on 'a ship which is registered or licensed in the Republic or which is in terms of [the MSA] required to be so licensed', wherever the death occurred.[145] SAMSA may also appoint a competent person to hold a preliminary enquiry when the death occurred on a ship registered or required to be so registered in a country other than South Africa, in three cases. First, when the death occurred either in a South African port, in the South African internal waters or in the territorial waters of the Republic.[146] Second, when (i) the death occurred elsewhere than in a South African port, in the South African internal waters or in the territorial waters of the Republic, (ii) the ship subsequently arrives at a South African port and (iii) an enquiry into the casualty has not been held by any competent court or other investigatory body in any country which is a party to any relevant bilateral treaty or agreement entered into by South Africa.[147] Third, when (i) the death occurred elsewhere than in a South African port, in the South African internal waters or in the territorial waters of the Republic, (ii) the ship on which the death occurred is registered at any place in, or is recognised as belonging to, a country which is a party to a relevant bilateral treaty or agreement entered into by South Africa and (iii) evidence is obtainable in South Africa as to the circumstances in which the death occurred.[148] The ship on which the death occurred may be detained for purposes related to the holding of the preliminary enquiry, 'provided the ship is not thereby unduly delayed'.[149] Upon the conclusion of the enquiry the person appointed to hold it, without delay, must transmit to SAMSA a report containing a full statement of the case as well as his or her opinion

144 S 333(2) read with s 2(1).

145 S 264(1)(a)(ii)(cc) read with s 2(1). Although SAMSA is not compelled to convene a preliminary enquiry, it could 'be called upon to exercise its discretion in appropriate circumstances should it be recalcitrant in doing so' (J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* (2009) 379), in the light of the fact that one of SAMSA's objectives is 'to ensure safety of life … at sea' (s 3(a) of the South African Maritime Safety Authority Act 5 of 1998).

146 S 264(1)(b) read with s 264(1)(a)(ii)(cc).

147 S 264(1)(d)(i) read with ss 2(1) and 264(1)(a)(ii)(cc).

148 S 264(1)(d)(ii) read with ss 2(1) and 264(1)(a)(ii)(cc).

149 S 264(3) read with s 264(1)(a)(ii)(cc).

thereon, together with such report of, or extracts from, the evidence as well as such observations as he or she thinks fit.[150]

Whether or not a preliminary enquiry has been made the Minister of Transport may, at his or her discretion, convene a court of marine enquiry to hold a formal investigation into a death which occurred at sea[151] in three cases: first, where the death occurred on a ship registered or licensed in South Africa or which is in terms of the MSA required to be so licensed; second, where the death occurred on board a ship registered in a country which is a party to a relevant bilateral treaty or agreement entered into by South Africa[152] and third, where the death occurred on board a ship which is not registered in a country which is a party to a relevant bilateral treaty or agreement entered into by South Africa, while the ship was either in a South African port, in the South African internal waters or in the territorial waters of the Republic.[153]

When a proper officer at a place outside of South Africa[154] becomes aware that a death has occurred on board a South African ship at or near the place where the officer is, the latter, at his or her discretion, may convene a maritime court to investigate the cause of the death.[155] After hearing and investigating the case, and having given the individual(s) concerned an opportunity of making a defence,[156] the court may, if it has arrived unanimously at the conclusion that the death has been caused by the wrongful act or default of the master or a 'ship's officer of a South African ship, suspend the certificate of competency or service of that master or ship's officer for a stated period'.[157] The court may also take any steps in its power for the purpose of placing under the necessary restraint any person charged before it with the commission of an offence

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150 S 265(1) read with s 2(1). Ss 33–35 of the Constitution apply to the proceedings. See Hare (note 145 above) 380 fn 245.

151 S 266(1) read with s 2(1). With regard to how a court of marine enquiry is constituted, see ss 267 and 279. With regard to how the decisions of the courts of marine enquiry are reached and announced, see s 268. With regard to the procedure followed, see s 280 and the Courts of Marine Enquiry Regulations, 1961 (GN R1067 in *GG Extraordinary* 119 of 24 November 1961).

152 S 266(2)(a) read with s 2(1).

153 S 266(2)(b) read with ss 2(1) and 266(2)(a).

154 See paras (b), (c) and (d) of the definition of the term 'proper officer' in s 2(1).

155 S 270(e). With regard to how a maritime court is constituted, see ss 271 and 279. With regard to how the decisions of the maritime courts are reached and announced, see s 272. With regard to the procedure followed, see s 280 and the Maritime Courts Regulations, 1961 (GN R1066 in *GG Extraordinary* 119 of 24 November 1961).

156 S 283.

157 S 273(1)(b). It is unclear whether an individual may, after being punished by a maritime court, be tried for the same offence in a criminal court.

related to the death, and sending him or her as soon as practicable in safe custody to South Africa.[158]

At the conclusion of the investigation or hearing the presiding officer of the court of marine enquiry or the maritime court must transmit to SAMSA 'the notes of evidence and as many copies as [SAMSA] may require of the record of the proceedings and the report and decisions'.[159] The Minister of Transport may order the case to be reheard, but he or she is obliged to do so '(a) if new and important evidence which could not be produced at the investigation has been discovered; or (b) if for any other reason there has been in his [or her] opinion ground for suspicion that a miscarriage of justice has occurred'.[160] The decision of the court of marine enquiry or the maritime court may be appealed against 'to the High Court within the area of jurisdiction of which (a) in the case of a court of marine enquiry, the court was held; or (b) in the case of a maritime court, the ship which formed the subject of investigation, or on board which the casualty or occurrence investigated by the court took place, is registered'.[161]

Inquests Act

(i) Introduction

In the case of the death of a person[162] due to, or believed to be due to, a cause other than a natural cause, the Inquests Act places a duty upon

> [a]ny person who has reason to believe that [the] death was due to other than natural causes, [to] as soon as possible report accordingly to a policeman [or policewoman],[163] unless he [or she] has reason to believe that a report has been or will be made by any other person.[164]

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158 S 273(1)(f) read with s 341(1). With regard to the impact of the Bill of Rights on the provisions governing the court, see Hare (note 145 above) 387 fn 278.

159 S 286(1) read with s 2(1).

160 S 291(1) read with s 2(1).

161 S 292(1).

162 The then Appellate Division of the Supreme Court held in *Van Heerden & another v Joubert NO & others* 1994 (4) SA 793 (A), 1994 (2) All SA 468 (A) 473 that 'the legislature never had [a foetus] in mind when it used the word "person" in the Act. Were it otherwise, the legislature would surely have made an attempt to address some of the obvious problems which such an extended meaning of the word "person" would entail' (798D).

163 In terms of s 1, the term 'policeman' 'includes any member of a force established under any law for the carrying out of police powers, duties and functions'.

164 S 2(1). In terms of s 2(2), '[a]ny person who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000'. The duty is based on the fact that, '[f]or the

Provided that the MSA does not provide for specific steps to be taken in order to investigate the circumstances of the death,[165] the police officer to whom the death has been reported must, when he or she has reason to believe that a death has indeed occurred and that it took place by other than natural causes, 'investigate or cause to be investigated the circumstances of the death or alleged death'.[166] The police officer must then submit a report on the circumstances of the death or alleged death, 'together with all relevant statements, documents and information, to the public prosecutor'.[167] If criminal proceedings are instituted in connection with the death or alleged death, the cause of the death will be determined during those proceedings. If, however, criminal proceedings are not instituted, the public prosecutor must submit the statements, documents and information submitted to him or her to the magistrate of the district concerned.[168] The latter then, if it appears to him or her that a death has occurred and that it was not due to natural causes, must 'take such steps as may be necessary to ensure that an inquest as to the circumstances and cause of the death is held'.[169]

The Inquests Act does not indicate where the death must have occurred in order for the duty to report to arise. In fact there is no provision in the Act dealing specifically with the extent of its geographical application. However, it is stressed in section 5(2) of the Act, that 'no inquest in respect of which it is alleged that either the death or the incident has occurred outside the Republic shall be held unless the Minister [of Justice], or any person authorized thereto by him [or her], so directs'. That provision clearly implies that the Act does not apply only to deaths which occur within the South African territory.

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administration of justice to be complete and to instil confidence, it is necessary that ... there should be an official investigation in every case where a person has died of unnatural causes, and the result of such investigation should be made known' (*Timol & another v Magistrate, Johannesburg* 1972 (2) SA 281 (T) 287H–288A; cited with approval in *Marais NO v Tiley* 1990 (2) SA 899 (A) 901H; *In re Goniwe & others (Inquest)* 1994 (3) SA 877 (SE) 878D. See also *Ferreira v Die Meester* 2001 (3) SA 365 (O) 371F–G. In *De'Ath (substituted by Tiley) v Additional Magistrate, Cape Town* 1988 (4) SA 769 (C), the court explained that '[t]he pattern of Act 58 of 1959 differs from that of its predecessors in [that] [i]nquests no longer run parallel to criminal process'.

165 See above.

166 S 3(1)(a). See also s 3(1)(b).

167 S 4.

168 S 5(1).

169 S 5(2).

Deaths occurring at sea within the South African territory

On the basis of the principle that Acts of Parliament apply with regard to the whole national territory, it is clear that the reporting duty arises in the case of a death taking place either on the land component or the sea component of the South African territory. The fact that the Act applies to deaths which occurred at sea is confirmed by section 6(b) of the Inquests Act, which deals with the case of a death which 'has not occurred on land'. In that regard the court reasoned, in *In re Ohlson*,[170] on the basis that the word 'land' must be interpreted to include the area 'between the high- and low-water marks on the beach',[171] which, depending on the tide, could actually be part of the internal waters.[172]

Section 6(b) identifies the judicial officer to hold the inquest as, 'where it is alleged that the death has not occurred on land, … the magistrate of the district where the body has been brought ashore or on land or has been found, as the case may be'. Therefore it is clear that a magistrate does not have authority in terms of section 6(b) to hold an inquest when the body has not been brought ashore or on land, or has not been found within his or her district. The magistrate might, however, have authority in terms of section 6(a).

In *In re Ohlson*,[173] the court took note of the fact that there was no proof that the occurrence which gave rise to the deceased's passing, that is, to him drowning, had taken place on the beach.[174] The court did so because the connecting factor used in section 6(a) to establish which magistrate has jurisdiction, is not the death itself, but 'the incident', that is 'the occurrences during which an injury which gave rise to the death was sustained or during which other occurrences which directly gave rise to the death occurred'.[175] The fact that what matters is the location of

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170 2008 (1) SACR 360 (E).

171 Id 363H.

172 That is because the low-water mark is normally the baseline (see s 2(1) of the MZA).

173 Note 170 above.

174 Id 363H.

175 Section 6(a). The provision was amended to that effect by s 5 of the Inquests Amendment Act 45 of 1990. In *In re Owies se Geregtelike Doodsondersoek* (1992 (2) SA 92 (C), 1992 (4) All SA 235 (C)), the court explained that '[d]ie "ander gebeure" moet immers *tydens* die "gebeure" plaasvind. Enkele voorbeelde illustreer die punt. Gestel 'n jag vertrek van Durban na Kaapstad en die bemanning verdrink in Tafelbaai. Of iemand swem vanaf Kaappunt na Rooi Els en verdrink êrens naby Pringlebaai. Ek kan nie aanvaar dat die Wetgewer beoog dat in die eerste geval die landdros van Durban, en in die tweede geval die landdros van Simonstad met jurisdiksie ingevolge art 6*(a)* beklee sou word nie. Die blote begin van die vaart of in die onderhawige geval, die dag se swemmery kan sekerlik nie beskou word as die beoogde "gebeure … waartydens

the incident leading to the death, and not the place where the death took place, was confirmed in *In re Klein's Inquest.*[176] In that case a child died at Tygerberg Hospital, in the magisterial district of Bellville, as a result of injuries sustained while being run down by a motor car in the district of Goodwood.[177] Reading section 6(a) alone, it is therefore possible that a magistrate would have jurisdiction on the basis of that provision in the case of a death that occurred in the sea component of the South African territory when the incident leading to the death took place on land within the district of that magistrate.[178]

As already indicated, section 6(b) deals with cases 'where it is alleged that the death has not occurred on land'. The question arises as to whether section 6(b) limits the scope of application of section 6(a). Although paragraphs (a) and (b) do not refer to each other, they both state explicitly that their application is 'subject to the provisions of paragraphs (c) and (d)' of section 6. Thus it is clear that the legislature applied its mind to the relationships between the four paragraphs of section 6 and did not intend to subject paragraph (a) to paragraph (b) or paragraph (b) to paragraph (a). As a result, two different magistrates have jurisdiction to hold an inquest in a case where (i) the death occurred at sea, (ii) the incident leading to the death took place in one magisterial district (section 6(a)) and (iii) the body has been brought ashore or on land or has been found in another magisterial district (section 6(b)). It could be argued, however, that the magistrate of the district where the incident leading to the death occurred in most cases would be in a better position to hold the inquest and establish the causes of the death than the magistrate of a different district where the body was found or brought, a district where there would probably be less evidence as to the cause of the death. On that ground an amendment to paragraph (b) to the

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ander gebeure" wat aanleiding gegee het tot die sterfgeval plaasgevind het nie' ('[t]he "other occurrences" must indeed have occurred during the "occurence". A few examples will illustrate the point. Suppose a yacht departs from Durban to Cape Town and the crew drowns in Table Bay or someone swims from Cape Point to Rooi Els and drowns somewhere near Pringle Bay. I cannot accept that the legislature intended that in the first instance the magistrate in Durban and in the second instance the magistrate in Simonstown, be vested with jurisdiction in terms of sec 6(a). The mere commencement of the journey or, in the case at hand, the day's swimming surely cannot be viewed as the intended "occurrence ... during which other occurrences" which gave rise to the death occurred' (own translation)) (94H–I).

176 1992 (2) SA 658 (C), 1992 (4) All SA 337 (C).

177 Id 660D.

178 For instance, when the incident consists of the deceased sustaining a fatal injury during an altercation on the shore after which the deceased escaped his opponents on a motor boat.

effect that the paragraph is subject to paragraph (a) would appear to be justified. It must be stressed that such an amendment would not remove the authority of the minister in terms of section 6(c) to designate the magistrate who would otherwise have jurisdiction in terms of paragraph (b), because paragraph (a) would remain subject to paragraph (c) after the amendment is made.

Deaths occurring at sea outside the South African territory

As explained above the connecting factor giving authority to a magistrate to hold an inquest in terms of section 6(a) is not the death itself, but 'the incident', that is, 'the occurrences during which an injury which gave rise to the death was sustained or during which other occurrences which directly gave rise to the death occurred'. That connecting factor makes no reference to where the death occurred and the relevant magistrate would have jurisdiction even though the death occurred beyond the outer limit of the territorial sea, provided that the Minister of Justice, or any person authorised thereto by him or her, so directs in terms of section 5(2). As further explained above, the connecting factor giving authority to a magistrate to hold an inquest in terms of section 6(b) is not the death itself but the finding or the bringing of the body ashore or on land. That connecting factor, once again, makes no reference to where the death occurred and the relevant magistrate would have jurisdiction even though the death occurred beyond the outer limit of the territorial sea, provided that the Minister of Justice, or any person authorised thereto by him or her, so directs in terms of section 5(2). The above is confirmed by the decision in *In re Darrol:*[179] in that case, '[a]t the time of the incident the ship was cruising some 8,2 miles off the South African coast line',[180] a location which, at that stage, was beyond the territorial sea. The court reasoned, had the body been found or brought within a magisterial district, the section 6(b) magistrate would have had jurisdiction.[181]

As indicated above, paragraphs (a) and (b) of section 6 are subject to paragraph (c), which provides, 'where it is uncertain whether a death has occurred in or outside the Republic', that the inquest is to be held 'by any regional magistrate or magistrate designated by the Minister of Justice or person so authorized at a place so designated'. The purpose of subjecting paragraph (b) to paragraph (c) in this case is not entirely clear. It could be argued that paragraph (c) aims to ensure that paragraphs (a)

[179] 1976 (4) SA 208 (E), 1976 (4) All SA 155 (E).
[180] Id 209A.
[181] Id 209E.

and (b) are not applied blindly when the inquest could raise complicated issues, such as those related to the repatriation of the body to South Africa, as a result of the death having occurred outside of the Republic. If that is the case it is difficult to understand why paragraph (c) only requires the intervention of the minister 'where it is uncertain whether a death has occurred in or outside the Republic', and not also where there is no doubt whatsoever that the death occurred outside the Republic. Indeed, the result of that omission appears to be, for instance in a case where there is no doubt that the incident leading to the death took place in one magisterial district, there is no doubt that the death occurred beyond the territorial sea and the body was found in another magisterial district, the section 6(a) magistrate and the section 6(b) magistrate would only be deprived of their jurisdiction if the minister 'deem[s] it expedient' to intervene in terms of paragraph (c).

Paragraph (c) requires that the minister applies his or her mind to the matter and, once he or she has done so, designates *any* regional magistrate or magistrate to hold the inquest. Thus, paragraph (c) does not exclude any specific magistrate from being designated by the minister and, as a result, nothing appears to preclude the magistrate who otherwise would be expected to hold the inquest in terms of paragraph (a) or the magistrate who otherwise would be expected to hold the inquest in terms of paragraph (b) from being designated by the minister in terms of paragraph (c).

Disappearances at sea

(i) Introduction

In many instances, individuals disappear at sea and it becomes problematic to determine whether they died because their bodies are never found. In South African law 'there is no presumption of death from mere absence for any specific period'.[182] In addition, the Merchant Shipping Act does not deal specifically with disappearances at sea: its provisions apply only after a presumption of death has been granted either in terms of the Inquests Act or the common law.

(ii) Inquests Act

As explained above, a magistrate has jurisdiction on the basis of section 6(b) of the Inquests Act when 'the body has been brought ashore or on land or has been found' in his or her district. In the case of a disappearance the body has not been found and this ground

[182] *Ex Parte Welsh: In re Estate Keegan* 1943 WLD 147 149.

of jurisdiction is obviously unavailable. A body is not needed for a magistrate to have jurisdiction on the basis of section 6(a). However, 'the occurrences during which an injury which gave rise to the death was sustained or during which other occurrences which directly gave rise to the death occurred' need to have taken place within the magistrate's district. The difficulty, in the case where a person disappeared, is that one does not know whether that person died, let alone, if he or she did die, what the cause of the death is. In that regard, even if it is likely that a person died at sea, merely leaving the shore has been ruled not to be, on its own, a sufficient cause of death.[183]

In light of the above a magistrate does require, in most cases, to be designated by the Minister of Justice in terms of section 6(c). The magistrate must then establish whether 'the evidence proves beyond a reasonable doubt that a death has occurred'.[184] If not, the judicial officer must record the fact that he or she is unable to record any such finding[185] and cause the record of the proceedings to be submitted to the National Director of Public Prosecutions.[186] By contrast, if the magistrate finds that 'the evidence proves beyond a reasonable doubt that a death has occurred', he or she must record that finding.[187] In such a case, again, there are two options. If the magistrate found that 'the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person', he or she must 'cause the record of the proceedings to be submitted to the National Director of Public Prosecutions'.[188] If the magistrate made no such finding, he or she must 'submit the record of [the] inquest, together with any comment which he [or she] may wish to make, to any [Division of the High Court] having jurisdiction in the area wherein the inquest was held, for review by the court or a judge thereof'.[189]

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183 *In re Inquest into Death of Van Zyl & another* 1978 (4) All SA 674 (C) 675, 1978 (4) SA 577 (C).

184 S 16(1).

185 S 16(3).

186 S 17(1)(a). The provision still refers to the 'Attorney-General', something which, in terms of s 45(a) of the National Prosecuting Authority Act 32 of 1998 read with s 1, must be construed as a reference to the National Director of Public Prosecutions.

187 S 16(2).

188 S 17(1)(b). The provision still refers to the 'Attorney-General' something which, in terms of s 45(a) of the National Prosecuting Authority Act 32 of 1998 read with s 1, must be construed as a reference to the National Director of Public Prosecutions.

189 S 18(1). The provision still refers to 'any provincial or local division of the Supreme Court of South Africa', something which, in terms of s 53(b) of the Superior Courts

Common law

In cases where a magistrate has not been designated by the Minister of Justice in terms of section 6(c) a court may grant a presumption of death in terms of the common law at the conclusion of proceedings initiated by a private individual.[190] The latter might also initiate common-law proceedings even when a magistrate has been designated and made a finding.[191] The reason is that the general principle in matters of presumption of death is that '[t]he applicant should convince the court on a balance of probabilities that the particular person is presumably dead'.[192] In other words, the onus of proof is lighter in proceedings in terms of the common law than in proceedings in terms of the Inquests Act. Another difference resides, in the case where the person who disappeared was married, in that section 2 of the Dissolution of Marriages on Presumption of Death Act, 1979[193] provides for the automatic dissolution of the marriage only when a finding has been made in terms of the Inquests Act. This means, in the case of a finding made at the conclusion of common-law proceedings, a separate application for dissolution of the marriage must be brought if the court which made the finding did not at the same time make an order in terms of section 1 of the Act that the marriage in question must be deemed to have been dissolved.[194]

The South African courts have presumed death in terms of the common law in cases where a person disappeared from a ship,[195] where the vessel itself disappeared[196] or was destroyed,[197] where a person

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Act 10 of 2013 read with s 1, must be construed as a reference to the High Court of South Africa or a Division of the Court as the context may require.

190 A Barratt et al (eds) *Law of Persons and the Family* (2012) 137; T Boezaart *Law of Persons* 5 ed (2010); CJ Jordaan & RAJ Davel *Law of Persons Sourcebook* (2005) 480.

191 Boezaart (note 190 above) 167.

192 Id 161.

193 Act 23 of 1979.

194 In *Ex Parte Welsh: In re Estate Keegan* (note 182 above) 149, Schreiner J explained that a decree presuming a death is 'of the nature of a judgment *in rem* binding upon the world. There should be some Court having jurisdiction to declare authoritatively to the world whether a person is to be regarded as dead or not, just as there must be a Court to declare whether parties are married or divorced'. It must be stressed that a presumption of death can be set aside on application if it turns out that the person is still alive. This must be done by application to the court which granted the original application. See Boezaart (note 190 above) 165.

195 See, for instance, *In re BRC Cook* 1907 NLR 315 316; *Re Carrick* 1910 TPD 311 311.

196 *In re Duncan Fletcher* 1907 NLR 428 428.

197 See, for instance, *Ex parte Martienssen* 1944 CPD 139 139.

disappeared while swimming at sea[198] and a case where a person disappeared while walking along a steep coastal cliff.[199] In the process of reaching a decision of presumption of death the courts have taken into consideration a number of factors, such as the state of the sea, [200] the fact that the persons concerned had been last seen in an overcrowded lifeboat, [201] the long distance between the ship and the shore,[202] the possibility of the individual having been picked up by a passing ship[203] and the health and ability to swim of the person concerned.[204] The length of absence has most often not been taken directly into consideration: in some cases death has been presumed less than one year after the disappearance.[205]

The court which has jurisdiction to hear the application is the High Court in the area of jurisdiction of which the person who disappeared was domiciled at the time of his or her disappearance.[206] This means that the South African courts have jurisdiction irrespective of where the person concerned disappeared at sea, whether it is within or beyond the outer limit of the South African territorial sea and whether the person until his or her disappearance was on a South African ship or a foreign ship.[207]

A presumption of death is clearly a matter of status and for that reason it is likely that a foreign court will recognise a finding made by a South African court in a case where the *propositus* was domiciled in South Africa. As far as the recognition of foreign declarations is concerned,

198 *Ex parte Van Rijneveld* 1925 WLD 175 175; *In re Clifford Cartwright* 1927 D&CLD 9 PH G8 14; *Ex parte Dorward* 1933 NPD 17 17. An order was denied in *Ex parte James* 1947 (2) SA 1125 (T) 1127 on the ground that several persons deposed to having seen the alleged deceased after he had allegedly drowned.

199 *Dempers & Van Ryneveld v SA Mutual Life Assurance Society* (1908) 25 SC 162 169.

200 *Ex parte Hofmeyer NO* 1931 TPD 18 PH M53 100; *In re Clifford Cartwright* 1927 D&CLD 9 PH G8 14; *Ex parte Dorward* 1933 NPD 17 17.

201 *Ex parte Martienssen* 1944 CPD 139 139.

202 *In re BRC Cook* 1907 NLR 315 316.

203 Ibid.

204 *In re Clifford Cartwright* 1927 D&CLD 9 PH G8 14.

205 *Ex parte Hofmeyer NO* 1931 TPD 18 PH M53 100 (the disappearance occurred on 9 January 1931 and the decision was taken on 23 July 1931). An order was denied in *Ex parte Thesen's Steamship Co Ltd* 1944 CPD 165 167, where only six months had elapsed.

206 See *Ex parte Welsh: In re Estate Keegan* 1943 WLD 147 149; *Ex parte Maclean* 1968 (2) SA 644 (C) 646B. See also Boezaart (note 190 above) 159.

207 In *In re BRC Cook* (note 202 above) 316, the missing person disappeared while the ship was at least fifteen miles from the shore during a voyage from Delagoa Bay to Beira.

a South African court will recognise a finding made by a foreign court provided that the latter had international jurisdiction.[208]

Human remains at sea

The management of human remains is governed by the Regulations relating to the Management of Human Remains, 2013,[209] made in terms of section 68(1)(b) read with section 90(4)(c) of the National Health Act 61 of 2003. There is no provision in the Act dealing with its application *ratione loci*. As explained above regarding the Marriage Act, it therefore appears that the National Health Act applies also at sea but not further than the outer limit of the territorial sea. In other words, the Act applies to all South African and foreign ships while they are in the South African internal or territorial waters, but it does not apply to South African and foreign ships beyond the territorial sea.

The Regulations govern the entry into and the exit from South African territory of human remains. Regulation 14(1)(a) forbids any person from importing human remains into South Africa unless he or she is issued with an import permit.[210] Neither the Act nor the Regulations limit the meaning of the term 'South Africa' to the land component of the national territory. For that reason, regulation 14(1)(a) could be interpreted as forbidding the importation of human remains without a permit on any ship, including a foreign ship, into the South African internal and territorial waters, irrespective of whether the ship calls at a port. This interpretation would appear to be confirmed by regulation 14(3)(a), which provides that 'a death certificate, indicating the deceased's name, address, the date and place of death and the cause' of death must accompany the application for a permit when human remains are being brought into the Republic after the deceased died in transit on the vessel concerned, 'irrespective of whether or not such human remains [are] to be buried in the Republic'.

However the 1969 International Health Regulations, which apply in South Africa in terms of section 2 of the International Health Regulations Act, 1974,[211] stress that '[n]o health measure shall be applied by a State to any ship which passes through waters within its jurisdiction without calling at a port or on the coast'.[212] In order to reconcile this provision

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208 Forsyth (note 84 above) 326.

209 Published in *GG* 36473 of 22 May 2013.

210 The format of the permit is indicated in Annexure I of the Regulations. The information and documents to be provided are listed in reg 14(2). See further reg 14(4).

211 Act 28 of 1974.

212 Art 32(1). At the same time, art 32(2) confirms that, '[i]f for any reason ... a call

with regulation 14(1)(a) the latter therefore must be read to mean that no human remains may without an import permit be imported into the South African internal or territorial waters by any vessel calling at a port or on the coast.[213] Similarly, regulation 14(3)(a) must be interpreted to require a death certificate only when the human remains are being brought into the South African internal or territorial waters by a vessel calling at a port or on the coast. Should human remains be imported without a permit, the Director-General of the national Department of Health 'may order that such human remains be kept in a mortuary or at an undertaker's premises at the expense of the importer until such time that the required permit has been issued'.[214]

Regulation 14(1)(a) forbids any person from exporting human remains from South Africa unless he or she is issued with an export permit.[215] The Regulations do not appear to govern the burial at sea of a person who died outside the Republic. Indeed, regulation 20(1)(a) only requires the permission of the Director-General when the deceased died 'in the Republic'.[216] Permission may not be granted when the deceased 'is known to have left a written direction that his remains shall not be buried at the sea or shall be buried elsewhere than at sea'. Burials must take place no closer than six kilometres from dry land and at a depth of at least 200 metres in the case of remains which have not been cremated.[217] In the latter case, '[a]ll necessary measures [must] be taken to ensure that the human remains sink to the bottom rapidly and permanently'.[218] To that end a permit may only be issued when, or upon the condition that 'the coffin or container in which the body is to be buried is of suitable construction, and will be weighted in a satisfactory

is made, the laws and regulations in force in the territory may be applied without exceeding, however, the provisions of' the International Regulations.

213 Reg 9A of the Supplementary Regulations under the International Health Regulations Act, 1974, insists that '[o]nly an approved port may be the first port of call in the Republic for any vessel on an international voyage'. In terms of item 2 of the Designation of Ports as Approved Ports (published in *GG* 24713 of 11 April 2003), the approved sea ports are: Cape Town, City Deep (Container Depot), Durban, East London, Mossel Bay, Port Elizabeth and Richards Bay.

214 Reg 14(1)(b), which also provides that 'if the prescribed permit is not issued within 30 days after the date of the order, the Director-General may order that such human remains be buried or dealt with in accordance with the burial prescripts in the Republic and such burial shall be at the expense of the importer'.

215 The format of the permit is indicated in Annexure I of the Regulations. See further reg 14(3)(b).

216 Permission is to be given on the prescribed form, a format of which is given in Annexure A of the Regulations. See further reg 20(1)(b)–(c) and reg 20(2).

217 Reg 21(1) and (3).

218 Reg 21(2).

manner'.[219] Oddly, the Regulations appear only to require that 'flowers and wreaths consisting of materials which are readily decomposable in the marine environment' be used during the burials, when the latter are subject to the issuance of a permit.[220] In other words, the Regulations seem not to forbid the use of non-decomposable flowers and wreaths during the burials of a person who died outside the Republic.

Wills executed at sea

An impending demise may lead a person to execute a will on board a ship, either when the ship is already at sea or when she is still in port. In such a case[221] section 3*bis*(1)(e) of the Wills Act, 1953[222] provides that the will is formally valid if it was executed in compliance 'with the internal law of the State or territory in which [the] vessel ... was registered at the time of such execution'. This ground of validity should be available in most cases where (i) the will is executed outside the territorial sea of a state, (ii) the will is executed on board a ship which is within the internal or territorial waters of a state but is about to engage in a voyage beyond those waters, or (iii) the will is executed on board a ship which is within the internal or territorial waters of a state at the end of a voyage beyond those waters. That is because most ships operating in international waters are registered in a state or territory and fly the flag of that state or territory.[223] An international court may entertain a challenge to the validity of the registration.[224] By contrast, a South African court would probably not entertain such a challenge, on the ground that the act of state doctrine requires that '[t]he judicial branch of government ... be astute in not venturing into areas where it would' impinge on the comity of nations.[225]

In addition, section 3*bis*(1)(e) provides that the will is formally valid if it was executed in compliance 'with the internal law of the state or territory ... with which [the ship] was otherwise most closely connected at that time'. The reason for this additional ground of validity is that there

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219 Reg 20(4)(a).

220 Reg 21(4).

221 Forsyth (note 84 above) 400 also understands s 3*bis*(1)(e) to apply irrespective of where the ship is located, provided that the will is executed 'on board' the ship.

222 Act 7 of 1953.

223 One of the reasons for doing so is to avoid interference by foreign warships and other duly authorised ships clearly marked and identifiable as being on government service, on the basis of art 110(1)(d) of the LOSC.

224 See, for instance, *Grand Prince (Belize v France)* 2001 *ITLOS Reports* 17 and *Tomimaru (Japan v Russian Federation)* 2005–2007 *ITLOS Reports* 74.

225 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) 334D–E.

is often a tenuous link between the state or territory in which the ship is registered and the state or territory with which the various parties involved in the operation of the ship are connected. That is especially, but not necessarily, the case when the ship is flying a flag of convenience.[226] There is no reported case where a will has been held to be valid on this ground. Our courts however have had several opportunities to apply the closest-connection factor in other matters.[227] In the case of a will executed at sea the most relevant international instrument is the 1986 UN Convention on Conditions for the Registration of Ships,[228] which identifies the ownership and the manning of a ship as the main elements of a genuine link between a state or territory and that ship.[229] In South African law the Ship Registration Act, 1998,[230] only has regard to ownership.[231]

Finally, section 3*bis*(1)(e) provides that the will is formally valid in the case where it was executed while the vessel was within the internal or territorial waters of a state when the form of that execution complies with the internal law of that state, that is, the *lex loci actus*.[232]

Section 3*bis* does not apply in respect of 'a will made by a South African citizen otherwise than in writing'.[233] In such a case the common law continues to apply and '[i]t is clear that a will disposing of either movables or immovables will be formally valid … if it complies with the formalities laid down by the *lex loci actus*'.[234] The reason for this rule is that '[t]he reasonable man expects that compliance with the norms of the place where he is to be sufficient'.[235] For that reason, although a ship in international waters is not a floating part of the territory in which it is registered,[236] there appears to be no obstacle to extending, *in favorem testatoris*, the application of the *lex loci actus* rule to ships or, more

226 Forsyth (note 84 above) 400.

227 As far as contractual obligations are concerned, see for instance *Improvair (Cape) (Pty) Ltd v Establishments Neu* 1983 (2) SA 138 (C) 146H–147B; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) 526I and *Kleinhans v Parmalat SA (Pty) Ltd* [2002] ZALC 57 para 19. As far as delictual obligations are concerned, see *Burchell v Anglin* 2010 (3) SA 48 (ECG).

228 (1986) 7 *Law of the Sea Bulletin* 87. South Africa has not ratified the Convention, which is not in force.

229 See arts 7–9.

230 Act 58 of 1998.

231 S 16(1)(a) read with s 1(4)(b).

232 S 3*bis*(1)(a)(i).

233 S 3*bis*(4).

234 Forsyth (note 84 above) 396, who assesses the clarity of the relevant cases in footnote 294.

235 Id 396.

236 Tanaka (note 9 above) 157.

accurately, to developing the common law by adding a *lex navis actus*, the law in force on the ship where the act is executed. It is clear that the fact that a will is executed at sea has no impact on the alternatives of the *lex situs* in the case of a will disposing of immovables, and the *lex (ultimi) domicilii* in the case of a will disposing of movables.

Criminal taking of human life at sea

Common law

The South African common law applies within the whole South African territory, including the South African internal and territorial waters.[237] That means that the common-law crimes of murder and culpable homicide[238] can be committed at sea landward of the outer limit of the territorial sea irrespective of the flag flown by the ship on which the crime is committed.

International law does not place any limitation on the exercise by South Africa of its executive jurisdiction when the crime is committed on a foreign vessel and the latter is not exercising the right of innocent passage.[239] The position is more complicated when the vessel is exercising the right of innocent passage. The reason, in that case and in principle, is that South Africa should refrain from arresting any person or conducting any investigation on board the vessel.[240] However that principle does not apply when the foreign vessel is 'passing through the territorial sea after leaving internal waters'.[241] The principle also does not apply when the crime disturbs 'the peace of the country or the good order of the territorial sea'.[242] Obviously nothing stands in the way of an arrest or investigation when 'the assistance of the [South African] authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State'.[243]

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237 That is confirmed by ss 3(2) and 4(2) of the MZA.

238 See A St Q Skeen (updated by SV Hoctor) 'Criminal law' (2010) 6 *LAWSA* 241–246 paras 237–244.

239 In order for a foreign ship to enjoy that right, the master of the ship must ensure that the passage is 'continuous and expeditious' (art 18(2) of the LOSC) and 'is not prejudicial to the peace, good order or security of' South Africa (art 19(1) of the LOSC). International law is not concerned with a matter involving a South African vessel in South African waters because that is a domestic matter.

240 Art 27(1) of the LOSC. South Africa must refrain from exercising its jurisdiction when the crime was committed on a warship or other government ship operated for non-commercial purposes. See art 32 of the LOSC.

241 Art 27(2) of the LOSC.

242 Art 27(1)(b) of the LOSC.

243 Art 27(1)(c) of the LOSC.

There is a presumption that criminal law does not apply extraterritorially.[244] As stressed earlier, South African ships are not floating parts of the South African territory,[245] therefore, unless there is a basis to rebut the presumption, the South African common-law crimes of murder and culpable homicide cannot be committed beyond the outer limit of the South African territorial waters. One such basis, as indicated earlier, is section 9(1) read with section 1 of the Maritime Zones Act, 1994,[246] in terms of which the common law applies on all artificial islands, installations and structures within the South African EEZ or on or above the South African continental shelf. When a murder or culpable homicide is committed in one of those locations, for judicial jurisdiction purposes, it is deemed to have been committed within the magisterial district nearest to that location[247] unless the Minister of Justice has designated another district.[248]

Another basis to rebut the presumption is section 327 of the MSA. That provision implies that the South African common-law crimes of murder and culpable homicide can be committed by an individual, irrespective of his or her nationality, on board a South African ship while she is 'on the high seas'.[249] That term is not defined in the Act: there is no doubt that it must be interpreted to refer to the high seas as defined in article 86 of the LOSC.[250] It would make little sense not to interpret the term as including the South African EEZ as well as those of other states. The reason, otherwise, is that the legal position would be that the crimes could be committed either landward of the EEZs (in the territorial seas) or seaward of the EEZ (on the high seas), but not in the EEZs themselves. In addition, section 327 of the MSA implies that the South African common-law crimes of murder and culpable homicide can be committed by a South African citizen on board a South African ship while she is in the internal or territorial waters of another state, and on board a foreign ship wherever the latter is.[251] In all those cases a South African court has jurisdiction to try the offence if the person is found within the area of

244 *S v Makhutla & 'n ander* 1968 (2) SA 768 (O) 771E–F; *S v Mathabula & another* 1969 (3) SA 265 (N) 266B–C; *S v Maseki* 1981 (4) SA 374 (T) 375D–E.

245 That is the position also in the United Kingdom. See M Hirst *Jurisdiction and the Ambit of the Criminal Law* (2003) 283.

246 Act 15 of 1994.

247 S 9(3) of the MZA.

248 S 9(2) of the MZA.

249 Para 1 read with para 4.

250 See note 16 above. See also s 1 of the Marine Living Resources Act.

251 Para 1(a) read with para 4.

jurisdiction of that court and the latter 'would have had jurisdiction to try the offence if it had been committed within the said area'.[252]

Section 327 could be interpreted in such a way as to give South African courts jurisdiction over a foreign national who, while on board a foreign ship and in the event of a collision or any other incident of navigation in an EEZ or on the high seas, acts in such a way as to commit culpable homicide against a person on board a South African ship involved in that incident. That application of the principle of objective territoriality[253] however must be excluded in terms of section 233 of the Constitution because it would conflict with article 97(1) of the LOSC. Indeed, that provision stresses, in such a case, 'no penal or disciplinary proceedings may be instituted against [the] person except before the judicial or administrative authorities either of the flag State or of the State of which [the] person is a national'.

Statutory law

Other than common law, the main statutory instrument is the Protection of Constitutional Democracy against Terrorist and Related Activities Act. In terms of section 10(g) of the Act, any person who 'kills a person, in connection with the commission of any of [a number of] acts ... is guilty of an offence relating to hijacking a ship or endangering the safety of maritime navigation'.[254] The Act gives jurisdiction to a South African court in respect of the offence if (i) the accused was arrested on the land territory of South Africa, its internal waters or its territorial sea;[255] (ii) the

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[252] S 327(1) of the MSA. Jurisdiction can also be conferred on foreign courts in terms of s 327(2).

[253] J Dugard *International Law: A South African Perspective* 4 ed (2011) 150.

[254] Those acts include intentionally '(a) seiz[ing] or exercis[ing] control over a ship by force or threat thereof or any other form of intimidation; (b) perform[ing] any act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; (c) destroy[ing] a ship or caus[ing] damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; (d) plac[ing] or caus[ing] to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or causes damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; (e) destroy[ing] or seriously damag[ing] maritime navigational facilities or seriously interfer[ing] with their operation, if such acts are likely to endanger the safe navigation of a ship; [and] (f) communicat[ing] information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship'. A similar provision applies in the case of 'an artificial island, installation, or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for economic purposes' (s 6 read with s 1(1)(viii)).

[255] S 15(1)(a).

accused was arrested on board a ship or aircraft registered or required to be registered in South Africa;[256] (iii) the offence was committed on board a ship registered or required to be registered in South Africa at the time the offence was committed;[257] (iv) the offence was committed by a South African citizen or a person ordinarily resident in South Africa;[258] (v) a South African citizen was seized, threatened, injured or killed during the commission of the offence;[259] or (vi) 'the evidence reveals any other basis recognised by law'.[260]

A South African court has jurisdiction in respect of the offence, in the absence of any other ground, if the offence has been committed in the South African internal waters.[261] It is unclear whether the position is the same if the offence has been committed in the South African territorial sea. Section 15(1)(b)(i) of the Act gives jurisdiction to a South African court if the offence was committed 'in the territory of the Republic': as indicated earlier the South African territorial sea is part of the South African territory. However, it can be argued that the term 'territory of the Republic' does not include the territorial sea for the purposes of the Act, because section 15(1)(a) of the Act refers to the case where 'the accused was arrested in the territory of the Republic, *or* in its territorial waters',[262] thereby distinguishing explicitly between the territory of the Republic, on the one hand, and the Republic's territorial sea on the other.

The Act compels the National Commissioner of the South African Police Service (SAPS) to cause the necessary measures to be taken, upon receiving information from an appropriate government body of a foreign state, to investigate any matter involving a person who might be present in South Africa and is alleged to have committed, or is convicted of, or is sentenced in respect of, any offence in respect of which a South African court has jurisdiction or any court in a foreign state may have jurisdiction.[263] As required by article 7(1) of the 1988 Convention for the

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256 Ibid.

257 S 15(1)(b)(ii).

258 S 15(1)(b)(iii).

259 S 15(1)(b)(vii).

260 S 15(1)(c).

261 S 15(1)(b)(i). See further s 15(2)–(4).

262 Emphasis added.

263 S 15(5) read with s 1(1)(xvi). On investigative powers, freezing orders as well as the cordoning off of an area and the stopping and searching of vehicles and persons, see ss 22, 23 and 24 respectively, as well as ss 28A, 29(1), 34(1), 35(1)(a)–(b) and 40(1)(b) of the Financial Intelligence Centre Act 38 of 2001 and the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002. On preservation of property orders and forfeiture orders, see ss 38–62 of the Prevention of Organised Crime Act 121 of 1998.

Suppression of Unlawful Acts against the Safety of Maritime Navigation,[264] the Act provides that a person must be arrested where it appears on reasonable grounds from the investigation that extradition or criminal proceedings might be instituted against him or her, and such an arrest is necessary to ensure his or her presence at the proceedings.[265] In the case where an arrest is made the National Director of Public Prosecutions (NDPP), should he or she decline to prosecute, promptly must notify all the foreign states that might have jurisdiction over the offence in question of the fact that the person is in custody and of the circumstances that justify the person's detention, with a view to the surrender of the person to any of those states for prosecution.[266] A prosecution relating to the abovementioned offences requires the written authority of the NDPP[267] who must communicate the final outcome of the proceedings promptly to the Secretary General of the International Maritime Organisation.[268]

In addition, section 2 of the Act gives effect in South African law to the 1997 International Convention for the Suppression of Terrorist Bombings[269] as well as the 1999 OAU Convention on the Prevention and Combating of Terrorism[270] and its 2004 Protocol,[271] by making it an offence to engage in a terrorist activity, which includes any act committed in or outside South Africa, which 'causes ... the death of, any person, or any number of persons',[272] and

> which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to
> (i) threaten the unity and territorial integrity of [South Africa];
> (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or
> (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public,

264 1678 *UNTS* 201, (1988) 27 *ILM* 668.
265 S 15(6). See further s 15(7).
266 S 15(8) read with s 1(1)(xvii). In terms of s 15(9), the provisions of s 15 are subject to the provisions of the Extradition Act 67 of 1962.
267 S 16(1).
268 S 16(2)(c).
269 2149 *UNTS* 256. South Africa ratified the Convention in 2003.
270 See https://treaties.un.org/doc/db/Terrorism/OAU-english.pdf (accessed 7 April 2016). South Africa ratified the Convention in 2002.
271 See http://www.peaceau.org/uploads/protocol-oau-convention-on-the-prevention-combating-terrorism-en.pdf (accessed 7 April 2016). South Africa ratified the Protocol in 2007.
272 S 1(1)(xxv)(a)(iii).

> or a domestic or an international organisation or body or inter-governmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles, whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside [South Africa];[273] and ...
>
> which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.[274]

Finally, section 24(3) of the Defence Act, 2002[275] makes it an offence to commit an act of piracy. The latter includes any illegal act of violence leading to the death of a person which is 'committed for private ends by the crew, including the Master, or the passengers of a private ship or a private aircraft, and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; [or] (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state'.[276] The accused 'may be tried in any court in the Republic designated by the Director of Public Prosecutions and, upon conviction, is liable to a fine or to imprisonment for any period, including life imprisonment'.[277]

Conclusion

The legal environment at sea is complex, jurisdiction being exercised on various bases in different spatial areas in accordance with both the international-law and domestic-law regimes. That means that the legal provisions governing birth, marriage and death at sea inevitably are more intricate than those governing those events when they take place on dry land where territorial jurisdiction applies uniformly in terms of domestic law.

With regard to the acquisition of South African citizenship by birth, the amendments made to the South African Citizenship Act do not completely eliminate cases of dual citizenship arising from a birth at sea. Nevertheless, they have the effect of reducing those cases in that birth on a South African ship is now a ground for acquisition of South

[273] S 1(1)(xxv)(b).
[274] S 1(1)(xxv)(c).
[275] Act 42 of 2002.
[276] S 24(1)(a).
[277] S 24(3).

African citizenship only in specific circumstances. On the other hand, by providing a new avenue for the acquisition of citizenship when the birth occurs in the state's internal waters and territorial sea, the amendments have the effect of reducing cases of statelessness. Moreover, the Act refers to the BDRA as the legislative basis on which a birth must be registered for that birth to be a ground of acquisition of citizenship. That reference is understandable because the BDRA is the only legislation governing the registration of a birth taking place on dry land. However, that reference raises difficulties in the case of a birth at sea because the MSA applies also in that case and the two pieces of legislation do not speak adequately to each other.

As far as marriages at sea are concerned, they are ignored by the Marriage Act. On the basis of case law and the fact that the territorial sea is part of the national territory in South African law, however, it is clear that the Act applies to marriages concluded up to the outer limit of the territorial sea. It is also clear that it applies to marriages concluded in the internal waters, archipelagic waters and territorial sea of other States. In addition, there appears to be no reason why designated marriage officers could not be authorised to solemnise marriages in an EEZ or on the high seas. The position is similar under the Civil Union Act. Moreover, the registration of marriages concluded at sea in terms of the Marriage Act does not present any legal difficulty. The position is different with regard to the Civil Union Act because neither the MSA nor the Identification Act has been amended to take its promulgation into account.

The registration of deaths at sea raises the same difficulties encountered in the case of registrations of births. Enquiries into the cause of deaths at sea can be problematical as a result of the fact that there are two bases for those enquiries. One basis is the MSA, which provides a complicated but thoroughly thought-through process. By contrast, the relevant provisions of the Inquests Act are arcane and in dire need of improvement. That is also the case with regard to disappearances at sea, where the common law still has a role to play. The position is unnecessarily complicated with regard to human remains at sea, which are not satisfactorily dealt with by the Regulations relating to the Management of Human Remains. As far as the formal validity of wills executed at sea is concerned, it is confirmed in the great majority of cases by the Wills Act, complemented in most other instances by the common law. Finally, while the arsenal available to deal with the criminal taking of human life at sea is powerful, it can only benefit from a consolidation of its many components.

The above shows that a legal regime, which inevitably is complex due to the legal nature of the marine environment, is made even more complicated in South African law by failures adequately to take that

complexity into account when drafting legislation and to ensure that the various pieces of legislation involved speak coherently to each other. It must be kept in mind, however, that the situation with regard to births, marriages and deaths at sea is only a facet of a larger problem which, as the country becomes more aware of the crucial role which the Atlantic Ocean, the Indian Ocean and the Southern Ocean have and will continue to play in shaping its future, requires a comprehensive process of revision of South African marine and maritime law.