



IMO
INTERNATIONAL MARITIME LAW INSTITUTE
Established under the auspices of the International Maritime Organization
A specialized agency of the United Nations



REMOVAL OF WRECK ACT NO. xxx OF 2008

A Legislation Drafting Project submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) at the IMO International Maritime Law Institute

Submitted By: SIPHO J MBATHA (SOUTH AFRICA)

Supervisor: ADRIANA PADOVAN

Academic Year 2007/2008

DEDICATION

**To my late father, Lizzie, Vusi, Mandla and Makhosazana, may God
bless you.**

ACKNOWLEDGMENT

Many thanks to the following:

To my supervisor, Ms. A. Padovan; and

to Ms. E. Belja for her enormous contribution to this project.

TABLE OF CONTENT

	Page
Dedication	I
Acknowledgement	II
Table of content	III
Explanatory note	V

Sections	Page
1. Definitions	1
2. Scope of application of this Act and interpretation of the Convention	4
3. Exclusions	4
4. Reporting wrecks	4
5. Determination of hazard	5
6. Locating wrecks	7
7. Marking of wrecks	7
8. Measures to facilitate the removal of wrecks	8
9. Liability of the owner	10
10. Remedies of the Authority	10
11. Limitation of liability	11
12. Exceptions to liability	14
13. Compulsory insurance or other financial security	14

14. Issuing of insurance or other financial security certificate	15
15. Certificate to be carried on board	18
16. Survey of ships	19
17. Extension, cancellation and lapsing of insurance or other financial security certificate	19
18. Detained ships	20
19. Time limit	21
20. Regulations	21
21. Offences and penalties	21
22. Repeal and amendment	22
23. Short title and commencement	22

Page

Schedule

XV

Annex

XVI

Nairobi International Convention on the Removal of Wrecks, 2007

I Explanatory Note

A. Purpose

The purpose of this draft is to incorporate the Nairobi International Convention on the Removal of Wrecks, 2007 (hereinafter referred to as “the Convention”) into the South African legislation. The primary intention of the Convention is to establish uniform international rules and procedures to ensure that prompt and effective response is achieved when removing wrecks that have a potential of causing hazard to lives, goods, and property at sea and to marine environment; for the payment of compensation for the costs involved.

B. Background

In May 2007, the Convention was adopted at the Diplomatic Conference held in Nairobi. The Convention fills the lacuna in the international legal framework, by providing sets of uniform international rules aimed at ensuring that prompt and effective removal of wrecks, located beyond the territorial sea, is achieved. The Convention also provides an optional clause enabling State Parties to apply certain provisions of the Convention to their internal waters and territorial sea.

There are a number of abandoned wrecks worldwide situated in the States’ internal waters, territorial seas, exclusive economic zones (hereinafter referred to as “EEZ”) and on the high seas. Those abandoned wrecks cause or may cause problems to the coastal States and to the safety of navigation and most of the problems are as follows:

- a shipwreck located on a navigation route may pose hazard to navigation and has a potential to endanger other vessels;
- any hazardous object, e.g. cargo that is on board the sunken ship may have potential of causing substantial damage to the marine and coastal environment; and
- the costs involved in locating, marking and removing hazardous wrecks may be astronomical.

The problems aforementioned and other related matters are addressed by the Convention. The Convention provides a legal framework for coastal States to remove from their EEZ wrecks that pose hazards to the safety of navigation or to the marine or coastal environment. The shipowner will be financially liable for locating, marking and removing the wreck. The shipowner, of a ship of 300 gross tonnage and above, is required to take out insurance or provide other financial security to cover the costs of wreck removal. In that regard the State has a right of direct action against shipowner's (wreck owner's) insurers.

C. Summary of the provisions of the Convention

The primary provisions of the Convention cover, *inter alia*, the following:

Article 5 imposes an obligation to the shipowner to report, to the Affected State, any maritime casualty resulting in a shipwreck.

Article 6 sets out the criteria to be taken when determining whether the wreck poses hazard or not.

Article 7 covers the action taken by the Affected State to locate the ship or wreck; and to warn the mariners and States concerned of the nature and location of the wreck.

Article 8 states that Affected State should ensure that all reasonable steps are taken to mark the wreck. Furthermore, the Affected State should publish the particulars of the marking of the wreck.

Article 9 sets out measures to facilitate the removal of wrecks including rights and obligations to remove hazardous ships and wrecks.

Article 10 states that the liability for costs in locating, marking and removing of wreck is borne by the shipowner unless liability falls under the exceptions. Article 10 (2) of the Convention gives effect to the right of the registered owner to limit his liability under any applicable national regime or International Convention on Limitations of Liability for Maritime Claims, 1976 as amended (hereinafter referred to as "LLMC"). It is noteworthy that there is neither a national legislation regime regulating limitation of liability nor is South Africa a party to the LLMC.

A state has a prerogative to adopt the limited or unlimited regime regarding the liability of the shipowner.

If a state chooses the unlimited liability regime then that would basically mean that ships calling that state should hold and maintain the unlimited insurance or other financial security concerning the removal of wreck. Furthermore, if a ship becomes a wreck and such wreck constitute a hazard in that state the shipowner will be liable for all claims, apart from those falling under the exception, and cannot limit his liability.

The aforementioned approach will not be favorable to the South African position. It is worth mentioning that South Africa is a developing country and situated in a strategic position in term of international sea route. Most of the country's import and export commodities are carried by sea transport. South Africa is not one of the biggest consumers of the world trade; and its economic power is not the strongest in the world. Taking into account the above, to adopt unlimited regime would not be ideal for South Africa; and foreign ships may choose to circumvent South Africa and use neighboring ports which limit the liability of the shipowners.

Therefore, it would be prudent for South Africa to protect and encourage ships to call its ports; and one of the means to do so is to limit the liability of the shipowners. The legislation that limit the liability for the removal of wrecks will bring comfort to the shipowners and will somehow encourage them to visit South African ports without fear of being exposed to infinite liability claims within the jurisdiction of South Africa.

Article 12 obliges the shipowner of a ship of 300 gross tonnage and above to maintain insurance or other financial security to cover liability under the Convention.

Article 15 deals with dispute settlement that may arise between two or more State Parties regarding the interpretation or application of the Convention.

Basically, the Convention establishes uniform international rules and procedures to ensure prompt and effective removal of hazardous wrecks. The aim of the Convention is to improve safety of navigation, security in maritime operations and the protection of the marine environment.

D. South African position

The dangers posed by wrecks, whether marked or unmarked cannot be overemphasized. In 1971 *M/V The Brandenburg* struck a wreck, *M/V The Texaco Caribbean*, in the Strait of Dover and sank. Few weeks later, notwithstanding the wreck being marked *M/V The Niki*, ran into the wreck aforementioned and sank. In these two incidents combined, 51 lives were lost.¹

South Africa is definitely not immune to dangers posed by wrecks in its territorial waters and on its EEZ. In brief, South Africa is located on the southern tip of Africa; and surrounded by the Atlantic Ocean on the west part, and the Indian Ocean on the south and eastern part. South Africa is located on a particular busy corner of the world's major sea routes and has a combination of wind and sea currents, because of the convergence of oceans. That has resulted in the Cape of Good Hope conversely called the "Cape of Storms". Frequently, the weather conditions are dreadful and many shipping casualties occur.

E. Motivation

In South Africa, issues regarding the removal of wrecks are vested in the hands of the Minister of Transport. However, the Minister of Transport has delegated such powers to the South African Maritime Safety Authority (hereinafter referred to as "SAMSA"). SAMSA was established as a juristic person in terms of SAMSA Act (Act 5 of 1998). The objectives of SAMSA are to ensure safety of life and property at sea; prevent pollution of the maritime environment by naval activities; and promote South Africa as a maritime nation.

Presently, South Africa has a Wreck and Salvage Act (Act 94 of 1996) (hereinafter referred to as "the WSA") emanating from the International Convention on Salvage, 1989 (hereinafter referred to as "Salvage Convention") which deals primarily with salvage. However, section 18 of the WSA provides SAMSA with powers to deal with removal of wrecks located in South Africa's internal waters and territorial sea. In brief, section 18 addresses the following matters:

¹ "Accidents at Sea" Mankabady, Samir, International Maritime Organization, Volume 2.

- When a ship is wrecked, stranded or in distress, SAMSA may direct the shipowner to move such ship to a place specified by SAMSA or to include measures as may be specified by SAMSA.
- If the shipowner fails to perform the above act within the required time or if SAMSA has not been able to contact the shipowner, it may cause any wreck, stranded or abandoned ship or any part thereof to be raised, removed or destroyed or dealt with in such a manner as it may deem fit.
- If SAMSA incurs any expenses in connection with the exercise of any power aforementioned, it may recover such expenses from the owner of the wreck or ship in question or, in the case of an abandoned wreck or ship, from the person who was the owner at the time of the abandonment.
- SAMSA may sell any wreck or ship, and any goods removed and apply the proceeds of the sale towards the settlement of any expenses incurred in connection with the exercise of such power; or
- SAMSA may cause any such wreck, ship or goods to be detained until security to the satisfaction of SAMSA has been given for the payment of such expenses.
- If any wreck, ship or goods are sold and the proceeds of the sale exceed the amount of the expenses, the surplus shall be paid to the owner of the wreck, ship or goods in question.

Analytically, it is apparent that WSA was not intended to deal with the removal of wrecks, in great details but salvage. There is only one section, section 18, which deals with the removal of wrecks and that section has loopholes. For example, section 18 provides that SAMSA can recover its costs incurred during the removal of wreck to the shipowner by selling his wreck, ship or goods. However, WSA does not address the issue where proceeds of such sale are in deficit of the costs incurred by SAMSA. Furthermore, the WSA does not address the issue where the shipowner escapes the jurisdiction of South Africa before honoring his responsibilities of removing the wreck and is nowhere to be found. The WSA applies only to internal waters and territorial sea of South Africa.

Furthermore, the WSA does not provide any provision for the registered owner to have any compulsory financial security regarding the removal of wreck. The owner or operator of a vessel entering South African internal waters, territorial sea or exercising right of innocent passage, is not compelled in terms of WSA, to have in place an adequate insurance or any other financial security covering liabilities that may arise in consequence of that ship becoming a wreck.

Therefore, should one of the incidents aforementioned occur SAMSA may face the effect of the shortcoming of WSA.

F. Conclusion and Recommendations

It has been mentioned on several occasions that 90% of most countries' trade is carried by sea transport. Therefore, every coastal State must ensure that its navigation routes and marine environment are protected and safe at all times. If the coastal State fails to protect its navigation routes and marine environment against any objects that have the potential of posing hazard then that may lead to serious detriment on that country's economy. In that case the State may be exposed to claims of a nature that can reach extremely high amounts considering the number of human lives depending on marine resources and navigation routes.

As far as South Africa is concerned, its peculiar location and sea perils which in the region are extremely high especially due to the prevailing metrological and hydrographic conditions, numerous hazardous wrecks are often found in the territorial sea, near coastal areas and in the EEZ of South Africa.

Since the enactment of WSA, there have been several incidents in particular on the internal waters and territorial sea of South Africa leading to wrecks that pose hazards to the safety of navigation or to the marine or coastal environment. So far, almost all operations have been conducted successfully and with least legal challenges. However, that does not mean that WSA is watertight and will not in future face any challenges in particular those highlighted above.

Furthermore, the Convention primarily applies to EEZ, but Article 3 (2) allows the State Party to opt-in and apply the Convention to its territory

including territorial sea. The opt-in provision establishes universal standards in dealing with hazardous wrecks located in the State's territorial sea. It is apparent that South Africa has a national legislation dealing with removal of wrecks located in its internal waters and in its territorial sea. However, there is no legislation in South Africa dealing with the removal of wrecks located in its EEZ; although it has established its EEZ as provided in section 7 (1) of the Maritime Zones Act 15 of 1994 as follows:

“The sea beyond the territorial waters referred to in section 4, but within a distance of two hundred nautical miles from the baselines, shall be the exclusive economic zone of the Republic.”

Therefore, what will happen if a wreck or hazardous cargo on board the sunken vessel is located outside internal waters or territorial sea of South Africa, for instance on its EEZ, and poses navigation hazard or hazard of damage to marine environment?

Obviously, WSA does not extend to cover such area. Therefore, SAMSA may have a very limited power, if no power at all, to compel the shipowner to locate, mark and remove the wreck situated in the Country's EEZ. Furthermore, SAMSA may have no power to compel the shipowner to effect an insurance covering the respective liability.

Firstly, it has been shown that WSA has loopholes and needs to be revised. Secondly, WSA does not apply to the removal of wrecks located in the EEZ of South Africa. Conversely, the Convention applies to convention areas or the EEZ of State Parties and also provides an opportunity for State Parties to opt-in and apply the relevant provisions of the Convention to their internal waters and territorial sea. Therefore, it is advisable for South Africa to adopt the Convention and opt-in, to cater for such possible predicaments.

In that regard, section 18 of WSA has to be repealed and the new comprehensive legislation be enacted (see the attached Removal of Wreck Bill).

The adoption of the Convention will be a major milestone in ensuring that internal waters, territorial seas and the EEZ of South Africa are adequately protected against the wrecks that pose hazard to the safety of navigation or to the marine and coastal environment.

II. CONSTITUTIONAL IMPLICATIONS

The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “Constitution”), which is the highest law of South Africa, makes provisions for the Bill of Rights under which the environmental rights are included as follows:

“24. Environment

Everyone has the right:

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
 - i. prevent pollution and ecological degradation;
 - ii. promote conservation; and
 - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

In terms of section 7 (2) of the Constitution it is mentioned that the “State must respect, protect, promote and fulfill the rights in the Bill of Rights.” Therefore, it should be noted that the government of South Africa has a duty to ensure that environmental rights are protected at all times.

III. INCORPORATION OF TREATIES AND PROCESS OF ENACTING NATIONAL LEGISLATION.

A. Incorporation of Treaties

South Africa follows the dualist approach to the incorporation of treaties. The treaties are negotiated and signed, ratified or acceded to by the national executive of South Africa. Only those treaties incorporated by the Act of Parliament become part of South African law. Therefore, treaty-making process falls exclusively within the competence of the executive. The treaties are ratified or acceded to by the resolutions of the two Houses of Parliament, the National Assembly and the National Council of Provinces to become part of national law.

Section 231 of the Constitution provides the following:

“(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by the resolution in both the National Assembly and the National Council of Provinces but must be tabled in the Assembly and the Council within a reasonable time.

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation: but a self-executing provision of an agreement that has been approved by Parliament is the law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

Furthermore, by adopting the treaty does not mean that the provisions of such treaty apply automatically as South African law. The treaty has to be translated into national legislation by enacting a Bill.

B. Process to enact national legislation

Section 7 (1) of SAMSA Act empowers SAMSA to perform certain functions on behalf of the Minister of Transport (hereinafter referred to as the “Minister”). Some of those functions are, *inter alia*, to perform the obligations of South Africa under international maritime treaties to which the country is a party to; and to draft and administer some of the maritime legislation that falls within the scope of SAMSA’s duties.

In this regard, SAMSA has to translate the Convention into national legislation by enacting a Bill. The Bill is enacted through the following process:

Firstly, SAMSA will form a Working Group (hereinafter referred to as “WG”) which comprises of legal and technical experts in the subject matter.

Secondly, the WG will identify the affected and interested stakeholders and forward them a copy of the treaty for their attention and comments. Then the

WG will commence its drafting work. If the WG receives relevant comment from the stakeholders and interested parties then such comments may be considered during the drafting process.

Thirdly, after the draft Bill is completed it is forwarded to the State Law Advisors to ensure it complies with drafting rules. If the draft Bill passes the State Law Advisors' test then the WG submits the draft Bill together with a detailed explanatory note to the Department of Transport (hereinafter referred to as "DoT").

Fourthly, the DoT will publish the Bill in the Government Gazette for public comments. The comments have to be submitted to the DoT within 30 days of publication. If the DoT receives relevant comments then it will consult the WG regarding possible incorporation of such comments. If the comments are incorporated then the Bill will not be re-published for further comments; however, it will proceed to the final stage.

Lastly, the DoT will prepare a Cabinet Memo and the Minister will present the Bill to the Parliament for adoption. Once the Bill is adopted, the President of South Africa will sign and pronounce the date of which it will come into force. Then, from that date, the Bill becomes the Act of Parliament and it is published on the Government Gazette for public consumption.

SCHEDULE

Nairobi International Convention on Removal of Wrecks, 2007

ANNEX

**CERTIFICATE OF INSURANCE OR OTHER FINANCIAL
SECURITY IN RESPECT OF LIABILITY FOR THE REMOVAL OF
WRECKS**

Issued in accordance with the provisions of section 14 of the Removal of Wrecks Act, 2008 (Act No.xxx of 2008).

Name of Ship	Gross tonnage	Distinctive number or letters	IMO Ship Identification Number	Port of Registry	Name and full address of the principal place of business of the registered owner

This is to certify that there is in force, in respect of the above-named ship, a policy of insurance or other financial security satisfying the requirements of section 13 of the Removal of Wrecks Act, 2008 (Act No. xxx of 2008).

Type of Security

Duration of Security.....

Name and address of the insurer(s) and/or guarantor(s)

Name.....

Address.....

This certificate is valid until.....

Issued or certified by the South African Maritime Safety Authority

At On

(Place)

(Date)

.....
(Signature and Title of issuing or certifying official)

REMOVAL OF WRECK ACT NO. xxx OF 2008

To take measures in relation to the removal of a wreck which poses a hazard in the Convention area of the Republic and to provide for matters connected therewith.

Definitions

1. In this Act, unless the context indicates otherwise—

“Affected State” means a State Party in whose Convention area the wreck is located;

“Authority” means the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act 5 of 1998;

“Convention” means the Nairobi International Convention on the Removal of Wrecks, 2007;

“Convention area” means the territory, including territorial sea and the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such zones, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extends not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

“Court” means the Commercial Court of the Republic of South Africa;

“Hazard” means any condition or threat that:

- (a) poses a danger or impediment to navigation; or
- (b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States;

“Maritime casualty” means a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting

in material damage or imminent threat of material damage to a ship or its cargo;

“Minister” means the Minister of Transport;

“Operator of the ship” means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended;

“Organization” means the International Maritime Organization;

“Proper officer” means the officer or the surveyor of the Authority;

“Registered owner” means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the operator of the ship, **“registered owner”** shall mean such company;

“Related interests” means the interests of South Africa directly affected or threatened by a wreck, such as:

(a) maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;

(b) tourist attractions and other economic interests of the area concerned;

(c) the health of the coastal population and the wellbeing of the area concerned, including conservation of marine living resources and of wildlife; and

(d) offshore and underwater infrastructure;

“Removal” means any form of prevention, mitigation or elimination of the hazard created by a wreck. “Remove”, “removed” and “removing” shall be construed accordingly;

“Republic” means the Republic of South Africa;

“Salvor” mean any person rendering services in direct connection with salvage operations.

“Secretary-General” means the Secretary-General of the Organization.

“Ship” means a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources;

“South African ship” means a ship registered in the Republic in terms of the Merchant Shipping Act 57 of 1951, or a ship entitled to fly South African flag;

“State of the ship’s registry” means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly;

“State Party” means a State which is a Party to the Convention;

“Wreck”, following upon a maritime casualty, means:

(a) a sunken or stranded ship; or

(b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or

(c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or

(d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

Scope of application of this Act and interpretation of the Convention

2. (1) Except as otherwise provided in this Act, this Act shall apply to wrecks in the Convention area and to South African ships wherever they are. **“Convention area”** means the internal waters, territorial sea and the exclusive economic zone of the Republic of South Africa established in terms of section 7 of the Maritime Zones Act 15 of 1994.

(2) The Convention shall, subject to the provisions of this Act, have the force of law and apply in the Republic.

(3) In the case of any conflict between the English, isiZulu and Afrikaans texts of this Act the English text shall be decisive.

Exclusions

3. (1) This Act shall not apply to—

(a) measures taken under the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, as amended, or the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, as amended; and

(b) any warship or other ship owned or operated by the Republic and used, for the time being, only on Government non-commercial service, unless the Republic decides otherwise.

(2) The following provisions of this Act shall not apply in the internal waters and territorial sea of the Republic:

(a) Section 8 (1) (a) and (c), (6) (a), (8) (a) and (10)

Reporting wrecks

4. (1) The master and the operator of a South African ship must report—

(a) to the Affected State, without delay, when that ship has been involved in a maritime casualty resulting in a wreck.

(b) to the extent that the reporting obligation under paragraph (a) has been fulfilled either by the master or the operator of the ship, the other shall not be obliged to report.

(2) The master and the operator of a ship that has been involved in a merchant casualty resulting in a wreck within the area defined under section 2 (1) shall:

(a) without delay and by the quickest means of communication available, report to the Authority when the ship has been involved in a maritime casualty, resulting in a wreck.

(3) The reports mentioned in subsection (1) and (2) shall provide the name and the principal place of business of the registered owner and all the relevant information necessary for the Authority to determine whether the wreck poses a hazard in accordance with section 5, including:

(a) the precise location of the wreck;

(b) the type, size and construction of the wreck;

(c) the nature of the damage to, and the condition of, the wreck;

(d) the nature and quantity of the cargo, in particular any hazardous and noxious substances; and

(e) the amount and types of oil, including bunker oil and lubricating oil, on board.

(4) If the master and the operator of any ship fail to comply with the provision of subsections (1) (a), (2) and (3) shall be guilty of an offence.

Determination of hazard

5. When determining whether a wreck poses a hazard the Authority shall take into account the following criteria:

- (a) the type, size and construction of the wreck;
- (b) depth of the water in the area;
- (c) tidal range and currents in the area;
- (d) particularly sensitive sea areas identified and, as appropriate, designated in accordance with guidelines adopted by the Organization, or a clearly defined area of the exclusive economic zone where special mandatory measures have been adopted pursuant to article 211, paragraph 6, of the United Nations Convention on the Law of the Sea, 1982;
- (e) proximity of shipping routes or established traffic lanes;
- (f) traffic density and frequency;
- (g) type of traffic;
- (h) nature and quantity of the wreck's cargo, the amount and types of oil (such as bunker oil and lubricating oil) on board the wreck and, in particular, the damage likely to result should the cargo or oil be released into the marine environment;
- (i) vulnerability of port facilities;
- (j) prevailing meteorological and hydrographical conditions;
- (k) submarine topography of the area;
- (l) height of the wreck above or below the surface of the water at lowest astronomical tide;
- (m) acoustic and magnetic profiles of the wreck;
- (n) proximity of offshore installations, pipelines, telecommunications cables and similar structures; and
- (o) any other circumstances that might necessitate the removal of the wreck.

Locating wrecks

6. (1) The Authority upon becoming aware of a wreck, shall use all relevant publications, including Government Gazette, marine notice, the website of the Authority and Lloyd's publication to warn mariners and the States concerned of the nature and location of the wreck as a matter of urgency.

(2) If the Authority has a reason to believe that a wreck poses a hazard in the Convention area it shall:

(a) Appoint the South African Navy Hydrographic Office or other competent person to establish the precise location of the wreck.

(b) Designate its officer to monitor the operation of locating the wreck.

Marking of wrecks

7. (1) If the Authority determines that a wreck constitutes a hazard in terms of section 5 it shall:

(a) Appoint the South African Navy Hydrographic Office or other competent person—

(i) to mark the wreck;

(ii) in marking the wreck, to take all practicable steps to ensure that the markings conform to the internationally accepted system of buoyage in use in the area where the wreck is located.

(b) designate its officer to monitor the operation of marking the wreck.

(2) The Authority shall promulgate the particulars of the marking of the wreck by use of all applicable means, including the appropriate nautical publications, Government Gazette, marine notice, the website of the Authority and Lloyd's publication to warn mariners and the States concerned of the nature and location of the wreck as a matter of urgency.

Measures to facilitate the removal of wrecks

- 8.** (1) If the Authority determines that a wreck constitutes a hazard, the Authority shall immediately—
- (a) inform the State of the ship's registry.
 - (b) require the registered owner of a ship to provide the evidence of insurance or other financial security as mentioned in section 13.
 - (c) proceed to consult the State of the ship's registry, registered owner of the ship and other States affected by the wreck regarding measures to be taken in relation to the wreck.
- (2) The registered owner of the ship shall remove the wreck determined to constitute a hazard.
- (3) The Authority may direct the registered owner of a ship in writing to remove such wreck to a reasonable place specified by the Authority or to perform reasonable acts in respect of such wreck as may be specified by the Authority.
- (4) The contact details provided by the master or operator of the ship in accordance with section 4 shall be deemed to be valid contact details of the registered owner of the ship. All notices sent under subsections (3) and (7) to such contact details shall be deemed to be received by the registered owner.
- (5) Subject to the national laws of the Republic, the registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the registered owner of the ship. Before such removal commences, the Authority may lay down reasonable proportional conditions for such removal to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment.
- (6) (a) When the removal referred to in subsections (2) and (5) has commenced, the Authority may intervene in the removal of the wreck to ensure that the removal proceeds effectively and in a manner that is consistent with considerations of safety and protection of the marine environment.

(b) When the removal referred to in subsections (2) and (5) takes place in the internal waters and territorial sea of the Republic the Authority may intervene at any time in the removal of the wreck to ensure that such removal proceeds effectively and in a manner that is consistent with considerations of safety and protection of the marine environment

(7) The Authority shall—

(a) set a reasonable deadline within which the registered owner of the ship must remove the wreck, taking into account the nature of the hazard determined in accordance with section 5;

(b) inform the registered owner of the ship in writing—

(i) of the deadline it has set and specify that, if the registered owner does not remove the wreck within that deadline, it may remove the wreck at the registered owner's expense; or

(ii) that it intends to intervene immediately in circumstances where the hazard becomes particularly severe.

(8) (a) If the registered owner of the ship fails to remove the wreck within the time specified in subsection (7) the Authority shall remove the wreck by the most practicable and expeditious means available, consistent with considerations of safety of navigation and protection of marine environment.

(b) If the registered owner of the ship fails to remove the wreck in the internal waters or territorial sea of the Republic within the time specified in subsection (7) the Authority shall remove the wreck at any time and in a manner that it deems fit.

(9) The Authority, notwithstanding the provisions of subsection (8), may cause any wreck to be removed if it has not been able to contact the registered owner of the ship.

(10) In circumstances where immediate action of removing the wreck is required, the Authority shall—

(a) inform the State of the ship's registry and the registered owner of the ship accordingly.

(b) contract with any salvor or other person to remove the wreck by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment.

(c) If the registered owner of a ship fails to comply with the provisions of subsections (1) (b), (2) and (8) shall be guilty of an offence.

Liability of the owner

9. (1) Subject to section 11, the registered owner of the ship shall be liable for the costs of locating, marking and removing the wreck under section 6, 7 and 8, respectively, unless the registered owner of the ship proves that the maritime casualty that caused the wreck—

(a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;

(b) was wholly caused by:

(i) An act or omission done with intent to cause damage by a third party; or

(ii) The negligence or other wrongful act of the Port Authority of South Africa responsible for the maintenance of lights or other navigational aids in the exercise of that function.

(2) Nothing in this Act shall affect the right of the registered owner of the ship to limit liability under section 11.

(3) Nothing in this section shall prejudice any right of recourse against third parties.

Remedies of the Authority

10 (1) Subject to subsection 9 (1) if the Authority incurs any expenses in connection with the exercise of any power in terms of section 8 (8), (9) or (10), it may recover such expenses from the registered owner of the ship or, in the case of an abandoned wreck, from the person who was the registered

owner of that ship at the time of the abandonment or their insurer or providers of financial guarantee.

(2) If the Authority fails to recover its full expenses mentioned in subsection 9 (2) it may—

(a) sell any wreck in respect of which any power has been exercised in terms of section 8 (8), (9) or (10) and apply the proceeds for the sale towards the payment of any expenses incurred in connection with the exercise of such power.

(b) cause any such wreck to be detained until security to the satisfaction of the Authority has been given for the payment of such expenses.

(3) If any wreck is sold in terms of subsection 9 (3) and the proceeds of the sale exceed the amount of the expenses referred to in that subsection, the surplus shall be paid to the registered owner of the ship after deducting therefrom the amount of any duty payable in respect of such wreck in terms of the Customs and Excise Act 91 of 1964.

(4) The Authority or any other person acting under its authority shall not be liable for any loss or damage caused to any party which might have arisen from the exercise of powers in terms of the provisions of this section.

Limitation of liability

11 (1) The registered owners of a ship may limit his liability in accordance with the provisions of this section for claims set out in subsection (6).

(2) If any claims set out in subsection (6) are made against any person for whose act, neglect or default the registered owners of a ship is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this section.

(3) In this section the liability of registered owners of a ship shall include liability in an action brought against the ship itself.

(4) An insurer of liability for claims subject to limitation in accordance with the provisions of this section shall be entitled to the benefits of this section to the same extent as the assured himself.

(5) The act of invoking limitation of liability shall not constitute an admission of liability.

(6) Subject to subsections (8) and (9) the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) claims in respect of the section 6, 7 and 8;

(b) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this section, and further loss caused by such measures.

(7) Claims set out in subsection (6) shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under subsection 6 (a) and (b) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

(8) A registered owner of a ship liable shall not be entitled to limit his liability if it is proved that the marine casualty leading to a wreck resulted from his personal act or omission, committed with the intent to cause such wreck, or recklessly and with knowledge that such wreck would probably result.

(9) Where a person entitled to limitation of liability under the provisions of this section has a claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this section shall only apply to the balance, if any.

(10) The limits of liability for claims arising out of sections 6, 7 and 8 shall be calculated as follows:

(i) 1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,

(ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):

for each ton from 2,001 to 30,000 tons, 400 Units of Account:

for each ton from 30,001 to 70,000 tons, 300 Units of Account; and

for each ton in excess of 70,000 tons, 200 Units of Account.

(11) For the purpose of this section the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Merchant Shipping Act (Act 57 of 1951).

(12) The Unit of Account referred to in subsection (10) is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in subsection (10) shall be converted into the national currency of the Republic in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of the Republic is equivalent to such payment. The value of a national currency in terms of the Special Drawing Right, of the Republic which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions.

(13) The Republic provides that, where an action is brought in its Courts to enforce a claim subject to limitation, the registered owner of a ship liable under section 6, 7 and 8 may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this section or is constituted when the right to limit liability is invoked.

(14) The registered owner of a ship alleged to be liable may constitute a fund with the Court in the Republic in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in subsection (10) as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

(15) A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the Republic where the fund is constituted and considered to be adequate by the Court.

(16) Subject to the provisions of subsection (10), the fund shall be distributed among the claimants in proportion to their established claims against the fund.

(17) If, before the fund is distributed, the registered owner of a ship liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this section.

(18) The right of subrogation provided for in subsection (17) may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

Exceptions to liability

12. (1) The owners of a ship shall not be liable under this Act for the costs mentioned in section 9 (1) if, and to the extent that, liability for such costs would be in conflict with:

(a) The International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended.

(2) To the extent that measures taken under this Act are considered to be salvage under Wreck and Salvage Act 94 of 1996, such Act shall apply to questions of the remuneration or compensation payable to salvors to the exclusion of the rules of this Act.

Compulsory insurance or other financial security

13. (1) Any ship of 300 gross tonnage and above that—

(a) enters or leaves, or attempts to enter or leaves, a port of the Republic;

(b) arrives at, or leaves, or attempts to arrive at or leave, a terminal on the internal waters of the Republic;

(c) passes through the Exclusive Economic Zone of the Republic;

must maintain insurance or other financial security, such as a guarantee of a bank or similar institution, to cover liability under this Act, in an amount at least equal to the limits of liability calculated in accordance with section 11.

(2) The Authority may maintain records of all certificates issued by it in an electronic format, accessible to all State Parties, attesting the existence of the certificate and enabling State Parties to discharge their obligations.

Issuing of insurance or other financial security certificate

14. (1) The Minister authorizes the Authority to issue the certificate referred to in subsection (2) and (4).

(2) The registered owner of a South African ship shall apply to the Authority for the issue of a certificate attesting that an adequate insurance or other financial security is maintained for the ship in accordance with section 13 of this Act.

(3) In relation to each application under subsection (2), the Authority must—

(a) if it is satisfied that the registered owner of the ship is maintaining insurance or other financial security for the ship in an amount that will cover the limits of liability prescribed by section 11 in relation to the ship, issue to the applicant an insurance or other financial security certificate for the ship;
or

(b) if it is not so satisfied, refuse to issue an insurance certificate for the ship.

(4) The owner of the ship not registered in a State Party may apply to the Authority for the issue of a certificate attesting that an adequate insurance or other financial security is maintained for the ship in accordance with section 13 of this Act.

(5) The applications referred to in subsections (2) and (4) must be made in the form and manner include the information and be accompanied by the documents specified by the Authority respectively.

(6) In relation to each application under subsection (4), the Authority may—

(a) verify all the information and documents submitted to it.

(b) require the applicant to forward any other information or documents it deems necessary.

(c) at any time, request consultation with the insurer or guarantor named in the relevant documents, if it has a reason to believe that the named insurer or guarantor is not financially capable to meet the obligations imposed by this Act.

(d) if it is satisfied that the registered owner of the ship is maintaining insurance or other financial security for the ship in an amount that will cover the limits of liability prescribed by section 11 in relation to the ship, issue to the applicant an insurance or other financial security certificate for the ship.

(e) if it is not so satisfied, refuse to issue an insurance certificate for the ship.

(7) An insurance certificate issued under this section must be in accordance with the Annex of the Convention and contain the following particulars:

(a) Name of the ship, distinctive number or letters and port of registry;

(b) Gross tonnage of the ship;

(c) Name and principal place of business of the registered owner;

(d) IMO ship identification number;

(e) Type and duration of security;

(f) Name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and

(g) Period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

(8) The certificate issued shall be in English language.

(9) The certificate issued by the Authority comes into force on the day stated in the certificate and, subject to subsection 10, remains in force until the expiration of the day stated in that certificate.

(10) The Authority shall withdraw certificates issued under this section at anytime if the conditions under which they have been issued are not maintained. In all cases the Authority shall, if it had notified the Secretary-General that it maintained record in an electronic format attesting the existence of the certificate, report such withdrawal to the Secretary-General.

(11) The Authority shall keep a copy of the certificate issued under subsections (3) (a) and (6) (d).

(12) An insurance or other financial security shall not satisfy the requirements of this section if:

(a) It ceases for any other reason, except the expiry of the period of validity of the insurance or security specified in the certificate under subsection (7) (g), before three months have elapsed from the date of which notice of its termination is given to the Authority or a new certificate has been issued within the said period.

(b) Subsection (12) shall similarly apply to any modification, which results in the insurance or security no longer satisfying the requirements of this section.

(13) The Authority shall, subject to the provisions of this section, determine the conditions of issue and validity of the certificate.

(14) Nothing in this Act shall be construed as preventing the Authority from relying on information obtained from other States or the Organization or other international organizations relating to the financial standing of providers of insurance or financial security for the purposes of this Act. In such cases, the Authority relying on such information is not relieved of its responsibility as the Authority issuing the certificate required by section 14.

(15) The Authority shall accept the certificates issued under the authority of the State Party for the purpose of this Act and shall have the same force and effect as certificates issued by the Authority, even if issued in respect of a ship not registered in a State Party.

(16) (a) Any claim for costs arising under this Act may be brought directly against the insurer or other person providing financial security for the registered owner's liability. In such a case the defendant may invoke the defenses (other than the bankruptcy or winding up of the registered owner) that the registered owner of a ship would have been entitled to invoke, including limitation of liability under section 11.

(b) Even if the registered owner of a ship is not entitled to limit liability, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with section 13.

(c) The defendant may invoke the defense that the maritime casualty was caused by the willful misconduct of the registered owner of the ship, but the defendant may not invoke any other defense which the defendant might have been entitled to invoke in proceedings brought by the registered owner of a ship against the defendant.

(d) The defendant shall in any event have the right to require the registered owner of a ship to be joined in the proceedings.

(17) If insurance or other financial security is not maintained in respect of a ship owned by the Republic, the provisions of section 13 relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the Authority, stating that it is owned by the Republic and that the ship's liability is covered within the limits prescribed in section 11. Such a certificate shall follow as closely as possible the model prescribed by section 14 (7).

Certificate to be carried on board

15. (1) Any ship of 300 gross tonnage and above that—

(a) enters or leaves, or attempts to enter or leave, a port of the Republic;

(b) arrives at, or leaves, or attempts to arrive at or leave, a terminal in the internal waters or territorial sea of the Republic; or

(c) passes through the Exclusive Economic Zone of the Republic

unless a State Party under whose authority that ship was certified in accordance with the Convention has notified the Secretary-General that it maintains records in an electronic format, accessible to all State Parties, attesting the existence of the certificate and enabling the Authority to discharge its obligation under this Act, to require the master or other person in charge of a ship to produce insurance certificate or other financial security in force for the ship.

Survey of ships

16. (1) Subject to the provisions of this Act, proper officer may inspect any South African ship of 300 gross tonnage and above wherever it may be or any ship of 300 gross tonnage and above while is within the internal waters or offshore terminals of the Republic, for the purpose of ascertaining whether it possesses a relevant certificate or other financial security in force for the ship.

(2) If the master or other person in charge of a ship fails or refuses to produce relevant insurance certificate or other financial security in force for that ship or has no record in an electronic format accessible to the Authority attesting the existence of such certificate as required by the Act, the proper officer may detain that ship until such a certificate or other financial security is obtained or produced to the proper officer.

Extension, cancellation and lapsing of insurance or other financial security certificate

17. (1) If—

(a) an insurance or other financial security certificate that has been issued for a ship under section 14 expires or is about to expire; and

(b) the Authority is satisfied that, after the day stated in the certificate, there will be in force a contract of insurance or other financial security for the ship in an amount that will cover the minimum limits of liability prescribed by section 11 in relation to the ship,

the Authority may extend the certificate for a period during which that contract of insurance or other financial security is to remain in force, being a period that does not exceed one month from the day of extension.

(2) The Authority may cancel a certificate issued under section 14 if it is satisfied that, because of any modification or variation of, or to, the contract of insurance or other financial security for the ship, the owner of the ship will not be covered for his liability under this Act in an amount that is not less than the limits of liability prescribed by section 10 in relation to the ship.

(3) If, while a certificate issued under—

(a) section 14 (3) (a) for a South African ship is in force, the ship ceases to be a South African ship as the case may be, the certificate so issued thereupon automatically ceases to be in force.

(4) If an insurance certificate issued under section 14 (3) (a) or (6) (d) is cancelled under subsection (2) or ceases to be in force in terms of subsection (3), the Authority shall report such cancellation or cessation to the Secretary-General.

Detained ships

18. (1) If a ship is detained under section 16 (2), the Authority may—

(a) direct the master or the operator of the ship to move the ship to a reasonable stated place; or

(b) acting with any necessary help or force, escort the ship to another place.

(2) The master or operator of a ship commits an offence if, given a direction under subsection (1) (a) by the Authority, without reasonable excuse, fails or refuses to comply with the direction.

(3) If a ship detained at a port under section 16 (2) leaves the port before it has been released from detention, the master and the registered owner of the ship each commits an offence.

Time limit

19. (1) Rights to recover costs under this Act shall be extinguished unless an action is brought hereunder within three years from the date when the hazard has been determined in accordance with this Act.

(2) No action shall be brought after six years from the date of the maritime casualty that resulted in the wreck. Where the maritime casualty consists of a series of occurrences, the six-year period shall run from the date of the first occurrence.

Regulations

20. (1) The Minister may make regulations to prescribe any matter which in terms of this Act may be prescribed or which may be necessary or expedient to prescribe in order to achieve or promote the objects of this Act.

Offences and penalties

21. Any person who contravenes or fails to comply with the provisions of sections 4 (1) (a), (2) (a), 8 (1) (b), (2), (7), 13 (1), 15 (1), 16 (2) or 18 (2), shall on conviction be liable—

(a) in the case of an offence mentioned in sections 4 (1) (a), (2) (a), 15 (1), 16 (2) or 18 (2) shall be liable to a fine not exceeding R 50 000; and

(b) in the case of an offence mentioned in sections 8 (1) (b), (2), (7) or 13 (1) shall be liable to a fine not exceeding R 90 000.

Repeal and amendment

22. Section 18 of the Wreck and Salvage Act, 1996 (Act 94 of 1996) is hereby repealed.

Short title and commencement

23. (1) This Act shall be called the Removal of Wrecks Act, 2008 (Act No.xxx of 2008).

(2) This Act comes into force on the date fixed by the President by proclamation in the Gazette.