'MESSING AROUND IN BOATS'\textsuperscript{1} - SAFE MANAGEMENT OF SOUTH AFRICAN PLEASURE VESSELS

A REVIEW OF THE SOUTH AFRICAN SHIPPING LEGISLATION APPLICABLE TO SMALL PLEASURE VESSELS OPERATING AT SEA AND THE APPLICATION OF THIS REGIME TO SOUTH AFRICA’S INLAND BOATERS

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Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the M. Phil (Shipping Law) in approved courses and a minor dissertation/research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of M. Phil (Shipping Law) dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

\textsuperscript{1} Kenneth Grahame The Wind in the Willows
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The Merchant Shipping (National Small Vessels Safety) Regulation ... clearly enhances the safety of small vessels and ought to be widely observed by the many small vessel owners that put to sea from South African shores.\textsuperscript{2}

Belinda and Jack, my family, thank you for the time away from home that you have allowed and given to complete these studies which I have thoroughly enjoyed; and also to the Professors and other staff for all your assistance.

\textsuperscript{2} Hilton Staniland 'Admiralty Law' 2008 Annual Survey of South African Law 55.
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CHAPTER 1 INTRODUCTION

South Africans have long enjoyed recreational activities and especially boating on our waters.3 South Africa is not blessed with 'navigable' rivers and waterways that give access to our interior regions for commercial shipping and boating via rivers and canals.4 Boating on South African inland waters has essentially been restricted to smaller pleasure boats and tourism ventures, which have mostly evolved around our major state owned dams that have been constructed to store water for agriculture and human consumption.5

Shipping is controlled by numerous pieces of legislation, but principal control over ship safety is via the Merchant Shipping Act 57 of 1951. Regulation of recreational boating is long-standing, but has been topical since the mid-1970s when concern over the loss of life suffered by boaters lead to a formal enquiry into its safety.6 Numerous efforts have been initiated to control recreational boating safety since then. These efforts have focused on the principle that boating is not seen as a method of public transportation, but merely as a sporting activity. The level of commitment to its regulation is accordingly less focussed than if pleasure boating had been considered to be a formal mode of transport.

This dissertation aims to document the evolution of the legislative regime that governs safe boating as it has been applied to seagoing boats and also the subsequent application of this regime to inland waterways. A review of the implementation and enforcement of the regime is conducted, with specific reference to the control of

3 For example, the Royal Natal Yacht Club was founded in 1858 and references to recreational sailing are found in personal diaries dating back to the 1840s. Available at http://rnyc.org.za/?page_id=143, accessed on 19 April 2013. The Duzi canoe marathon was first held in 1950. Available at http://www.dusi.co.za/history.html, accessed on 18 April 2013. The Royal Cape Yacht Club finds its history dating back to 1905. Available at http://rcyc.co.za/About-RCYC/rcyc-history, accessed on 18 April 2013.
4 East London is the only river port in South Africa. It is situated at the mouth of the Buffalo River. No penetration into our interior is made by seagoing ships when calling at this port. Available at http://www.ports.co.za/east-london.php, accessed on 22 April 2013.
5 For example, the Transvaal Yacht Club was established in 1923 in the banks of the Haartebeespoort Dam available at http://www.tyc.co.za/, accessed on 18 April 2013. River mouths and estuaries are however navigable by small seagoing boats including for example the Berg River, Bot River and Breede River (Port Beaufort which was formerly a commercial port).
6 Commission of inquiry into the control of small craft GN 1197 GG 5630 of 1 July 1977.
boating on inland waters. Lastly, certain recommendations are made to assist the successful implementation of the current boating regime.
CHAPTER 2 CURRENT LEGISLATION

I SUMMARY OF CURRENT SMALL VESSEL LEGISLATION

Pleasure boating is controlled through the same legislation that is applicable to commercial vessels operating at sea. Shipping has a longstanding history and South Africa has developed its own unique blend of admiralty law. It is thus not possible to discuss the applicability of legislation to pleasure boaters without looking at regulation of shipping generally.

(a) Outline of legislative framework.

In South Africa, regulation of shipping generally is by two principal Acts, namely: the Merchant Shipping Act 57 of 1951 (MSA) — the Act's preamble states that its purpose is to: 'provide for the control of merchant shipping and matters incidental thereto'; and the Ship Registration Act 58 of 1998 (SRA) — which 'provides anew for the registration in the Republic….'

Control of ships by the MSA is first through the determination of their ownership, secondly through inspection (or survey) for compliance with regulated safety, construction and operational standards and thirdly through the detention of ships that are not compliant. Standards for safety, construction and operations are laid out in regulations made by the Minister of Transport.

Unseaworthy ships are not permitted to operate in South Africa and owners are legally required to 'use all reasonable means...' ensure that their ships are seaworthy. Seaworthiness is a test of the vessels ability 'to encounter the ordinary

7 A full description of the developments and history of admiralty law in South Africa is conducted by Hare in *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) ch 1.
8 Preamble to Act 57 of 1951.
9 Preamble to Act 58 of 1998.
10 Ownership of ships can be determined through registration, licencing or marking. Registration of ships is currently enabled by the SRA.
11 MSA s 190.
12 Ibid s 8. A general obligation is placed on officials (proper officer) to act as necessary if they suspect noncompliance by any ship in South African waters in order 'to ensure compliance with the said provisions.' Specific actions related to the inspection of ships that are suspected of submerging their loadlines are prescribed in MSA s 214 and 220.
13 Ibid s 243.
14 Ibid s 356.
15 Ibid s 240-1.
perils of the voyage upon which she is engaged or about to enter. Part of the test would be statutory compliance with regulated requirements and the remaining tests would be found in common law. Determining the ownership and contemplated operation or employment for the vessel is thus crucial to enforcing safety (seaworthiness). Three broad categories of determining ownership and operation are envisaged in the MSA, namely: registration, licensing and marking.

All three methods named above require ships to be inspected to establish if they comply with the legislative requirements. Registered and licensed ships require statutory surveys prior to the first issue of safety certification and also periodically thereafter. Marked boats are subject to initial and annual inspection to ensure compliance with the standards. Ad hoc inspection of ships is required when allegations of unseaworthiness are made against a particular ship. Inspections may also be conducted when noncompliance is suspected. The MSA requires non-compliant and thus unseaworthy ships to be detained. Ships are detained in accordance with the procedure in sec 335. Delinquent ships are ultimately liable to seizure and forfeiture under the MSA.

(b) Definition of ‘ship’

A 'ship' is defined many times in South African legislation including: ‘any kind of vessel used in navigation by water, however propelled or moved,…’; ‘any type of vessel used in navigation by water,…’; ‘ship’ and ‘vessel’ have the same meaning in the MSA.

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16 Definition of ‘unseaworthy' MSA s2.
17 Hare op cit note 7 at 318.
18 Requirements for registration found in the SRA.
19 ‘Licencing’ is required for unregistered ships other than those of less than 100 gross tons that are used solely for sport or recreation. MSA s 68.
20 ‘Marking’ is required for unregistered ships used solely for sport or recreation that are less than 100 gross tons; and either propelled by engines of greater than 15 horse power or rigged as sailing vessels and longer than nine meters in length. Marked ships are regulated through Part 4 of the Merchant Shipping (National Small Vessel Safety) Regulations 2007 GN 705 GG 30151 of 8 August 2007.
21 Ibid MSA s 190 and s 197.
23 Ibid MSA s 223.
24 Ibid MSA s 245.
25 Ibid MSA s 243 and s 223.
26 The prescribed forms used to detain a ship are found in '[t]he forms regulations relating to safety, detention and forfeiture of ships, 1968' GN 175 GG 1978 of 9 February 1968.
27 Ibid s 334-7.
28 MSA s 2. 'Ship' and 'vessel' have the same meaning in the MSA.
vessel capable of navigation by water...'; 29 'any vessel used or capable of being used on the sea or internal waters ... whether self-propelled or not'; 30 and 'a waterborne craft or structure of any type ..., but does not include a vessel propelled by oars'. 31

No distinction is made in these definitions regarding the nature of the vessel’s operations, i.e. whether commercial or recreational in nature. Differentiation between commercial and recreational operations is made by the regulations that define the safety, construction and operational standards for ships. 32

Section 2 of the MSA defines 'small vessel' to be those ships that are 'of less than twenty-five gross tons' 33 and of more than three meters in length. 'Small vessel[s]' can be operated as either commercial or pleasure vessels. Ships of normal dimensions having a length of approximately 14 meters usually fall within the twenty-five gross tons limit, and this is commonly used as a controlling length. 34 Small vessels of less than three meters in length are prohibited from operating at sea, unless used in areas designated by the local authority and within a limit of 1000 meters from the shore. 35

Pleasure boats, 36 commercial seagoing vessels of less than 25 gross tons and all vessels operating on inland waters are commonly called 'small vessel[s]' even

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29 SRA.
30 Admiralty Jurisdiction Regulation Act 105 of 1983.
32 For example the Merchant Shipping (Safe Manning) Regulations 1999 GN 1548 GG 20772 of 30 December 1999 do not apply to the following vessel types: any vessels of less than 25 gross tons; and any vessel of less than 100 gross tons that is used solely for sport or recreation; and any vessel of greater than 100 gross tons that is used solely for sport or recreation if an 'adequate number' of people are employed on the vessel.
33 'Gross ton' is a unit of measure of the volumetric capacity of ships: .... The method for calculation of a vessel’s gross tonnage is prescribed by the International Convention on Tonnage Measurement of Ships, 1969 which entered into force on 18 July 1982. South Africa is signatory to the convention and has ratified the requirements by publishing the Tonnage Regulations 1986 GN 3960 GG 10267 of 6 June 1986. This measure finds its history in the measurement of the size of merchant ships. George Moorsom of the British board of trade devised the first method for calculating tonnage in 1854. Available at http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Tonnage-Measurement-of-Ships.aspx, accessed on 30 April 2013.
34 The formula for calculating gross tons is shown below. The length of vessel equal to 14 meters and typical proportionate dimensions for breadth (4.5 m), depth (1.6m) and height of accommodation (2.5 m) are assumed.

\[
GT = K_v V = 0.25 \left( (14 \times 4.5 \times 1.6 \times 0.6) + (4.5 \times 2.5 \times 3.5) \right) = 24.963
\]
35 MSA s 72A and Merchant Shipping (National Small Vessel Safety) Regulations GN 705 GG 30151 of 8 August 2007 reg 8(4).
36 The term ‘boat’ is not defined in the MSA. The term will be used in this dissertation to refer to ships of less than 100 gross tons used solely for sport or recreation.
though they may be greater than the 25 gross ton limitation. The reason why the term 'small vessel' is commonly used to describe vessels that do confirm to the statutory definition is due to them sharing the same set of regulations that govern their safe operation.\(^{37}\)

Pleasure vessels of greater than 25 gross tons are classified as 'class XII' in terms of the Life Saving Equipment Regulations.\(^{38}\) The overlap between the Life Saving Equipment Regulations and the Merchant Shipping (National Small Vessel Safety) Regulations 2007 is an omission that has not been corrected. The current interpretation by SAMSA is that 'class XII', as defined in the Life Saving Equipment Regulations, applies to pleasure vessels of greater than 100 gross tons.

\(c\) **Scope of application of MSA**

The MSA applies to all vessels registered or licenced (or required to be registered or licenced) in the Republic;\(^ {39}\) and also to those pleasure boats which are specifically not required to be registered or licenced.\(^ {40}\) The Act binds the state, but does not apply to ships 'belonging to the defence forces of the Republic....'\(^ {41}\) Foreign ships, except warships, must comply with certain provisions of the Act while inside the internal waters and territorial waters of the Republic.\(^ {42}\)

\(d\) **Administration**

The South African Maritime Safety Authority (SAMSA) was established in 2008 by sec 2 of the South African Maritime Safety Authority Act 5 of 1998 (SAMSA Act). The duties of SAMSA include the administration of 'laws... and any applicable regulations...' that govern safe shipping in South Africa.\(^ {43}\) These duties include the appointment of surveyors to conduct inspections in terms of the MSA and its regulations. Surveyors may be 'any qualified person whom [SAMSA] deems fit to

\(^ {38}\) GN 141 GG 1970 of 2 February 1968, as amended.
\(^ {39}\) Ibid s 3(4).
\(^ {40}\) Ibid 3(7). Exemption from licencing is enjoyed by unregistered boats used solely for sport or recreation in terms of MSA sec 68(3)(b).
\(^ {41}\) Ibid s 3(6).
\(^ {42}\) Ibid s 3(5).
\(^ {43}\) SAMSA Act s 4(a).
act as such for the purposes.... The SAMSA Act requires that '[t]he necessary staff must be employed by [SAMSA] under a contract of employment.'

SAMSA's head office is located in Pretoria and it has established offices in all the commercial ports that are controlled by Transnet. The offices at the coast are managed by 'principal officers.' The MSA requires certain functions and responsibilities to be performed by a 'proper officer'. The definition of 'proper officer' at sec 2 of the MSA designates the 'principal officer' at a SAMSA office to be the 'proper officer' within the Republic.

In the unlikely event of no principal officer being appointed by SAMSA the controller of customs or excise is designated to the position. Various designations are made for the position of proper officer at places outside the Republic, including the career consular or diplomatic representative of the Republic (or a treaty country), or a foreign maritime authority that fulfils a similar function in a treaty country and to the extreme any master of a South African ship that is specifically appointed.

(e) Scope of application of Merchant Shipping (National Small Vessel Safety) Regulations

The Merchant Shipping (National Small Vessel Safety) Regulations 2007 contain the statutory safety controls applicable to certain vessels operating at sea and on inland waters. The regulations are applicable to all vessels being operated on inland waters. The construction and safety requirements for pleasure boats of less than 100 gross tons and commercial vessels of less than 25 gross tons operating at sea are controlled through these regulations. The regulations do not apply to tenders.

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44 MSA s 4(b).
45 SAMSA Act s 27(1).
46 SAMSA has established offices at Port Nolloth, Saldanha Bay, Cape Town, Mossel Bay, Port Elizabeth, Ngqura, East London, Durban and Richards Bay.
47 'Principal officer' is defined at sec 2 of the MSA as 'the officer in charge of the office of [SAMSA] at a port.'
48 MSA s 2 Definition of proper officer.
50 There are no limitations concerning the size of vessels operating on inland waters for either commercial or pleasure vessels.
51 Ibid reg 3(1)(a) and (c).
52 Ibid reg 3(1)(d).
53 Ibid reg 3(1)(b).
South African national ships operating within the waters of another state must, in addition, comply with local legislation applicable in that coastal state.\cite{55}

Boats must be inspected for compliance by surveyors or safety officers.\cite{56} Compliant boats are issued with a certificate of fitness. Safety officers are members of the authorised agencies that are appointed to conduct inspections of boats that belong to members and issue certificates of fitness to complaint boats.\cite{57} Small vessel surveyors are appointed by SAMSA to conduct surveys of boats and issue certificates of fitness as required.\cite{58}

Registered and licenced small vessels must be issued with a local general safety certificate.\cite{59} These regulations prescribe certain standards for construction and requirements for safety equipment and skipper certification. Registered small vessels are required to be issued with local general safety certificate before operating at sea or in a port.\cite{60} South Africa applies these regulations to foreign commercial ships of less than 25 gross tons when plying regularly between South African ports.\cite{61}

(i) Application to foreign small vessels

Foreign vessels used for sport or recreation that are visiting South Africa are subject to the international rules for innocent passage.\cite{62} Permission must be given should these foreign vessels wish to interrupt their innocent passage to practice their sport or recreational activities. Written permission to engage in 'normal activities' and to enter our internal waters must be given in terms of the Marine Traffic Act 2 of 1981.\cite{63} SAMSA marine notice 13 of 2005 details the method of compliance for foreign pleasure boats and states that a 'certificate of fitness' should be issued to

\begin{itemize}
  \item {\footnotesize ‘Tender’ is defined as being a ‘vessel not exceeding four meters in overall length that is used solely in sheltered waters for conveyance of persons or stores from shore to a vessel, or vice versa, or from one vessel to another vessel without financial gain or reward.’}
  \item \cite{55} Ibid reg 3(3).
  \item \cite{56} Ibid reg 23-5.
  \item \cite{57} Ibid reg 30(4)(a).
  \item \cite{58} MSA s 4(b).
  \item \cite{59} MSA s 68.
  \item \cite{60} MSA s 200 (1)(d).
  \item \cite{61} MSA sec 203(8).
  \item \cite{62} GN 282 GG 7408 of 13 February 1981.
\end{itemize}
foreign pleasure boats that wish to operate along our coast.\textsuperscript{64} Strict compliance with South African boating safety legislation is not required for visiting pleasure boats, the boats must simply comply with a ‘reasonable standard of safety.’\textsuperscript{65} Certificates of fitness issued to visiting pleasure boats can give permission to operate within our internal waters and/or stop in South African territorial waters to engage in ‘normal activities.’ These certificates must state that they are issued in terms of reg 3(f) of the Marine Traffic Regulations, 1985.\textsuperscript{66}

II APPLICATION OF THE MSA TO 'INLAND WATERS'

On 14 March 2008, the scope of the MSA’s application was extended to dams and inland waters of South Africa.\textsuperscript{67} This made the current safety regime for sea going boaters applicable to the inland waters of South Africa that are capable of being navigated by boats. The declaration defines ‘inland waters’\textsuperscript{68} and ‘declared inland waters’\textsuperscript{69}, the difference being that ‘declared inland waters’ excludes those ‘inland waters’ that are never capable of supporting navigation or are closed to the public.

(a) Administration of the MSA on declared inland waters

The declaration that details the ‘exemptions, modifications and restrictions’ of certain sections the Act which apply to ‘declared inland waters.’ The major alterations made include the substitution of references to ships operating at ‘sea’ with operations on ‘declared inland waters’.\textsuperscript{70} No omissions or alterations were made to the powers of authority or administration of the MSA.\textsuperscript{71} SAMSA remains responsible for the administration of the MSA, as is does for sea going ships. Control of ownership of

\textsuperscript{64} Certificates of fitness are issued in terms of the Merchant Shipping (National Small Vessel Safety) Regulations Reg 24.
\textsuperscript{65} SAMSA Marine Notice 13 of 2005 para 5.
\textsuperscript{66} GN 194 GG 9575 of 1 February 1985.
\textsuperscript{67} GNR 298 GG 30869 of 14 March 2008 declared the MSA to be applicable to South African inland waterways, as allowed by sec 3(9) of the Act.
\textsuperscript{68} ‘Inland waters’ is defined as ‘the waters of any dam, lagoon, lake, river or wetland, but does not include a tidal lagoon or tidal river...’
\textsuperscript{69} ‘Declared inland waters’ means ‘all inland waters in the Republic that are – (a) from time to time capable of navigation; and (b) open to or used by the public for navigation, whether on payment of a fee or otherwise.’
\textsuperscript{70} Ibid para 3.
\textsuperscript{71} MSA s 4-9.
ships through licencing is retained as for sea going ships.72 No limitation on the minimum size of vessel used on inland waters is prescribed.73

Entire parts that are specific to certain operations at sea have been omitted.

(b) Competency and Manning

Chapter III of the MSA allows for the certification of officers and allows for the issue of certificates of competency to successful candidates. Major omissions include the requirements related to the application of foreign crewing standards and certification for ships on declared inland waters.74 The exemption from the prescribed manning requirements that is allowed for ships built 'before the coming into operation of this section' by sec 74(3) is also omitted. Masters are not required to produce the crew’s competency certificates when requesting clearance, since clearance is not required.75

Chapter IV that deals with the ‘engagement, discharge, repatriation, payment, discipline[;] and general treatment of seaman, cadets and apprentice-officers’ is mostly omitted. The sections that are applicable are those related to the provision of satisfactory accommodation76 and prescribed medicines being kept on board ships.77 Sufficient crew must be employed on ships operating on declared inland waters,78 but radio operators are not required.79

(c) Ownership and safety certification

Commercial vessels operating on declared inland waters are required to be issued with a licence.80 The requirements for licencing include declaring the ownership and operation of the vessel81 and submitting the vessel to survey for compliance with the relevant regulations.82 No provision is made to issue safety convention certification83

72 Ibid s 10 and 68-72.
73 Ibid s 72A.
74 Ibid s 73(4).
75 Ibid s 86 and s 227.
76 Ibid s 161.
77 Ibid s 167.
78 Ibid s 221(1).
79 Ibid s 222 omitted.
80 Ibid s 68.
81 As required by the Merchant Shipping (Licencing of Vessels) Regulations GN 112 GG 24275 of 17 January 2003.
82 Licensed vessels are required to be issued with a Local General Safety Certificate.
and load line certification\textsuperscript{84} to ships operating on declared inland waters.\textsuperscript{85} Foreign owned non-convention ships must be issued with a local general safety certificate when operating on declared inland waters.\textsuperscript{86}

Safety certificates shall be displayed on board ships.\textsuperscript{87} Prescribed ships shall have their stability characteristics determined by an inclining experiment and retain the information on board the ship 'for the guidance of the master.'\textsuperscript{88} Signal lamps and properly working compasses must be provided where required by regulation.\textsuperscript{89}

The importance of correctly using distress signals is emphasised and persons using or displaying distress signals when no distress situation exists must pay compensation if convicted of this offence.\textsuperscript{90} The statutory requirements for conducting 'boat and fire drills' are not required for ships operating on declared inland waters.\textsuperscript{91} The international requirements for the carriage of grain and timber cargoes are omitted.\textsuperscript{92}

(d) \textit{Unseaworthy ships}

Unseaworthy ships are not permitted to operate on declared inland waters\textsuperscript{93} and unseaworthy ships must be detained.\textsuperscript{94} Owners and masters are required to report damages and alterations\textsuperscript{95} that affect the seaworthiness or efficiency of ships when operating on declared inland waters.\textsuperscript{96} Safety certification may be cancelled if remedial directions for unseaworthy ships are not complied with.\textsuperscript{97}

\begin{flushleft}
\textsuperscript{83} Ibid s 192-3 and 196. Issued in terms of the International Convention for the Safety of Life at Sea, 1974 (SOLAS) to which South Africa is a signatory.
\textsuperscript{84} Ibid s 204 to 220. Issued in terms of the International Convention on Load Lines, 1966 to wich South Africa is a signatory.
\textsuperscript{85} Ibid s 193-3, and 6, and 200, and 202.
\textsuperscript{86} Ibid s 203.
\textsuperscript{87} Ibid s 224.
\textsuperscript{88} Ibid s 226.
\textsuperscript{89} Ibid s 228-9.
\textsuperscript{90} Ibid s 232.
\textsuperscript{91} Ibid s 233.
\textsuperscript{92} Ibid s 236-7. Similar provisions are however required by regulation.
\textsuperscript{93} Ibid s 240.
\textsuperscript{94} Ibid s 243.
\textsuperscript{95} Ibid, s 239(5) 'Alterations' includes the renewal of any part of the ship's hull, equipment or machinery.
\textsuperscript{96} Ibid, s 239(1).
\textsuperscript{97} Ibid, s 239(2-4).
\end{flushleft}
Ships may also be detained following complaints of unseaworthiness that are made in writing. Security against potential claims by ship owners may be required from complainants before ships are detained prior to their inspection by SAMSA. Complainants must pay SAMSA any expenses incurred during inspections made to ships that are ultimately found to be seaworthy. SAMSA is liable for any damages suffered by a ship if it was detained without reasonable cause.

(e) Investigations and enquiries

Masters and owners are required to report certain accidents and incidents to the nearest proper officer within 24 hours of the incident or by the fastest means of communication if loss of life or serious injury has occurred. The provisions for reporting incidents involving stevedores and other incidental persons are omitted for ships operating on declared inland waters. Provisions for owners to limit their liability for the loss of life or personal injury based on the tonnage of their ships are omitted for ships operating on declared inland waters. The extension of the obligations of the owner to persons other than the owner, such as charterers etc., is preserved.

Enquiries into allegations of incompetency or misconduct by owners, masters or crew; lost, abandoned or stranded ships; and the causes of accidents or loss of life and serious injury can be conducted by SAMSA through the appointment of a competent person to hold a preliminary enquiry. Formal investigations into the above incidents can be made by a court of marine enquiry as appointed by the Minister of transport. Courts shall be constituted and have all the powers as allowed
for sea going ships.\textsuperscript{107} No provision is made for convening maritime courts outside the Republic.\textsuperscript{108}

The provisions for owners to appeal to a court of survey when dissatisfied with the report made by a surveyor regarding the condition of their ship and the option to call experts instead of a court of survey have been omitted.\textsuperscript{109} No alternative arrangements are prescribed.

\textit{(f) Contravention of the MSA}

Contravention or non-compliance by any person with the provisions of the MSA is deemed to be an offence for which prescribed penalties are provided.\textsuperscript{110} SAMSA can impose a penalty on people that admit to committing an offence and they must comply with any decisions concerning the offence.\textsuperscript{111} A right of appeal to the Minister for fines exceeding R2000 is allowed within three months of the determination. No further prosecutions are allowed after such determinations are agreed and the person admitting to the contravention is not deemed to be guilty of committing a criminal offence.

The provisions for combatting bribery and forgery are retained.\textsuperscript{112} Magistrate's courts are given jurisdiction, despite contrary provisions of other laws.\textsuperscript{113}

Ultimately ships may be subject to forfeiture when not incompliance with the MSA.\textsuperscript{114} SAMSA may take physical possession of a ship, by formal seizure, if it believes that it is beneficial to do so.\textsuperscript{115} The method used to service of documents in accordance with the MSA is stipulated in sec 342.

\textit{(g) Conduct on board ships}

Stowaways and other persons boarding or remaining on board ships operating on declared inland waters are not regulated through the provisions of the MSA.\textsuperscript{116} The

\begin{itemize}
\item [\textsuperscript{107}] Ibid s 266-9
\item [\textsuperscript{108}] Ibid s 270-3 are omitted.
\item [\textsuperscript{109}] Ibid s 274-8.
\item [\textsuperscript{110}] Ibid s 312-3.
\item [\textsuperscript{111}] Ibid s 324.
\item [\textsuperscript{112}] Ibid s 314-5.
\item [\textsuperscript{113}] Ibid s 328. Compensation for the unapproved use of distress signals and proceedings related to the forfeiture of ships are excluded.
\item [\textsuperscript{114}] Ibid s 334.
\item [\textsuperscript{115}] Ibid s 337.
\item [\textsuperscript{116}] Ibid s 317-8.
\end{itemize}
conduct of persons on board passenger ships is regulated as per seagoing ships.  

Unauthorised obstruction of the management and navigation of a ship is not allowed.  

No provision is made to allow the conveyance of deserters or the return of imprisoned seaman to ships operating on declared inland waters.  

The deduction of fines from a seaman's wages for misconduct on board ship is also omitted.

The requirement for a proper officer to conduct an inquiry into the cause of death of a crew member is limited to foreign-going ships only and is thus omitted for ships operating on declared inland waters.

Since it is not envisaged that foreign ships are allowed to operate on declared inland waters, the requirements for detention of foreign ships causing damage and the subsequent notification of their consular representative is not made applicable.

(h) Exemption of liability

The exemption of liability for loss or damage on board ships owned, operated or chartered by the State or by SAMSA is applicable to ships operating on declared inland waters.

Safety officers, representatives, appointees and committee members that are appointed on board ships operating on declared inland waters are not liable for any civil claims if they have failed to act in accordance with the MSA.

(i) Regulations

The Minister may make regulations for ships operating on declared inland waters as allowed for seagoing ships, except that regulations concerning the following topics are omitted:

- the employment of cadets or apprentice officers;
- the care of shipwrecked and distressed seaman and apprentice officers;

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117 Ibid s 319.
118 Ibid s 320.
120 Ibid s 323.
121 Ibid s 333.
122 Ibid s 339-41.
123 Ibid s 343bis.
124 Ibid s 355A.
125 Ibid s 343ter.
126 Ibid s 356(1)(xv).
127 Ibid s 356(1)(xviii).
• the employment of qualified medical practitioners on board ships;\textsuperscript{128}
• the operation of seaman's houses;\textsuperscript{129}
• the treatment and care of sick seaman;\textsuperscript{130}
• the requirements for keeping records of seaman engaged on the ship;\textsuperscript{131} and
• the period of pre-sea training for seaman and apprentice officers.\textsuperscript{132}

The Ministerial power to apply the various requirements in the safety conventions\textsuperscript{133} to ships and other circumstances not specifically envisaged by these conventions is retained for declared inland waters.\textsuperscript{134}

\section*{III REGISTRATION AND CONTROL OF SHIPPING AND BOATING}

\subsection*{(a) Ship registration in international law}

The United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982,\textsuperscript{135} requires that ships exercising their right to freedom of navigation on the high seas\textsuperscript{136} must have a nationality and they must consequently be given documents to that effect.\textsuperscript{137} The convention prescribes that states must 'fix conditions' for the granting of nationality; for the right to fly the national flag and for the registration of ships. There is only one international requirement for these conditions – being the need for a 'genuine link between the State and the ship.'\textsuperscript{138}

\subsection*{(b) Ships of South African nationality}

The Ship Registration Act 58 of 1998 defines those ships which have South African nationality to be both 'registered' and 'unregistered'\textsuperscript{139} ships.\textsuperscript{140} The requirements for

\begin{itemize}
\item \textsuperscript{128} Ibid s 356(1)(xx).
\item \textsuperscript{129} Ibid s 356(1)(xxi).
\item \textsuperscript{130} Ibid s 356(1)(xxii).
\item \textsuperscript{131} Ibid s 356(1)(xxiii).
\item \textsuperscript{132} Ibid s 356(1)(xxxvii).
\item \textsuperscript{133} Ibid s 356(2) namely: International Convention for the Safety of Life as Sea, 1974 (SOLAS); International Regulations for Preventing Collisions at Sea, 1972 (COLREGS); International Convention on Load Lines, 1966 (LL); the International Convention on Tonnage Measurement of Ships, 1969 (Tonnage); International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW).
\item \textsuperscript{134} MSA s 359(2-6).
\item \textsuperscript{135} South Africa is a signatory to the convention (on 5 December 1984). Ratification waited until 23 December 1997.
\item \textsuperscript{136} United Nations Law of the Sea Convention, 1981, Art 86 and 87.
\item \textsuperscript{137} Ibid Art 91(2).
\item \textsuperscript{138} Ibid Art 91(1).
\item \textsuperscript{139} SRA s 3(b) Unregistered ships are only considered to have South African nationality if they are entitled to be registered.
\end{itemize}
ships to be entitled to registration are prescribed. Broadly speaking, this means being a ship that is owned by South African nationals or residents, either outright or by a majority of shares, but excludes ships on bareboat charter to South Africans and which are already registered under the laws of another state.

(c) Registration in South African law

'Registration', as required by international law, of South African ships is allowed by the Ship Registration Act 58 of 1998. The Act repealed the relevant sections of the MSA that had previously allowed for the registration of South African ships. The MSA, intern repealed the British Merchant Shipping Act 1894 that allowed ships to be registered and controlled in the Colony and subsequently the Republic.

Ships that are entitled to be registered must be registered before they may depart from a port in South Africa for 'a place outside the Republic', furthermore South African ships that are entitled to be registered may not depart from any foreign port without being registered.

'Registration' as required in the SRA means being registered in South Africa. It however also includes ships that enjoy foreign registration and those that are 'deemed to be or regarded as registered'. The term 'deemed to be registered' is found in the un-amended 1951 Merchant Shipping Act and the term includes 'all ships registered at a port in the Union … in accordance with the provisions of any law repealed… and the [requirement for registration] shall not apply to in respect of such ships.' The unamended MSA allowed for the issue of 'provisional certificate[s]' and 'temporary passes' to South African ships.

'Provisional certificates' were issued to qualifying persons who intend to register their ships in South Africa and were valid for six months. 'Temporary
passes' could be issued in special cases to allow qualifying ships to sail between ports, subject to limitations, without being formerly registered. These provisions are mirrored in the current SRA at s 26 and s 29, except that the word 'regarded' is used instead of 'deemed' in the 1951 Act. These two documents allow ships to be 'deemed to be or regarded as registered' as South African ships for their specific purpose.

(d) **South African maritime zones**

The Maritime Zones Act 15 of 1994 delineates the South African maritime zones, over which the Republic claims its sovereignty under international law. It does not specifically describe what can be considered to be 'outside the Republic' and thus when owners must register their ships. The Act specifies that 'any law in force in the Republic, including common law' shall have force in the Republic's 'internal' and 'territorial' waters. Furthermore, the 'contiguous zone', 'maritime cultural zone', 'exclusive economic zone' and 'continental shelf' are named. The Republic has claimed its international rights to these areas, previously forming part of the high seas, and specific but limited legislative control is exercised over these zones. The rights that South Africa asserts in the exclusive economic zone are limited to ownership of all natural resources and are akin to the rights and powers in the territorial waters. The continental shelf, where it extends further than 200 nautical miles from the baselines (i.e. outside the limits of the exclusive economic zone) does not form part of the Republic for navigational purposes.

Article 78 of UNCLOS defines the legal status of the continental shelf and it specifically states that the coastal state's rights do not affect the status of the superjacent waters. The Maritime Zones Act confirms this by limiting the law applicable to 'mining of precious stones, metals or minerals, including natural oil, the

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150 Ibid s 31.
151 Ship Registration Act 58 of 1998 s 44(1).
152 Waters found landward of the baselines and within harbours.
153 Waters within twelve nautical miles from the baselines.
155 Ibid s 5-8.
156 Ibid s 7.
continental shelf shall be deemed to be unalienated state land. This section does not refer to the water, only the land, being under state control.

It therefore follows that to be considered to be departing for 'a place outside the Republic' the planned voyage must enter another state's maritime zones or be planned to extend further than the 200 nautical mile breadth of the Exclusive Economic Zone.

Ships, including pleasure boats, must be registered when anticipating such voyages.

(e) Ships without nationality

The consequences of not being registered are potentially disastrous for unsuspecting pleasure boat owners who find themselves on the high seas. International Law does not offer any protection to ships without nationality. The case concerning the vessel Asya confirms that the international rights to the freedoms of the high seas are only available to ships flying the flag of a state. The Asya was seized and claimed by Palestine due to her not having a nationality, even though a Turkish flag was raised by the crew. The Privy Council found that ships without nationality operating on the high seas are not offered any protection under international law. Oppenheim was accepted as a valid statement by the Privy Council in the Asya appeal:

‘In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for freedom of navigation on the open sea is a freedom for such vessels only as sail under the flag of a State.’

(f) Prohibition of registration of certain ships

The SRA gives the Minister of Transport the right to make regulations that prohibit certain types or classes of ships from being registered. The Ship Registration Regulations confirm the prohibition of registration for ships on the South African flag that are already registered in another state. Wooden ships of primitive build;

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157 Maritime Zones Act s 8(3)(b).
158 Naim Molvan v Attorney General of Palestine [1948] AC (PC) at 351.
159 International Law 6 ed vol 1 546.
160 SRA s 56(3)(d).
161 Ship Registration Regulations GN 497 GG 2334 of 26 April 2002.
162 SRA s 19. Registration is however permitted if the ship has been acquired legally in terms of sec 9 of the Admiralty Jurisdiction Regulation Act 105 of 1983 or if it is operating on a bareboat charter to
ships of less than three meters in length; and ships used solely on inland waters are also prohibited from registration.\textsuperscript{163}

Pleasure boaters operating solely on inland waters and boats of less than three meters in length operating at sea are thus prohibited from registration. This seems to be wholly defensible, since there is no international requirement for registration on inland waters, and boats of less than three meters in length would hardly be used for prolonged ocean passages envisaged for voyages beyond the exclusive economic zone. Owners of boats that are less than three meters long may however wish to use these boats in the coastal waters of another state and thus seek registration for their boat. Operating this size of boat at sea is not generally allowed under the current ship safety regime in South Africa.\textsuperscript{164} It is therefore not practicable for safety reasons to register these boats when owners wish to operate outside of South Africa.

\textit{(g) Licensing of South African ships}

Registration is not the only option available to owners of pleasure boats to ensure compliance with the law since we have seen that even unregistered ships are considered to be South African. Licensing is required for unregistered South African vessels that operate on the South African coast.\textsuperscript{165} Boats of less than 100 gross tons used solely for sport or recreation are however not required to be licenced.\textsuperscript{166}

Licensing is regulated by the Merchant Shipping (Licensing of Vessels) Regulations 2002.\textsuperscript{167} The basic requirement for licensing is a declaration of the ownership and intended operation of a ship,\textsuperscript{168} and the subsequent marking of an official number onto the vessel.\textsuperscript{169} Licenced ships are required to be surveyed for compliance and be issued with a local general safety certificate.\textsuperscript{170} Owners must

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\textsuperscript{163} Ibid reg 12.
\textsuperscript{164} Merchant Shipping Act 57 of 1951 s 72A and Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 8(4).
\textsuperscript{165} MSA s 68.
\textsuperscript{166} MSA s 68(3)(b).
\textsuperscript{167} GN 112 GG 24275 of 17 January 2003.
\textsuperscript{168} Ibid reg 3.
\textsuperscript{169} Ibid reg 6.
\textsuperscript{170} Ibid reg 5.
report to SAMSA if they have sold their vessels\textsuperscript{171} or changed the operation or
design of the ship during the validity of the licence.\textsuperscript{172}

(h) Identification and marking of unregistered boats

Unregistered boats which are less than 100 gross tons and are used solely for sport or
recreation are exempted from licencing.\textsuperscript{173} Compliance with Part 4 of the Merchant
Shipping (National Small Vessel Safety) Regulations 2007 is required for the larger
of these small boats.

Power driven boats with engines of greater than 15 horse power and sailing
boats that are greater than nine meters long are required to be identifiable by an
‘approved marking.’\textsuperscript{174} These boats must be inspected to ensure that they comply
with the regulations and compliant boats are to be issued with a certificate of
fitness.\textsuperscript{175}

‘Marking’ is similar to ‘licencing’; the difference being that ‘marking’ is only
allowed for boats used solely for sport or recreation. Approved markings are
assigned by either SAMSA or a designated authorised agency.\textsuperscript{176}

(i) Unmarked boats

The MSA definition of 'ship' and 'vessel' is broad enough to include craft that could
be best described as pieces of sports equipment such as kayaks, sail boards, dinghies
and the like. South African regulations therefore allow the smallest of the
unregistered 'ships' to be self-regulated by their owners and skippers if they are used
solely for sport and/or recreation.\textsuperscript{177}

\begin{footnotes}
\item[171] ibid reg 7.
\item[172] ibid reg 8 and 9.
\item[173] MSA s 68(3)(b).
\item[175] Ibid reg 22-6.
\item[176] Ibid reg 21.
\item[177] This interpretation is not consistent in all jurisdictions. The Queen's Bench Division (Admiralty
Court) decided that a personal water craft or 'wet bike' was not a vessel since it was not used in
navigation and thus was not subject to their Merchant Shipping Act. \textit{Steedman v Scofield} [1992] c
Lloyds's Rep.163. \textit{cf R v Goodwin} [2006] 2 All ER 519. It was held that this jet ski was of substantially different
construction to the 'wet bike' referred to in \textit{Steedman v Scofield}. The court held that the jet ski was a
vessel as defined in the Collision regulations but not a vessel for reporting purposes in their Merchant
Shipping Act.
\end{footnotes}
Self-regulated boats include sailing vessels of less than nine meters in length, power-driven vessels not exceeding 15 horse power and vessels propelled by human power alone. Owners are not required to mark or survey these boats but must however still maintain a certain level of safety compliance as required by regulation through self-regulation.

(j) Consequences of non-compliance in South Africa

Vessels are prohibited from use if their owners have failed to register, licence or mark them, unless the boats are allowed to be self-regulated. Pleasure vessel owners may choose between the three options listed above, depending on their requirements, the size of the vessel and the voyage contemplated. In all three cases there is a requirement for a safety compliance inspection, commonly referred to as 'survey', to be successfully completed before, during or after the registration, licence or marking is issued.

The scope of these inspections varies in purpose and intensity depending on whether registration, licencing or marking is envisaged.

178 ibid reg 20(2).
179 ibid reg 37.
180 Ship Registration Act 58 of 1998 s 44 and s 45.
181 Merchant Shipping Act 57 of 1951 s72.
182 Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 21(1).
183 SRA s 17 (1)(a) and MSA s 190.
184 MSA s 68 and s 190.
185 Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 22(1).
CHAPTER 3 EVOLUTION

I EARLY CONTROL OF SOUTH AFRICAN SHIPPING

The Register of Ships in Cape Town dates back to the late 1800's when ships were still registered under English legislation.\(^{186}\) The South African Merchant Shipping Act 57 of 1951 repealed various pieces of shipping legislation, including the English registration legislation.\(^{187}\) It brought forward a regime where South African ships could be registered within what was first the Union of South Africa and finally the Republic.\(^{188}\) This registration regime remained until the current Ship Registration Act 58 of 1998 came into force on 25 April 2003.\(^{189}\)

(a) English legislation

It is important to note the definition of 'ship'\(^{190}\) in the 1894 English Merchant Shipping Act as compared to 'vessel'\(^{191}\) — ships being those vessels that are not propelled by oars. Currently the definitions of 'ship' and 'vessel' have the same meaning in South African law.\(^{192}\) The British Merchant Shipping Act listed those ships that were exempt from registration at that time in s 3.

‘The following ships are exempted from registry under this Act:—

(1) Ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of the ships are resident:

(2) Ships not exceeding thirty tons burden and not having a whole or fixed deck, and employed solely in fishing or trading coastwise on the shores of Newfoundland or parts adjacent thereto, or in the Gulf of Saint Lawrence, or on such portions of the coasts of Canada as lie bordering on that gulf.’

Pleasure yachts fell into the definition of ships that must be registered, save for the exemption of those listed above. Inspection of the Register of South African Ships in Cape Town shows examples of registered ships that could have been

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\(^{186}\) British Merchant Shipping Act 1894 s 745(e).

\(^{187}\) MSA s 1.


\(^{189}\) Proc 32 GG 24788 of 25 April 2003.

\(^{190}\) Ibid s 742 ‘Vessel’ includes any ship or boat, or any other description of vessel used in navigation

\(^{191}\) Ibid ‘Ship’ includes every description of vessel used in navigation not propelled by oars.

\(^{192}\) Op cit note 28. As defined in the MSA.
pleasure boats. The repeal of the 1894 English Act saw ships being registered as 'South African ship[s]' .

(b) South African control of ships

The MSA required all 'South African ship[s]' of more than 25 gross tons to be registered, although section 13(3) of the 1951 Act allowed the minister to exempt certain ships under 100 gross tons from registration. Pleasure yachts and any other vessels not used for fishing or carrying goods or persons for profit were duly exempted from registration by the minister.

The MSA did however have limited application to these vessels, even though they were not required to be registered. Exempted vessels were required to comply with licencing, safety survey and casualty notification. Their safety certification was admissible as evidence and contravention of these sections was deemed to be an offence.

Vessels of less than 25 gross tons which were not registered and which were being used for commercial fishing or carrying persons or goods for profit were required to be issued with a licence as an alternative to registration. Furthermore, the vessels exempted by s 13(3) of the MSA were required to be licenced.

193 Matchless was registered in 1882 to John James Robertson Meiklejohn in his personal capacity. The official number is 18517 with a gross tonnage of 100.51. Countess Carnarvon was registered in 1885 to William Messina of Port Elizabeth, Cape of Good Hope who is described as 'boat owner' and not 'merchant'. She is given official number 84604 and has a gross tonnage of 39.69. Volente registered in 1927 was owned by Mr Henry James Wenbolm in his personal capacity. The vessel was transferred to Cape Town from Southampton in 1927 and then back to Southampton again in 1933. She was given official number 149254 and her gross tonnage was 25.62. None of the owners of the ships listed above are noted to be 'merchants' in the register and none have any accommodation space listed for utilisation by crew. It is assumed that they could have been pleasure yachts.

194 MSA s 2(lxxx) 'South African ship' means a ship registered in the Union in terms of this Act ....

195 Merchant Shipping Act 51 of 1951 s 13


197 Registration of Ships Regulations (R.4) GN2099 of 24 December 1959.

198 MSA s 3(7).

199 Ibid s 68 to 72.

200 Ibid s 190, 191, 194, 195, 197, 198 and 199.

201 Ibid s 259 and 260.

202 Ibid s 254.

203 Ibid s 312 and 313.

204 Pleasure yachts and other non-commercial vessels between 25 and 100 gross tons were exempted from the registration.
(c) Initial control by MSA

The regime that was thus put in place for pleasure vessels by the 1951 MSA required vessels of between 25 gross tons and 100 gross tons that enjoyed an exemption from registration to be licenced and those of greater than 100 gross tons to be registered – both would require initial and subsequent safety surveys and certification.\(^{205}\)

There were no arrangements for pleasure vessels of less than 25 gross tons and owners were free to operate as they saw fit.

II REINECKE COMMISSION

‘Alas! So many have now entered this new and somewhat dangerous field, and so many have failed to have sufficient regard for the dictates of safety in choosing and operating their boats and equipment; indeed, so many have been prone to venture forth into dangerous seas in circumstances and conditions where and when only the most foolhardy and reckless would have dared to do so, with the inevitable and lamentable result that the number of fatalities among boats and boatmen has assumed such alarming proportions that the Government was constrained finally to appoint a commission of inquiry into the Control of Small Craft (‘Reinecke Commission’) to investigate and report upon all aspects of this matter.’\(^{206}\)

(a) Boating problems

The above quotation reveals the state to which boating had descended and the remedial action that was required. The Reinecke Commission\(^ {207}\) had the following objectives:

‘To inquire into, report on and make recommendations in connection with—

(a) The desirability or otherwise of laying down safety standards by legislation and/or introducing such standards through educational programmes with regard to smaller craft which are not in commercial use and which put to sea from any point on the South African coast;

(b) the nature of such measures and the authority or authorities to be responsible for their execution;

\(^{205}\) MSA s 190.


\(^{207}\) Op cit note 6.
(c) the desirability or otherwise of extending such measures to craft in use on inland waters; and

(d) any other matter which the Commission may deem to be relevant to or necessary in connection with its inquiry.\(^{208}\)

The Commission regarded the humanitarian principle concerning the rescue of people in distress as the driving force behind the need for better control over small boats, stating that the South African Search and Rescue Organisation (SASAR) had been concerned about the disappearance of small boats and their occupants without SASAR even being aware of the distress situation that had developed. In particular, SASAR found it 'impossible to keep track of the many craft at sea at any one time, and in the event of an accident…'.\(^{209}\) It is also noted that the establishment of the Reinecke Commission originated from a recommendation from the SASAR-Marine.

(b) Findings of the Commission

The Commission's major findings regarding the regulation of boat safety included:

- a critical need for uniform safety standards concerning the use of water craft on inland waters;\(^{210}\)
- the requirement that provincial administrations pass regulations concerning the governing of water sport control areas;\(^{211}\)
- the realisation that control of boating safety is directly related to control over access to that water;\(^{212}\)
- that deaths resulting from boating averaged 74 each year between 1974 and 1978, of which 40 were on inland waters;\(^{213}\)
- that the actual boating problem lay at the helm of power boats (\textit{cf} sailing and non-power driven boats), especially those owned by people who did not wish to affiliate themselves with sporting clubs and their associated control;\(^{214}\)
- the concern over the safety of children under 16 years of age being allowed to be in charge of power boats;\(^{215}\)
- that competency certification of all skippers proceeding to sea was critical to safety;\(^{216}\)


\(^{209}\) Ibid 3.

\(^{210}\) Ibid 3.1.2.

\(^{211}\) Ibid 3.1.3.

\(^{212}\) Ibid 3.1.6-7.

\(^{213}\) Ibid 3.1.9.

\(^{214}\) Ibid 3.1.10-1.

\(^{215}\) Ibid 3.1.12.
the need to register small coastal and inland boats on a national register;\textsuperscript{217}
that compulsory two-way radio communication for seagoing boats was essential;\textsuperscript{218}
that minimum standards for boating safety were required;\textsuperscript{219}
that private clubs played a considerable role in controlling small boats;\textsuperscript{220}
that legislative compliance by pleasure boats between 25 and 100 gross tons was not generally observed;\textsuperscript{221}
that confusion between registration and licencing of boats was commonplace;\textsuperscript{222}
that the current regulations were not applicable to small boats;\textsuperscript{223}
that the MSA was being applied to situations which the drafter could not have envisaged;\textsuperscript{224}
that surveyors were being overwhelmed by the number of small boats engaged in commercial activities;\textsuperscript{225}
that numerous statutory bodies and departments felt that control of boats should be nationalised and be in the domain of the Department for Transport Affairs;\textsuperscript{226}
that there was an urgent need for control of boats on the coast and on inland waters.\textsuperscript{227}

Furthermore, the Commission found that individuals and groups within boating had an appropriate respect for the dangers inherent to water activities and that it is through these individuals and groups that the 'complete message of boating safety [would] be convened to the general boating public.'\textsuperscript{228} It was appreciated that there was a need for control of these individuals, groups and government departments to ensure that their efforts were coordinated and focused on safety. The Commission

\textsuperscript{216} Ibid 3.3.1.
\textsuperscript{217} Ibid 3.3.4.
\textsuperscript{218} Ibid 3.3.5.
\textsuperscript{219} Ibid 3.3.9.1.
\textsuperscript{220} Ibid 3.4.3.
\textsuperscript{221} Ibid 3.4.17(i).
\textsuperscript{222} Ibid 3.4.17(ii).
\textsuperscript{223} Ibid 3.4.17(iv), (v), (vi), (vii).
\textsuperscript{224} Ibid (viii).
\textsuperscript{225} Ibid (ix).
\textsuperscript{226} Ibid 3.4.18 to 3.4.18.1.
\textsuperscript{227} Ibid 3.5.1 to 3.5.6.1.
\textsuperscript{228} Ibid 3.2.3.
thus recommended that a control board be established as the statutory body for small craft, namely the 'Small Craft Control Board'. 229

III LEGISLATIVE RESPONSE TO THE REINEKE COMMISSION

The Minister of Transport Affairs reviewed the Commission's report and responded to the public by a press statement issued in 1981. 230

In summary, the Minister confirmed that the need for licencing of small boats had already been addressed by certain changes to legislation 231 (although not yet in force), but that the implementation of this licensing initiative was not yet possible due to the complex nature of the task. The Minister rejected the formation of the 'Small Craft Control Board' 232 due to the parallel nature of the responsibilities of this new board and the functions of the Department for Transport.

Furthermore the Minister committed to establishing a 'simple yet effective system of control' for boating and to cooperate with concerned parties regarding boat safety requirements and interventions. Control measures would include restricting the launching of boats to certain approved places. The minister warned local authorities to become familiar with their responsibilities regarding boating.

Most conspicuous, by its absence, was the lack of any reference to boating safety on inland waters.

(a) Changes to boating control

The necessary changes to the MSA were partially effected by Act 3 of 1981. 233 The definition of 'small vessel' 234 was introduced; and boats used solely for sport or recreation were required to be licenced in terms of MSA sec 68.

Subsection 4 was added to sec 68 allowing the Minister to exempt 'the owner or the master of a small vessel used solely for sport or recreation' from licensing. This exemption would depend on the owner or master of the boat complying with the conditions prescribed by the Minister.

229 Ibid 3.2.4 and 3.2.4.1.
230 As read in Schoeman op cit note 206 at 258.
231 Amendment of sec 68 of the MSA by the Merchant Shipping Amendment Act 3 of 1981.
232 Supra note 229.
233 Merchant Shipping Amendment Act 3 of 1981.
234 MSA s 2 'small vessel' is defined to mean 'a vessel of less than twenty-five gross tons and more than three meters in length'.
'Small vessel[s]' of less than three meters in length were prohibited from operating at sea, but the Minister could prescribe areas where these boats could be used.  \(^{235}\)

The regulations for the use of vessels of less than three meters in length – section 72A (2) of Act 57 of 1951\(^{236}\) allowed boats of less than three meters in length to go to sea in the following circumstances:

- if they were authorised by a port authority to do so; \(^{237}\)
- if licensed in terms of the MSA; \(^{238}\)
- if they were participating in controlled sports events; \(^{239}\)
- if they were used within the jurisdiction of a local authority and within 500 meters of the low-water mark. \(^{240}\)

No standards for the construction or equipment carried by these vessels were prescribed.

(b) *Debates preceding the changes to legislation in 1981*

The House of Assembly debates\(^{241}\) that preceded the Merchant Shipping Amendment Act 3 of 1981 give insight into the thinking of the Minister of Transport Affairs and are a gauge of the public opinion expressed by the other members regarding small vessel safety. The Minister stated that the whole of the MSA was currently under review, but that the amendments concerned were deemed urgent and could not wait for the working group to finalise its proposal. \(^{242}\)

The recommendations of the Reinecke Commission took centre stage and the majority of the debate centred on the envisaged measures to control small boats. The Minister stated that the amendments to sec 68 would require all small craft to be licenced, but that small craft used solely for sport or recreation (pleasure boats) would be exempted from this requirement.

\(^{235}\) MSA s 72A, introduced by sec 3 of Act 3 of 1981.
\(^{236}\) GN 1044 GG 7583 of 15 May 1981.
\(^{237}\) Ibid, reg 2(1) and (2).
\(^{238}\) Ibid reg 2(3) and (5).
\(^{239}\) Ibid reg 2(4).
\(^{240}\) Ibid reg 2(6).
\(^{241}\) South Africa *Debates of the House of Assembly* (Hansard) Vol 91 p 512.
\(^{242}\) We still use the Merchant Shipping Act 57 of 1951.
The members seem to have been concerned about the specifics of the control that would be applied to these pleasure boats.\textsuperscript{243} The Reinecke commission had recommended a national board of control; however the Minister rejected this idea and opted for control from within the structures of the Marine Division. The Minister clearly stated that there were insufficient resources to implement the Act in its entirety and that he would 'prefer' to exempt pleasure boats until the revised Merchant Shipping Act was implemented. \textsuperscript{244} The Minister gave some insight into his proposed course of action by stating:

'Now we must find certain ways and means to involve people who have the knowledge, and prevail upon them to co-operate with us. … However, I want to say at once that I do not intend licencing or instituting an investigation into every small vessel. I do not intend appointing a number of sea "speed-cops", for we simply do not have the staff.'

The Minister clarified the somewhat perplexing statement that he would exempt the pleasure boats from licencing (which was surely not the original intent of introducing licensing for boats) when he stated:

'… I am introducing [the requirement for licensing] to implement certain recommendations of the Reinecke commission, especially for the purpose of exercising control. The details will, however, have to be worked out and the control exercised by regulation, but I want the power to make the regulations and to implement them if necessary. It must be done…. The clause is to empower me in the case of certain sporting craft to refer… to the specific clubs concerned [for the control of their boats].'

The Minister thus needed to legally have the vessels under his control (i.e. licenced) and by carefully wording the exemption he would allow boat clubs to control their members' boats, as required by the ministerial exemption, without significant burden on the resources of the Department and attain the ultimate goal of improving the safety of boating.

\textsuperscript{243} Mr R.J. Lorimer ‘… but it is the method of control which, I think, comes under scrutiny here.’

\textsuperscript{244} 'I want to give the House the assurance, however, as I said in my Second Reading speech, that Mr. Douglas Shaw is at present rewriting this legislation and that we are only making provision in this Bill to cover certain aspects of the legislation. Personally, I would prefer to exempt small boats in the meantime. I say this because we do not have the personal to implement all the provisions of this Act.'
(c) Launching of boats

One of the major findings and recommendations of the Commission was to control places where boats could be launched. Regulations made under the Marine Traffic Act 2 of 1981 gave this control by restricting the places where ships could be launched or put to sea to a 'harbour', 'fishing harbour' or a 'launching site'.

(d) Implementation of licencing for pleasure boats

The practical implementation of the provisions for licensing (or the exemption from licensing) waited until 1985 when the Merchant Shipping Amendment Act 25 of 1985 was passed.

Licensing was required for all unregistered small vessels operating on the South African coast and for vessels that were exempt from registration, unless they were used in conformance with the requirements for vessels used solely for sport or recreation. The exemption for licensing of boats is found in sec 68(3) of the Act was amended to read:

'(3) The provisions of this section shall not apply in respect of any ship or vessel –
(a) unless the whole of the ship or vessel is owned-
(i) by the Government of the Republic; or
(ii) by persons all of whom in terms of section eleven are qualified to own a South African ship; and
(aa) a majority of the owners of the ship or vessel, either in number or extent of ownership, are persons resident in the Republic or bodies corporate having their principal place of business within the Republic; or

245 Op cit note 212.
246 Marine Traffic Regulations GN 194 GG 9575 of 1 February 1985 reg 17.
248 'H]arbour’ is defined in the Marine Traffic Act to mean 'a harbour of which Transnet Limited has become the owner in terms of section 3 of the Legal Succession to the South African Transport Services Act 9 of 1989’.
249 'F]ishing harbour’ is defined in the Marine Traffic Act to mean 'a fishing harbour as defined in section 1 of the Sea Fishery Act 12 of 1988’.
250 'L]aunching site’ is defined to be any place, whether artificially constructed or not, approved by a local authority or other Government authority, from or at which a vessel or a vessel of a particular type, as specified, may be launched, beached, moored or berthed, excluding a harbour or fishing harbour.
251 MSA s 68(1)(a).
252 Ibid s 68(1)(b).
253 Ibid s 68(3)(b).
(bb) the ship or vessel is, as to her management and use, principally controlled in the Republic;
(b) used, subject to such conditions as may be prescribed, solely for sport or recreation.'

(e) Debates preceding the changes to legislation in 1985

The debates of the House of Assembly again give clarity on the purpose of the amendments and their intended actions.\(^{254}\) The Minister stated that the amendments to sec 68 of the MSA empowered him to control pleasure boats of less than 100 gross tons by requiring them to be licensed. The exemption for licensing pleasure boats was 'subject to such conditions as may be prescribed' and would not subject these boats to the 'red tape' associated with owning a licenced ship.

Furthermore, the Minister stated that some 70 000 boats operated in this category and these measures would 'formulate a simpler substitute measure' for the control of boating. To achieve this 'simpler substitute measure' provision was made to delegate control of boats to clubs or associations. The Minister emphasised that local authorities had a 'very important' role to play in the management of their beaches and inland waters and that the role of the proposed amendments and their subsequent regulations was to provide uniform rules and standards for boating.

The debates circled around the following issues: the suspicion that surfers and sailboards would be considered to be boats that operate at sea;\(^{255}\) the perceived obligation and inherent costs of joining clubs;\(^{256}\) the support for the prohibition of unseaworthy ships going to sea;\(^{257}\) and lastly the undesirability of over regulation of this sport code.\(^{258}\)

The Minister responded to the Assembly by giving clarity to the thinking behind the legislation. He again emphasized that the Ministry did not have sufficient

\(^{254}\) Debates of the House of Assembly (Hansard) 25 January to 19 June 1985 Vol 2, 3 and 4
\(^{255}\) Mr D.J.N Malcomess '…many, many little boats which use estuaries … can be caught up in these regulations.\(^{;}\) and
\(^{256}\) ibid '…that nobody will be forced to become a member of any such club or association in terms of this legislation.'
\(^{257}\) Mr G.C. du Plessis 'The most important aim of the Bill is to ensure that unseaworthy vessels do not leave our harbours…'
\(^{258}\) Mr R.F. van Heerden 'However, I do not think we must make the mistake of using a sledgehammer to kill a gnat by imposing unreasonable conditions.'
resources to tackle this challenge in any other way.\footnote{259} The final statement by the minister confirms that the purpose and direction of the implementation of these provisions was to rely on the existing expertise within sporting clubs to ensure that boating was safely conducted on South African waters.\footnote{260}

The General Assembly had raised concern that over regulation of boating could be a negative result of these amendments. They called for the Minister to pass the intended regulations to the standing committee for comment before publication.\footnote{261} The amendment act did not require this,\footnote{262} but public consultation was required prior to publishing the regulations that would give effect to control of boating.\footnote{263}

\footnote{259} ‘We do not have the necessary people to play policeman in this regard. We must have the co-operation of the clubs.’
\footnote{260} ‘The whole purpose of this legislation is to compromise with the people who practice the sport and … to ensure safety in sport. I do not wish to lay down unnecessary laws.’
\footnote{261} Malcomess ‘I should like the hon the Minister to confirm that those same regulations will be submitted to the standing committee before they are published in the first place.’
\footnote{262} Minister ‘However, it is impossible for me to give the undertaking that the regulations will be brought back to the standing committee.’
\footnote{263} Sec 9(b) of Act 25 of 1982 ‘Before any regulations are made under section 356(1)(xli)bis, such regulations shall be published by the Minister in the Gazette together with a notice intimating that it is proposed to issue such regulations as regulations under this section within a stated period, but no less than four weeks as from the date of said publications, and inviting interested persons to submit any objections or representations concerning the proposed regulations: Provided that, if the minister thereafter determines on any alterations in the regulations published as aforesaid, as a result of any objections or representations submitted thereanent, it shall not be necessary to publish such alterations, before finally issuing the regulations in terms of subsection (1).’
CHAPTER 4 REGULATION OF BOATING

I REGULATIONS FOR BOATS USED SOLELY FOR SPORT OR RECREATION OPERATING AT SEA

The standards for the control of seaworthiness and competency of skippers for boats used solely for sport or recreation were prescribed by the Minister for Transport and came into effect on 1 February 1986.264

This was the first time that all boats used for sport or recreation and operating at sea were controlled by the state in South Africa. The regulations were not applicable to boats operating on inland waters, due to the MSA not being applicable to inland waters.265

(a) Application of national regulations

The regulations for ships or small vessels used solely for sport or recreation had application to all pleasure boats of less than 100 gross tons that were not registered.266 The primary means of control was through 'authorised agencies'267 or 'local authorities'268 that had jurisdiction over a specific piece of water.269

The Reinecke Commission had stated that 'local authorities' were the only realistic option to control boating since launch sites were generally under their control.270 Local authorities and authorised agencies had the right to inspect boats to establish compliance with the regulations and also to 'forbid' the use of unseaworthy boats.271

264 Regulations for ships or small vessels used solely for sport or recreation GN 2799 GG 10042 of 20 December 1985.
265 MSA s 3(9) No declaration making the MSA applicable to inland waters had been made by the Minister.
266 Ibid s 356(1)(xli)bis.
267 Supra note 264 'Authorised Agency' means 'a person or organisation delegated … powers or duties in terms of the MSA'.
268 For example: municipalities and nature conservation bodies.
269 Supra note 264 reg 16.
270 Reinecke Commission ‘…investigations into the role played by local authorities in controlling water sport and related activities satisfied the Commission that it was at this level that the most effective control can be exercised.’
271 Ibid reg 16(1) and (2).
(b) Authorised Agencies

Eight authorised agencies\textsuperscript{272} were appointed in the regulations to assist in affecting control over boats. Provision was made for the Director-General to delegate authority to additional agencies.\textsuperscript{273} The regulations made provision for any person to make use of the services\textsuperscript{274} of an authorised agency and to be controlled\textsuperscript{275} by that agency, even if the persons were not members of the club or association.\textsuperscript{276} People designated to control boating on behalf of a local authority or authorised agency were required to carry 'an acceptable document of identification' and a 'document of authority'.\textsuperscript{277}

Authorised agencies' control over boating was limited to: –

- the organising of controlled sports events;\textsuperscript{278}
- the recoding of markings and identifications for boats;\textsuperscript{279}
- the recoding of details regarding any excursions to sea;\textsuperscript{280}
- the granting of permission for boats registered in the Transkei or Ciskei to navigate in South African internal waters;\textsuperscript{281}
- the inspection of boats for seaworthiness\textsuperscript{282} and the prohibition of operation of unseaworthy vessels;\textsuperscript{283}
- the inspection of medical records for skippers to establish if they are 'physically able and of sound mental health';\textsuperscript{284}
- the testing of the competence of skippers and crew\textsuperscript{285} and subsequent issue of certificates of competence to competent skippers;\textsuperscript{286}
- the supervision and guidance of boat skippers that were younger than 16 years old.\textsuperscript{287}

\textsuperscript{272} Ibid reg 21(1) Cruising Association of South Africa; South African Yacht Racing Association; South African Power Boat Association; South African Underwater Union; Durban Offshore Yachting Committee (Power and Sail); S.A. Life-saving; National Sea Rescue Institute of South Africa.
\textsuperscript{273} Ibid reg 21(4).
\textsuperscript{274} Ibid reg 21(7).
\textsuperscript{275} Ibid reg 21(8).
\textsuperscript{276} Ibid reg 21(9).
\textsuperscript{277} Ibid reg 21(6).
\textsuperscript{278} Ibid reg 21(4).
\textsuperscript{279} Ibid reg 21(5).
\textsuperscript{280} Ibid reg 6.
\textsuperscript{281} Ibid reg 8.
\textsuperscript{282} Ibid reg 16.
\textsuperscript{283} Ibid reg 16(2).
\textsuperscript{284} Ibid reg 18(1).
\textsuperscript{285} Ibid reg 18(2).
\textsuperscript{286} Ibid reg 18(5).
\textsuperscript{287} Skippers and boats were exempted from certain provisions of the regulations for the duration of the controlled event. These events were generally races and competitions.
(c) Design and construction of boats

The regulations prescribed the design and construction characteristics of boats. All boats were required to be fitted with buoyancy that would allow them to remain afloat for a period of not less than 48 hours when completely 'flooded, swamped or capsized'. Furthermore, boats were required to be constructed in accordance with annexure A and be fitted with the equipment listed in annexure B.

(d) Certification for boats and skippers

Safety certification was not generally required by the 1985 regulations for seagoing boats or skippers. Skippers could subject themselves to examination and be issued with a certificate of competency if successful, which should have been sufficient proof of competency for that person. In practice this was not so and 'competing' agencies did not always mutually respect the skipper certificates issued – major discomfort resulted when boat owners launch at a place other than their 'home' launch site.

Boats would need to be marked with an identification number prior to being used. This number could be issued by the Director-General, the Principal Officer or an Authorised Agency. Principal Officers and Authorised Agencies were reluctant to issue 'identification markings' to boats without first making an effort to establish the condition of the boat that the number would identify. Consequently it became common practice for boats to be 'surveyed' for compliance with the regulations prior to marking. 'Seaworthiness' stickers were commonplace as evidence of the annual survey when conducted by Authorised Agencies.

(e) Control of inland waterways

The boating regulations seem to have extended control to boating on inland waters by defining terms such as 'inland waters' and 'lake area'; dividing boats into two broad subdivisions, namely seagoing boats (Category A) and inland water boats.

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287 Ibid reg 19(1) and (2).
288 Ibid reg 12(1).
289 Ibid reg 12(2).
290 Ibid reg 12(3).
291 Ibid reg 13(1).
292 Ibid reg 18(6).
293 Ibid reg 5.
294 Supra note 264.
(Category B); and giving authority for the inspection of boats used on inland waters.295

In reality no standards were prescribed for the construction of boats used on inland waters (Category B);296 or regarding the safety equipment to be carried on these boats.297 Furthermore, the Minister did not declare 'inland waters' to be subject to the MSA.298

Inland water boating continued to be largely unregulated even though this one of the major findings of the Reinecke Commission.299

II REGULATIONS FOR COMMERCIAL SMALL VESSELS OPERATING AT SEA

The control exercised over licensed 'small vessel[s]' was removed from the Life Saving Appliance Regulations,300 Safety of Navigation Regulations,301 and Construction Regulations302 when the Standards for Seaworthiness, Manning and Licencing of Vessels Regulations were published in 1986.303

The regulations were applicable to all unregistered 'small vessel[s]'304 that were not used solely for sport or recreation and were not tenders.305 The introduction of new regulations for small commercial vessels emanated from the recommendations made by the Reinecke Commission, which found that the existing regulations were not suitable for these small craft.306

The regime for the safe operation of commercial small vessels included:

- the approval of construction plans for vessels and inspection for compliance with construction standards;307

295 Ibid reg 16(1) '… allow and inspection of such vessel or of the appliances or equipment aboard .. by a … person … who has jurisdiction over … inland waters….'
296 Ibid Annexure A.
297 Ibid Annexure B.
298 MSA s 3(9).
299 Reinecke Commission finding 3.1.2 'The Department of Water Affairs recognises that there is a critical need for uniform safety standards concerning the use of water craft on inland waters.'
301 GN 661 GG 2049 of 19 April 1968.
303 GN 1025 GG 10252 of 30 May 1986.
304 MSA s 68(1).
305 Ibid reg 2(2).
306 Reinecke Commission finding 3.4.1.7.
307 Ibid reg 3.
the requirement to equip the vessel with prescribed safety appliances;\(^\text{308}\) 
that compliant vessels were issued with a local general safety certification;\(^\text{309}\) 
that annual surveys were conducted to ensure continued compliance and local general safety certification was renewed;\(^\text{310}\) 
that vessels were licenced annually,\(^\text{311}\) and 
that skippers were required to be examined and certificated as competent by the Director-General of the Marine Division.\(^\text{312}\)

### III ATTEMPTS TO CHANGE THE LEGISLATION APPLICABLE TO BOATING

Unregistered pleasure boats continued to be controlled by the provisions of the 1985 boating regulations. There were numerous attempts to change the regime of pleasure boat control, which will be discussed later in this section.

The major reason for change seems to be the incorrect interpretation by the Department of Transport that prohibited the registration of small vessels in terms of sec 11-13 of the MSA. It was incorrectly assumed that small pleasure boats were not allowed to be registered and that since they enjoyed an exemption from licencing.\(^\text{313}\)

Additionally the complexity of establishing competence and seaworthiness of skippers and boats; and the desire to extend real control to boats used on inland waterways attributed to the desire to change the legislation. Attempts to bring a new regime for boating included several draft Acts, Bills and draft regulations.

The SAMSA office in Cape Town has a few of these attempts on record, including the 8\(^\text{th}\) draft of 'The Safety, Licencing and Registration of Small Vessels Act';\(^\text{314}\) 'Proposed Model Inland Water (Navigation) Regulations';\(^\text{315}\) 'The Small Vessels Bill';\(^\text{316}\) and 'Regulations regarding boating on inland waters'.\(^\text{317}\)

\(^\text{308}\) Ibid reg 4. 
\(^\text{309}\) MSA s 190. 
\(^\text{310}\) Ibid reg 13(3). 
\(^\text{311}\) MSA s 68-72. 
\(^\text{312}\) Ibid reg 8. 
\(^\text{313}\) As read in Hare op cit note 7 at 231. 
\(^\text{314}\) No record can be found of this Bill being published in the Gazette. The preamble reading: 'To regulate the Standard of Safety of Small Vessels navigation within or through Territorial Waters of the Republic of South Africa.' This document is essentially a 'copy' of selected sections of the Merchant Shipping Act 57 of 1951. It is assumed that this is an early working draft of the 'Small Vessels Bill' named in note 316.
(a) Proposed model inland water (navigation) regulations

The Proposed Model Inland Water (Navigation) Regulations were drafted by the Department of Transport following a request from the erstwhile provinces for a set of 'model' regulations for the control of boating in a uniform way throughout South Africa. The model regulations were never intended to be published under the MSA.

Administration of these regulations was intended to be through the existing provincial departments that had competency in this regard. It is most notable that the regulations enabled the provincial departments to delegate powers to 'Authorised Agencies' for the enforcement of these regulations, as was allowed for sea going boats. The contemporary principles of safe boating at sea were used as a baseline for these model regulations. The requirements included numbering of boats; the testing of competency standards for skippers; and the prescription of standards for construction and carriage of safety equipment on boats.

No regulated requirements for the compulsory inspection and certification of the boat seaworthiness and skipper competency were prescribed. The conduct of skippers and boats operating on inland waters was regulated through the provision of basic collision regulations, additionally local authorities could make rules for boating in their jurisdiction that were 'not inconsistent with [the] regulations…'

Standards for water-skiing and the operation of personal water craft were prescribed.

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315 Proposed Model Inland Waters (Navigation) Regulations GN 1115 GG 18167 of 1 August 1997
317 These regulations would have been published under the Small Vessel Act, 1994. No evidence of these regulations indicating their publication in the Gazette could be found.
318 Ibid, reg 4 'It is the duty to apply such suitable measures as appears to it to be necessary or expedient to ensure that these regulations are complied with at all times.'
319 Ibid reg 5.
320 Ibid regs Reg 9.
321 Ibid reg 10 and 11.
323 Ibid reg 14.
324 Ibid reg 15.
325 Ibid reg 23.
326 Ibid reg 16.
327 Ibid reg 17.
It is assumed that these model regulations were not successfully adopted by the provincial departments throughout South Africa, since history reveals that safety and control has not been entrenched in inland boating.

(b) The Small Vessels Bill

The Small Vessels Bill is largely an abridged version of the Merchant Shipping Act; with the omission of certain provisions for larger vessel types. The preamble to the bill reads:

'To provide for the registration, licencing and mortgaging of small vessels; to make provision in relation to small vessels on bareboat charter; to provide generally for control over and the safety of small vessels; and to provide for matters connected therewith.'

It seems that the Bill was intended to alleviate the ship registration challenges posed by sec 13 of the MSA, which implied that boats of less than 25 gross tons could not be registered, by introducing a secondary registration regime. No immediate application of this act to inland waters was possible since the title of the act only referred to 'territorial waters'. Section 2(3) of the act allowed the Minister to determine if any sections of the act would apply to inland waters. This was surely the Minister's intention since the 'Regulations Regarding Boating on Inland Waters' had already been drafted.

The major shift in application of a safety regime for boating was the legislative requirement for skipper competency certificates. Compulsory survey of pleasure boats for seaworthiness was still absent from the regime, although unseaworthy boats were not permitted to be taken to sea.

I suspect that the unnecessary duplication of legislation may have been the prime reason that this bill was never enacted; and that the Ship Registration Act was signed in 1998.

328 Op cit note 316 Small Vessel Bill s 14 'The owner … shall ensure that there is employed … the number of persons duly certificated as prescribed….'

329 Ibid s 23.
IV CHANGES TO PLEASURE BOAT REGULATION

(a) Ship Registration Act 58 of 1998

The SRA changed the position regarding registration of South African ships – from a duty\(^{330}\) to register to an entitlement\(^{331}\) to register.\(^{332}\) The SRA repealed the sections of the MSA that allowed for registration in South Africa when it came into force on 23 April 2003. The ambiguity regarding the registration of small vessels was abolished by clearly allowing for their registration.\(^{333}\) The SRA amended sec 68 of the MSA by allowing unregistered South African ships\(^{334}\) of any size to be licensed, in lieu of registration, if operating along the South African coast.

Boats of less than 100 gross tons continued to enjoy an exemption from licensing if compliance with the 1985 boating regulations\(^{335}\) was achieved by owners and skippers.\(^{336}\)

(b) Merchant Shipping (Small Vessel Safety) Regulations 2002

The Draft Merchant Shipping (Small Vessel Safety) regulations were published for public comment on 15 September 2000.\(^{337}\) These draft regulations aimed to combine and replace the existing Standards of Seaworthiness, Manning and Licensing of Vessels Regulations, 1986, and the Regulations Regarding Ships or Small Vessels Used Solely for Sport or Recreation, 1985.\(^{338}\)

The principles of operating a licenced vessel seem to have been applied to pleasure boats. Compulsory skipper certification\(^{339}\) and ‘seaworthiness' inspections\(^{340}\) for certain categories of pleasure boats were proposed by the merger of the regulations.\(^{341}\)

\(^{330}\) MSA s 13(1) ‘[O]wners ... shall, ... apply to the proper officer at one of the ports of registry ... for the ship to be registered in terms of this Act.’

\(^{331}\) SRA s 16 ‘[T]he following ships are entitled to be registered: ....’

\(^{332}\) The SRA did not come into operation until 2003.

\(^{333}\) Ibid s 16(b) ‘small vessels, other than fishing vessels,...’

\(^{334}\) Licensing is only allowed for qualifying owners as defined in SRA s 16(a) or (b).

\(^{335}\) Op cit note 264.

\(^{336}\) MSA s 68(3)(b).

\(^{337}\) GN 3206 GG 21549.

\(^{338}\) Prelude to Draft Merchant Shipping (Small Vessel Safety) Regulations.

\(^{339}\) Ibid draft reg 13.

\(^{340}\) Ibid draft reg 18.

\(^{341}\) Ibid draft reg 16(1) ‘every unregistered pleasure vessels, not being a vessel propelled solely by oars, that is entitled to be registered....’
(i) Control of boating from the 2002 regulations

The Merchant Shipping (Small Vessel Safety) Regulations 2002\textsuperscript{342} were published by the Minister in April 2002. Their commencement coincided with that of the Ship Registration Act 58 of 1998, being 25 April 2003.\textsuperscript{343} These regulations only had application to seagoing boats, since no ministerial declaration in terms of sec 3(9) had been made.

Skipper competency certification was made compulsory for skippers of all power driven pleasure boats and additionally for sailing boats that were longer than six meters in overall length.\textsuperscript{344} Skipper certification had to be issued by a certification authority, defined as being SAMSA or any other designated authorised agency.\textsuperscript{345}

Owners could no longer rely on ad-hoc inspection of their boats at the time of launching to establish 'seaworthiness', should the local authority be committed to such an inspection. All boats that were exempt from licencing by sec 68(3)(b) of the MSA (i.e. unregistered pleasure boats of less than 100 gross tons operating at sea) were required to be marked with an approved marking and issued with a Certificate of Fitness.\textsuperscript{346} Inspection and recertification was required annually for ensured compliance.\textsuperscript{347} The categorisation of boats was simplified to include all boat types operating within a certain distance from shore.\textsuperscript{348}

Authorised Agencies continued to play and important role in the administration of the regulations, by providing the resources to inspect boats and administer skipper examinations.\textsuperscript{349} The definition of Authorised Agency was changed from the 1985

\textsuperscript{342} GN 500 \textit{GG} 23345 of 26 April 2002.
\textsuperscript{343} Commencement date published in GN 39 \textit{GG} 24788 of 25 April 2003.
\textsuperscript{344} Op cit note 342 reg 14.
\textsuperscript{345} South African Sailing was designated as a Certifying Authority, with the specific mandate of issuing certificates of competency for sailing boats. The remaining authorised agencies which had approved skipper training programs could examine their candidates for skipper competency, but the certification was issued by SAMSA.
\textsuperscript{346} Op cit note 342 reg 17-9. It was a very broad and ambitious aspiration, that 'all' seagoing boats would carry certificates of fitness – meaning that even paddle skis, wind surfers, small inflatables and to the extreme stand-up surfers would be required to be inspected for compliance with the regulations annually, even though the skippers of these boats were not required to be certificated.
\textsuperscript{347} Ibid reg 22.
\textsuperscript{348} Previously the category of vessel described the construction of the vessels and also restricted the operating area of the boat.
\textsuperscript{349} Ibid reg 27.
definition which allowed 'a person or organisation' to be delegated authority to exercise powers to the 2002 definition which only allowed the delegation of functions to a 'governing body, club or organization….'

The obvious omission in the 2002 regulations is any regulation of boating on the inland waters of the Republic.

(ii) Implementation of 2002 regulations
The 'Guidelines to the Implementation of the new Merchant Shipping (Small Vessel Safety) Regulations' dated 1st February 2003\(^{350}\) are not very helpful when trying to determine how boat owners should accomplish compliance. The guidance notes simply state that Principal Officers should make 'full use of any "small boat surveyors"' to conduct the required surveys. The guidelines reinforce the position that '[n]o small pleasure vessels are allowed to be used unless marked … and there is on board a "Certificate of Fitness"'.

SAMSA Marine Notice 13 of 2006 reveals the thinking that SAMSA developed regarding compliance avenues for small boat owners. Authorised Agencies listed in the marine notice are South African Sailing, South African Deep Sea Angling Association, South African Underwater Union, South African Inflatable Boat Association, South African Sea Cadets, Power Boat South Africa and the South African Institute for Skippers. Paddling boats were going to be controlled by Canoe South Africa, even though they were not yet appointed as an authorised Agency and the regulations had been in force since April 2003.

(c) Lifejacket lights
The 2002 regulations were amended in 2005\(^{351}\) resulting in lifejackets being required to be fitted with lifejacket lights.\(^{352}\) This did not sit well with boaters and even though these regulations had been published for comment in draft\(^{353}\) form there was little hope of this being practically enforced on board pleasure boats. These

\(^{350}\) SAMSA ref SM 1/5/46/3.
\(^{352}\) Ibid reg 5 'Every lifejacket and flotation aid of the kind required by these regulations must be fitted with a light that….'
provisions proved to be short lived and quickly removed when the 2002 regulations were repealed in 2007.

V STATUS OF INLAND WATERWAY NAVIGATION

The period between 2000 and 2007 saw a concerted effort being applied to control boating on inland waters. The 'Burport – Axios – TMT' consortium was tasked by the Department of Transport to investigate and report back regarding the safety of inland waterways for navigation.

(a) Inception report

The consortium submitted an inception report, dated 3 March 2004, revealing that South Africa had 23 major rivers and about 300 public dams. Commercial and recreational water activities were found to be active on South African inland waterways. Control of boating had no common approach throughout the country – well regulated and unregulated examples of control were found. Regulation was found to be most effective when conducted by a local sport club that had a respected presence at the water. The report examines the control exercised by the Department of Water Affairs and Forestry (DWAF) over state dams. It notes that control of the water surface is routinely delegated to other authorities.

The inception report concludes that there was agreement throughout South Africa to improve the levels of water safety on the inland waterways by introducing national standards. Regulations should include the best aspects of the existing control measures and should encourage voluntary compliance. Successful introduction of the new standards would be achieved through national, provincial

355 Ibid Waterbased tourism, rafting, canoeing and kayaking.
356 Ibid Both power boating and sailing is practiced.
357 Theewaterskloof dam is noted and a good example of control.
358 The Vaal Barrage Reservoir is noted to be unregulated.
359 Ibid at 6.
360 Ibid Theewaterskloof dam in the Western Cape was found to be well controlled by the local sports club. This arrangement was endorsed by the DWAF managers of the dam.
361 The report notes, amongst others, that Amatolawater in the Eastern Cape manages 26 dams on behalf of the department.
363 Ibid conclusion 6.2-5.
and local government making investments in both human capacity and capital infrastructure.\textsuperscript{364}

(b) Final Report

The final report of the consortium is dated 30 June 2004.\textsuperscript{365} The consortium was required to report on two aspects, namely:

- Part 1 – Report on the navigability of South Africa's inland waterways; and
- Part 2 – Report on the Safety Conditions of South Africa's Inland Waterways.\textsuperscript{366}

'Navigation' is defined by the consortium to be 'the art of sailing (navigating) a vessel safely from one point to another by the safest and shortest possible route.'\textsuperscript{367} They imply that certain scientific instruments and methods are requisite to navigation.

'Navigability' is defined as 'the ability of a vessel to navigate safely in a waterway.'\textsuperscript{368} Local conditions and hazards in close proximity to the boat attempting to safely proceed on the water course are taken into account, without reference to scientific methods as are required in true navigation.

(i) Density of boating and its control

The report reveals that 80–90 per cent of all boating takes place on only three inland waterways, namely Hartebeespoort Dam, Vaal Dam and the Vaal River Barrage Reservoir.\textsuperscript{369} The report confirms that there is no single national regime applicable to inland boating. DWAF has regulations applicable to boating on state owned dams.\textsuperscript{370} Local authorities have also adopted by laws to control boating in certain instances.\textsuperscript{371}

\textsuperscript{364} Ibid conclusions 6.6-7.
\textsuperscript{366} Ibid p 13.
\textsuperscript{367} Ibid para 3.3(a).
\textsuperscript{368} Ibid para 3.3(b).
\textsuperscript{370} Regulations governing dams and surrounding of state-owned land in terms of section 70(b), 70(c) and 70(i) of the Water Act, 1956, (Act No. 54 of 1956) GN654 GG777 of 1 May 1964.
\textsuperscript{371} Various examples currently exist including: Cederberg Local Municipality By-Law relating to the control of boats and boating on the Clanwilliam Dam LAN6 PG6181 22 October 2004; Ndlambe Local Municipality Bylaw for control of boats and other activities on rivers in the Ndlamba Municipality Area NN39 in ECPG 1029 9 June 2003; Overstrand Local Municipality By-Law
(ii) Problems that require attention

The report states that the biggest offenders of boating safety norms were power boat and jet ski operators that were not members of boating clubs. ‘[D]rinking and driving’ was suggested to be widespread on inland waters. 372 Failure to wear personal flotation devices; 373 the overloading of boats; and the fitting over powered engines were noted as a major safety concerns. 374

Construction standards for boats were not noted to be a safety concern within recreational boating, but problematic when commercial boating was considered

(iii) Proposals for effective control

The report proposes a safety plan for inland boating, which has the following principles:

- that operator (skipper) competency is established through testing;
- that on-the-water enforcement is conducted;
- that vessels are registered on a national database;
- that uniform standards for vessel construction and for the carriage of safety equipment are prescribed;
- that aids to navigation for inland waters are instituted for high volume usage waterways; and
- that coordinated emergency services including incident reporting and investigation are introduced. 375

The report notes that the registration of all recreational boaters on inland waters would be a ‘mammoth’ task and that it should not be contemplated unless enforcement of boating standards was envisaged by the legislation. 376 To this end the report includes proposed regulations for the inspection of pleasure boats for regulated construction and equipment standards for implementation in terms of sec...
3(9) of the MSA. A new regime falling under an 'Inland Waterways Act' is proposed for the long term control of inland boating.

Compulsory plan approval and SAMSA survey of commercial boats is proposed. Inspection of recreational boats would be dependent on the establishment of a database of boats. The provision of prescribed safety equipment is seen to be vital to the furtherance of safe boating.

The plan states that high volume usage dams should be charted and that a navigation marking system is implemented for inland waterways.

(iv) Constitutional implications

The report considers the Constitutional implications of passing inland waterway legislation. The Constitution prescribes that conflict between national, provincial or local regulations is to be resolved by testing the legislation against certain criteria.

National competence is reserved for matters that require national uniformity and that are necessary for the promotion of national security, economic unity, equal access and protection of the environment. Schedule 4 of the Constitution lists matters that have both national and provincial competence; whereas sch 5 of the Constitution lists areas that enjoy exclusive provincial competence.

The report considers boating to be a form of 'public transport' and thus falling under the concurrent competence of national and provincial government since this matter is listed in sch 4 of the Constitution. 'Provincial recreation and amenities' and 'provincial sport' are both listed in sch 5 and thus exclusively provincial matters. Boaters are however notoriously mobile and inland boats are regularly used at the South African coast, where they are then subject to the controls contained in the MSA.

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377 Ibid at 8.
378 Ibid at 12.
379 Ibid para 9.5.4.
380 Ibid para 9.5.4.
381 Ibid para 9.5.5.
383 Ibid s 146-50.
384 Ibid s 146(2).
385 Consortium report op cit note 365 at 34.
The report recommends that the current regime of national and/or provincial regulation is maintained.\(^{386}\)

**(v) Implementation challenges**

Lack of capacity and non-existent legal framework were the primary concerns raised by the report regarding the implementation of a new regime for inland boating.\(^{387}\) It was perceived that a general lack of trust in governments' ability to implement a new safety regime for inland boating would negatively affect the success of the plans.\(^{388}\) Other concerns regarding successful implementation were the range of geographical differences between inland waterways and the lack of coordination between national, provincial and local government.

It was proposed that safety arrangements at high volume dams would be controlled by provincial departments.\(^{389}\) Local control by non-statutory means was again quoted as the most effective method of control that was observed by the consortium and it highlighted that boaters using the majority of the waterways had a culture of lawlessness.\(^{390}\)

Nationalised registration and marking of boats is noted to be a 'extensive task' since the report estimates that approximately 90 000 power boats and 7 000 sailing boats operate on our inland waters. It was noted that SAMSA had approximately 1 000 vessels on the 'Ship Register' at that time. The National Department for Transport was proposed as the avenue for a new registration system possibly using the system that registers motor vehicles used on our roads.\(^{391}\)

**(vi) Response to boating emergencies**

Safety authorities that would conduct local enforcement were also tasked with responding to emergencies that may occur on the water.\(^{392}\) Recording the reporting of incidents was proposed to be a local authority responsibility since the South

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\(^{386}\) Ibid at 35.
\(^{387}\) Ibid at 75.
\(^{388}\) Ibid at 75.
\(^{389}\) No reference is made to which 'provincial departments' should control the safety arrangements.
\(^{390}\) Ibid at 7. 'The lack of regulation on most inland waterways has contributed to a general culture of lawlessness.'
\(^{391}\) Ibid para 9.5.3.
\(^{392}\) Ibid para 9.5.6.
African Police Services did not record boating accidents separately to their normal reporting system.\textsuperscript{393}

The plan sought to start afresh from within the National Department for Transport to build an inland safety model that clearly separated the control of commercial and pleasure boats; commercial boats being controlled by SAMSA to standards similar to sea going boats and pleasure boats being controlled by local authorities and authorised agencies. The highest priority for pleasure boat control was named to be the three high usage waterways, namely the Barrage, Hartebeespoort Dam and Vaal Dam.\textsuperscript{394}

VI WORKING GROUP FOR INLAND WATERWAYS

The Department of Transport called together a group called the 'Inland Waterways Working Group' to address the issue of instituting control of boating on inland waterways. The first meeting was held on 1 September 2004. The objectives of the working group were to:

- 'Inculcate safety on South Africa's Inland Waterways[; and]
- To oversee the role out plan for the implementation of regulations pertaining to inland waterways.'\textsuperscript{395}

The working group consisted of members from the Department for Transport, National Sea Rescue Institute, South African Maritime Safety Authority, South African Police Services, Department for Water Affairs and Forestry, Department for Sport and Recreation and various sporting bodies that were designated as Authorised Agencies for SAMSA. The guiding document for this working group seems to have been the report titled 'Inland Water Navigation: Proposed Safety Plan' compiled for the Department of Transport by 'Burport – Axios – TMT' consortium.\textsuperscript{396}

(a) Initial work

The minutes of the Inland Waterways Working Group state that the proposed safety plan was not implementable, but that the issues raised by the consortium would be used as the basis for drafting legislation. SAMSA was tasked with

\textsuperscript{393} Ibid para 9.5.7.
\textsuperscript{394} Ibid para 10.
\textsuperscript{395} Department of Transport Inland Waterways working group agenda and minutes.
\textsuperscript{396} Supra note 365.
reviewing the current regulations with the view of establishing how they could be adapted to implement and enforce control of commercial vessels operating on inland waters. This was done on 24 September 2004 when SAMSA reported back to the Department regarding the control of commercial boats operating on inland waters into the MSA.\textsuperscript{397}

\textit{(b) Proposed amendments to incorporate inland waterways}

The report to the working group shows that minor amendments would be required to the current regulations to control commercial boating on inland waterways. More importantly the Minister would need to declare the Merchant Shipping Act to be applicable to inland waterways and dams in terms of sec 3(9) of the Act.\textsuperscript{398}

SAMSA proposed that licensing\textsuperscript{399} of these commercial boats be conducted by the local authority and that SAMSA only issue the safety certification\textsuperscript{400} since the local authority would be best placed to give the permission for the operation to be conducted and may wish to prescribe additional control that has local significance.\textsuperscript{401}

\textit{(c) Registration and licencing of inland water and seagoing boats}

Registration and Licencing of boats continued to be debated within the working group and proposals were made to include boats into the national register for motor vehicles used on our roads.\textsuperscript{402} This was not accepted by the committee due to the existence of the SAMSA ships register – it was felt that all boats and ships should be registered in one place.\textsuperscript{403} No plans can be found to include licensed vessels and pleasure boats on the South African ships register.

\textsuperscript{397} SAMSA Inclusion of commercial operations on inland waters in the Merchant Shipping (Small Vessel Safety) Regulations 2002.
\textsuperscript{398} Ibid para 2
\textsuperscript{399} As required in terms of MSA sec 68
\textsuperscript{400} MSA s 194
\textsuperscript{401} Ibid para 3
\textsuperscript{402} Road vehicles are registered in terms of the National Road Traffic Act 93 of 1996. The national traffic information system (ENATIS) is the information system that retains the information for every motor vehicle. Available at http://www.tasima.co.za/enatis.html accessed on 1 June 2013.
\textsuperscript{403} Working Group meeting notes dated 9 February 2005
VII CHANGES TO SMALL VESSEL REGULATION DURING 2007

The Merchant Shipping (Small Vessel Safety) Regulations 2002 were repealed by the Merchant Shipping (National Small Vessel Safety) Regulations 2007 on 8 August 2007.

(a) Application of 'national' regulations

These 'national' small vessel regulations were specifically applicable to commercial small vessels and also to pleasure vessels of less than 100 gross tons used on inland waters and at sea. No ministerial declaration had extended the application of the MSA to inland waters at that time.

(b) Changes made to 2002 regulations

The regulatory requirements for the marking and survey of power driven pleasure boats was limited to power driven vessels equipped with engines greater than 15 horse-power; and to sailing vessels that were longer than 9 meters in length. This reduction in the scope of the application for the marking and survey of boats seems to be due to the over ambitious nature of the 2002 requirements, which required all seagoing pleasure boats to be marked and surveyed. The requirements for skipper certification were also realigned, taking into account the same limitations as the survey regime.

Furthermore, the 2005 requirement for lifejacket lights to be fitted to lifejackets used on boats was not included in the new 'national' regulations.

The regulations established a good foundation for inland waterway regulation, should the minister declare the MSA to be applicable to them.

404 GN500 GG 23345 of 26 April 2002.
405 GN 705 GG 30151 of 8 August 2007.
406 Ibid reg 3(1)(a)(iv) [Commercial small vessels being those commercial vessels of less than 25 gross tons.]
407 Ibid reg 3(1)(b)(iii)
408 Ibid reg 20(2)
409 Merchant Shipping (Small Vessel Safety) 2002 Reg 17
410 Ibid reg 14(1)(b)
411 A major challenge regarding the implementation of the regulations to inland water ways would be the tonnage limitations for commercial and pleasure vessels, since the gross tonnage of boats on inland waterways had never been determined.
VIII CURRENT INLAND BOATING CONTROL
The eleventh of July 2008 was a watershed day in the control of boating in South Africa. The minister published three notices that day, namely the Ship Registration Regulation amendments, the Declaration under sec 3(9) and the amendments to the National Small Vessel Safety Regulations.

(a) Inland waterways declaration
The declaration in terms of sec 3(9) of the MSA made inland waterways and dams that are 'from time to time capable of navigation' and 'open or used by the public for navigation' subject to the control allowed by the MSA. In order to understand the implications of the declaration we must explore the meaning of the relevant words, namely 'navigation' and 'open or used by the public'.

(i) Definition of 'navigation'
The word 'navigation' finds its origins in Latin and combines the words navis meaning ship and ago meaning to drive – thus meaning the 'art of conducting a vessel from one place on the earth's surface to another....'

'Navigation' is not defined in either the MSA or the sec 3(9) declaration, but is referred to in South African case law. Early references to 'navigable' are linked to land claims regarding the boundary of a piece of land in relation to a river.

Innes CJ states, in the Van Niekerk case, that South African courts have been enabled to develop unique law regarding water rights due to the elasticity allowed by the civil and Roman-Dutch systems that is specifically suited to our local conditions. He states that South Africa is practically devoid of navigable rivers, but has defined the 'streams' to be 'public' even if dry for extended periods. The judgement

412 GN 729 GG 31218.
413 GN 730 GG 31218.
414 GN 731 GG 31218.
415 'The Minister may by notice in the Gazette declare that any of the provisions of the Act which by that notice specified, subject to any exemptions, modifications and restrictions so specified, shall apply to any dams and other inland waters so specified.'
416 Ibid sec 2(a).
417 Ibid sec 2(b).
419 Van Niekerk & Union Government (Minister of Lands) v Carter 1917 AD 359. Lange and Another v Minister of Lands 1957 (1) SA 297 (A).
420 Van Niekerk at 377.
expressly states that riparian land owners are protected from the public who may wish to exercise their public rights on a river, if they need to trespass the riparian land to access the river.⁴²¹

The public’s rights to 'navigate' on a river were heard in the Butgereit case.⁴²² The Transvaal Canoe Union applied to the Transvaal Provincial Division for clarity regarding their rights to canoe on the Crocodile River. Eloff DJP held that the river was a public river and that the public right to 'navigation' on public rivers was longstanding.⁴²³ He averred that it was not material that the river was not navigable as envisaged by the early writers, but that 'navigability' as a concept was sufficiently broad to allow the passage of canoes on a river as a common law right that had not been eroded by statute.⁴²⁴

The case was taken on appeal where the original judgement was confirmed.⁴²⁵ The judgement refers to 'commercial navigation' not being possible on the majority of South African rivers (including the Crocodile River) but recognises that the public can use rivers for such activities as may be 'rendered possible' by a river.⁴²⁶

It is submitted that 'navigation' as practiced by persons in canoes and boats for 'sport and recreational purposes' was recognised to be similar to 'commercial navigation' practiced by 'large vessels' and that the term 'navigation' includes both forms.⁴²⁷

(ii) Water open to the public for navigation

Water must be 'open to or used by the public ...'⁴²⁸ for the MSA to be applicable.

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⁴²¹ van Niekerk op cit note 419 at 378.
⁴²² Transvaal Canoe Union and Another v Butgereit and Another 1986 (4) SA 207 (T).
⁴²³ Ibid at 210.
⁴²⁴ Ibid at 214.
⁴²⁵ Butgereit and Another v Transvaal Canoe Union and Another 1988 (1) SA 759 (A).
⁴²⁶ Ibid at 769.
⁴²⁷ 'Navigation' is defined in case British law and differs substantially from the definition implied in the Butgereit case: '...depends not on the size of the sheet of water but on whether the vessels are proceeding from an originating place A to a terminus B for the purpose of discharging people or cargo at the destination point, in which case there is navigation, or whether the water is simply used for pleasure purposes by people ‘messing about in boats’, in which case there is no navigation. Accordingly, a sailing dinghy used on a reservoir for such pleasure purposes is not a ‘vessel used in navigation’....’ Curtis v Wild [1991] 4 All ER 172.
⁴²⁸ Supra note 413.
The National Water Act 36 of 1998 at sec 4 allows ‘water in or from a water resource’ to be used for recreational purposes in accordance with the restrictions listed in sch 1. The water and its surface are allowed to be used for recreational purposes, including boating. Boats and canoes are allowed to be portaged along the riparian land so that continued boating on the watercourse is ensured. Access to the ‘water resource’ must have been lawful in order to enjoy these permissible uses of water.

Any entitlement to use water for recreational purposes is able to be limited and prohibited and must be exercised in accordance with the prevailing laws applicable to that activity in South Africa.

The requirements of the MSA as declared applicable to inland waters are one of the requirements for lawful access for boats to inland waterways.

(iii) Department of Water Affairs boating regulation and policy

‘Recreational use’ is not specifically defined in the National Water Act. The Department of Water Affairs (DWA) has published policy in this regard. The policy does not distinguish between commercial and pleasure (non-commercial) recreational water use (as is done by the MSA boating regulations). The department published draft regulations for recreational water use that were intended to replace the out dated 1964 regulations controlling boating.

\[\text{Sch 1 (1)(e)(i).}\]
\[\text{Sch 1 (1)(e)(ii). Portage of boats along a river bank was not found to be a common law right. Transvaal canoe union and another v Garbett and another 1993 (4) SA 829 (A).}\]
\[\text{Sch 1 (1)(e)(i).}\]
\[\text{Sch 1 (2).}\]

\[\text{ibid at 2 ‘Recreational water use thus includes all recreational activities and exploits which require water or the surface of the water resources for successful; completion. These activities may comprise inter alia sport, culture, or tourism and can range from de minimis (personal use) to commercial in extent and intent.’}\]
\[\text{Draft Regulations for the use of water for recreational purposes generally and in respect of a government waterworks and surrounding state owned land. GN1188 GG 29413 of 1 December 2006.}\]
\[\text{Regulations framed in terms of paragraphs (b), (c) and (j) of section seventy of the Water Act, 1956 (Act 54 of 1956) GN 654 GG 777 of 1 May 1964.}\]
The 1964 regulations were only applicable on state water surfaces when they were published. The previous regime regarding the ownership of water in South Africa allowed for both public and private ownership of water.\textsuperscript{438} The current National Water Act 36 of 1998 has changed the position regarding water ownership; and clearly states that all water resources are placed under the public trusteeship of the national government.\textsuperscript{439}

Furthermore, NWA sec 163 repeals and saves certain sections of previous legislation (including the Water Act 54 of 1956) and at sec 163(4) states that 'any regulation made under a law repealed by this act remains in force and is considered to have been made under this act' if it is not inconsistent with the new act and until it is repealed by the minister under this Act.'

The 2006 draft regulations never entered into force and the 1964 requirements are thus still enforceable, even though there do not seem to be control mechanisms in place to administer them.

(b) Merchant Shipping (National Small Vessel Safety) Amendment Regulations 2008

The amendment regulations\textsuperscript{440} broadened the scope of the application of the previous regulations concerning vessels operating on inland waterways. The scope of application for the regulations now includes all commercial and pleasure boats operating on inland waters.\textsuperscript{441} Additionally, certain definitions were clarified or introduced.\textsuperscript{442}

Pleasure boats fitted with engines of greater than fifteen horsepower and sailing boats that are longer than nine meters in length\textsuperscript{443} are required to be marked with an identifying number\textsuperscript{444} and surveyed for compliance\textsuperscript{445} with the standards for construction and safety equipment (whether operating at sea or on inland waters).

\textsuperscript{439} NWA s 3(1).
\textsuperscript{440} GN731 GG 31218 of 10 July 2008.
\textsuperscript{441} Merchant Shipping (National Small Vessel Safety) Regulations 2007, as amended, reg 3.
\textsuperscript{442} For example, the definitions of underway, tender and kill switch are affected.
\textsuperscript{443} Merchant Shipping (National Small Vessel Safety) Regulations 2007, as amended, reg 20(2).
\textsuperscript{444} Supra approved marking issued in terms of reg 21.
\textsuperscript{445} Ibid reg 23.
Compliant boats are issued with a certificate of fitness\textsuperscript{446}; additionally the skippers of these boats need to be certificated.\textsuperscript{447}

All commercial vessels are required to be licensed and are subject to compliance surveys.\textsuperscript{448}

The regulations are fully explored in Chapter 5.

(c) Changes to Ship Registration Regulations

The ship registration regulations\textsuperscript{449} were amended to prohibit the registration of vessels used solely on inland waters from registration.\textsuperscript{450} No alternative database was instituted to record the particulars of these vessels.\textsuperscript{451}

(d) Local laws and regulations

The safety of navigation requirements state that skippers must adhere to the 'law in force in the area in which the vessel is being operated, in so far as it is not inconsistent with the Act.'\textsuperscript{452} Municipalities can pass local by-laws relating to boating.\textsuperscript{453} As an example, boating on Clanwilliam Dam is subject to the following control by the Cederberg local municipality:\textsuperscript{454}

- The registration and licencing of boats by the municipality.\textsuperscript{455}
- The prohibition of people under the age of 16 from operating power driven boats.\textsuperscript{456}
- The prohibition of causing pollution of the dam, by requiring a suitable container for refuse to be collected and that tanks collecting sewerage and waste water may not be discharged into the water.\textsuperscript{457}
- The determination of where activities may be conducted on the dam, for example water skiing, sailing or fishing.\textsuperscript{458}

\textsuperscript{446} Ibid reg 24.
\textsuperscript{447} Ibid reg 14.
\textsuperscript{448} MSA s 68 and 190.
\textsuperscript{449} Ship Registration Regulations 2002 GN 479 GG 23345 of 26 April 2002.
\textsuperscript{450} Ibid Reg 12(d).
\textsuperscript{451} The Director-General is tasked with establishing a database of vessels in the Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 21(2)(c).
\textsuperscript{452} Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 8(1)(e & g).
\textsuperscript{453} Supra note 371.
\textsuperscript{454} By-law relating to the control of boats and boating on the Clanwilliam dam LAN 6 Western Cape Provincial Gazette 6181 of 22 October 2004.
\textsuperscript{455} Ibid by-law 2(1).
\textsuperscript{456} Ibid by-law 2(2).
\textsuperscript{457} Ibid by-law 3(j) and 11(3).
\textsuperscript{458} Ibid by-law 4 'Rules for boating'.
(e) Summary of legislative control over inland waterway boating

Reading the MSA and NWA in conjunction we can see that recreational boating is allowed on South Africa's inland waterways and dams where legal access to the water has been gained. The MSA and particularly the Merchant Shipping (National Small Vessel Safety) regulations 2007 are used, in addition to other national, provincial or local laws, to control that boating activity. Skippers and owners are to ensure that they are compliant when operating their boats.

IX SAMSA ADMINISTRATION OF BOATING

Administration of the MSA rests with SAMSA.459 Traditionally the only operational presence that SAMSA has maintained has been along the South African coast. Offices have been established at the major commercial harbours; while the head office has been located in Pretoria.460 The inclusion of inland waters under the control of the MSA resulted in a major lack of resources being available from SAMSA to successfully implement the new regime.

Administration of the inland boating regime was initially facilitated through the SAMSA office based in Pretoria where the 'Centre for Boating' was established.461 SAMSA continued to rely on the various existing Authorised Agencies, and their network of clubs and individuals that are dedicated to boating, for the successful implementation of the regime. The period between 2008 and 2010 however also saw a proliferation of several quasi-authorised agencies being designated by SAMSA.

These quasi-authorised agencies were generally locally based and intended to service the requirements of a community or group of communities for the profit of the owners of boating businesses acting in the guise of an 'authorised agency'.462 In addition, many of the true water sport governing bodies designated as authorised

459 MSA sec 5 '[SAMSA] shall be responsible for the administration of this Act, and shall have the control of all matters incidental thereto.'
460 Port Nolloth, Saldanha Bay, Cape Town, Mossel Bay, Port Elizabeth, East London, Durban and Richards Bay.
461 The centre for boating was officially launched on 28 January 2010 at a gala event hosted by SAMSA at Peaconwood Golf Estate on the banks of the Haartebeespoort dam
462 Examples included Stywelyne, Anchors Away, Boaters Hubb, Anchor Power Boat Academy and many more.
agencies had evolved to effectively operate as survey companies and were generally not operating within the limits of the regulations.\textsuperscript{463}

\( (a) \) Control of boating in organised sports

The boating regulations still allow for the designation of authorised agencies.\textsuperscript{464} Clubs and organisations that are affiliated with water sport governing bodies, or the governing body itself can be designated as authorised agencies thereby 'entrusting to it'\textsuperscript{465} the delegated control of the boats that are under their membership.

The use of the word 'entrusting' is indicative of the relationship that is envisaged between the sporting body and SAMSA; since there should be no obligation to conduct this control except that 'it is through the medium of these people that the complete message of boating safety will be conveyed to the general boating public.'\textsuperscript{466} Agencies may be designated to perform any or all of the following functions:\textsuperscript{467}

\begin{itemize}
  \item Determining the maximum number of persons to be carried on a pleasure boat.
  \item Record the voyage details for boats operating at sea and on inland waters.
  \item Determining if a pleasure boat is sufficiently and efficiently manned.
  \item Issuing, suspending or cancelling certificates of competency for small boat skippers.
  \item Requiring a person to submit evidence of medical fitness when acting as skipper of a boat.
  \item Supervision of persons under the age of 16 engaged in motorised water sport.
  \item Conducting initial and renewal inspections of boats that require certificates of fitness.
  \item Issuing certificates of fitness to compliant boats after inspections.
\end{itemize}

\textsuperscript{463} Authorised Agencies are defined in regulation to be 'a governing body, club or organisation designated under regulation 30(1)' which intern requires that authorised agencies are '…affiliated with a governing body….' The National Sport and Recreation Act 110 of 1998 defines a 'national federation' to mean 'a governing body of a sport code or recreational activity in the Republic recognised by a relevant international controlling body….' To this end the Department of Sport and Recreation has published regulations for the recognition of sport and recreation bodies GN 641 \textit{GG} 34509 of 8 August 2011.

\textsuperscript{464} Supra note 272.

\textsuperscript{465} Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 30(1).

\textsuperscript{466} Reinecke commission finding 3.2.3.

\textsuperscript{467} Ibid reg 30(1).
• Approval of controlled events, where boats are not fully equipped as per the requirements of the regulations.

Safety officers are appointed by authorised agencies to act on their behalf to perform the statutory functions listed in their designation. These safety officers must be members of the authorised agency. Their appointment terminates if their membership of the agency is suspended or terminated or if otherwise revoked by the agency. Safety officers are required to return their certificates of appointment as a safety officer if instructed to do so.

The loss of six lives when a boat carrying 21 Sasol employees capsized and sank on the Witbank dam caused SAMSA to focus its attention on the delegation of powers to authorised agencies. The boat had been incorrectly inspected by a safety officer from the South African Small Craft Association.

SAMSA responded by instituting a national moratorium on the appointment of safety officers and examiners; and scheduled a series of training workshops and examinations of safety officers and examiners. The quasi-authorised agencies were closed by SAMSA and closer compliance by the remaining agencies was achieved through focussed leadership, cooperation and training.

(b) Appointment of small vessel surveyors

SAMSA has for many years appointed individuals to survey small vessels on its behalf. These individuals were generally identified through their appointment as safety officers within authorised agencies or by the principal officer on an ad hoc basis. Small vessel surveyor conduct their inspections under the control of a principal officer.

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468 Ibid reg 30 (4).
470 The limits of their delegation being pleasure boats carrying 12 passenger (or less) and of less than nine meters in length, but the vessel was over nine meters long and operated commercially as a passenger vessel.
471 Moratorium on the appointment of examiners and 'safety officers' Ref: SM 20/p 22 March 2011.
472 More than 500 safety officers and 200 examiners have been trained and assessed to date. A handful of safety officers were suspended for non-attendance at these courses.
473 The appointment of these small vessel surveyors is done in terms of MSA s 4(b).
Owners of boats request the required statutory surveys directly with the small vessel surveyor when services are required. Certificates of fitness are issued to compliant pleasure boats by the surveyors. The record of the survey is then submitted to the relevant SAMSA principal officer for record keeping.

Appropriately trained and experienced small vessel surveyors are additionally appointed to survey commercial vessels, on behalf of SAMSA. These appointments are normally limited to the survey of small commercial fishing boats that are less than nine meters in length and carried on trailers. Owners are given the 'report of survey'\textsuperscript{474} which they submitted to the SAMSA principal officer. The principal officer then ensures that the Local General Safety Certificate is issued. The appointment of small vessel surveyors is seen as a cost effective method to ensure that the public can obtain the required statutory inspections and examinations.

\textsuperscript{474} In terms of MSA s 191
CHAPTER 5 COMPLIANCE

I BOATS USED FOR SPORT OR RECREATION

The onus for maintaining compliance with safety legislation applicable to small pleasure boats is divided between the owner\(^\text{475}\) and skipper.\(^\text{476}\) Boats must be registered if they wish to operate outside of the South African exclusive economic zone.\(^\text{477}\) Registered boats of all sizes and unregistered boats of greater than 100 gross tons must be surveyed annually for the issue of a local general safety certificate by a SAMSA surveyor.\(^\text{478}\)

Unregistered boats of less than 100 gross tons must comply with the special provisions listed in Part 4 of the Merchant Shipping (National Small Vessel Safety) Regulations 2007 if they fall within certain thresholds. Sailing vessels of greater than nine meters long and power-driven vessels fitted with engines greater than 15 horse-power are required to be marked for identification and be inspected for compliance.\(^\text{479}\) Owners and skippers are prohibited from operating these boats unless the boats have been marked and issued with a certificate of fitness.\(^\text{480}\)

Unregistered boats that are 'smaller' that those listed above are self-regulated by owners and skippers.\(^\text{481}\)

(a) Marking of unregistered boats

In order to be considered compliant with the regulations and thus able to be inspected for the issue of a certificate of fitness the boat must be marked with an

\(^{475}\) 'Owner' is defined in the Merchant Shipping Act 57 of 1951 and the Merchant Shipping (National Small Vessel Safety) Regulations 2007. The definition includes the owner, receiver of credit that relates to the purchase of a boat and any person entrusted by the owner with the care and control of the vessel.

\(^{476}\) 'Skipper' is defined in the Merchant Shipping (National Small Vessel Safety) Regulations 2007 as 'the master'. The Merchant Shipping Act 57 of 1951 defines master to mean 'in relation to a ship, any person (other than a pilot) having charge or command of such ship.'

\(^{477}\) Hare op cit note 7 summarises the master in terms of South African and International law at chapter 5-2 as being '... all things to all people. Subject to the law of the flag of the ship and to the observance of basic human rights, the master's command on board is absolute.'

\(^{478}\) SRA s 44-5.

\(^{479}\) MSA s 194.

\(^{479}\) Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 20.

\(^{480}\) Ibid reg 22.

\(^{481}\) Ibid reg 37.
'approved marking'.

Approved markings are obtainable from either SAMSA or directly from one of the authorised agencies that have been designated for this purpose. The marking must be visible from both the port and starboard sides of the vessel.

Furthermore, the Director-General of the Department of Transport is required to maintain a database of all boats that have been issued an approved marking. The Director-General must nominate the particulars of the boat and its ownership to be collected from the owners for input into the database. Approved markings have been issued to boats since the previous regime of small vessel control, but to date no database has been established. Agencies and SAMSA have un-aligned records of the particular boats that have been issued with their markings, but access to this information is generally limited to single queries only.

Owners are required to communicate information regarding the sale and service of their boats to SAMSA or the agency that issued the marking within fourteen days of any changes and in writing. Approved markings may be revoked and ordered to be removed by the SAMSA or an agency if they believe that the marking was obtained fraudulently or on wrongful information or has ceased to be valid. Where boats that are required to be marked are found not displaying an assigned marking then they should be assigned one by SAMSA or the relevant agency, since control of boats is directly related to their identification.

The above provisions all sound quite officious, but in reality numbers are assigned (in most cases) at the time of survey and by the surveyor or safety officer directly to the owner or skipper. SAMSA has designed their 'Report of Survey' form to include the application requirements for an approved marking, in a hope to minimise the 'red-tape' that owners must navigate during boat ownership. Streamlining of the requirements may have resulted in owners (and some safety officers and surveyors) not actually understanding the legal controls that result in

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483 Ibid reg 21(4).
484 Ibid reg 21(2).
485 Ibid reg 21(5) and (6).
486 Ibid reg 21(7) and (8).
487 Ibid reg 21(9).
them having their boat surveyed, since owners do not regularly comply with the notification requirements when selling or removing their boats from service.

(b) Inspection of unregistered boats

Certificates of fitness are valid for a period of 12 months and shall not be issued to boats unless they have been inspected (or surveyed) by a safety officer (or surveyor) and found to be compliant. The purpose of the survey is to ensure through the examination of the boat's structure, equipment, appliances, arrangements and materials that the boat's complies with the requirements prescribed by the regulations. Certificates of fitness that have been issued to compliant boats become invalid if the boat is registered by the owner; or if the boat is no longer controlled by the applicable authorised agency; or if owners have failed to maintain their boat's condition as inspected and in compliance with the regulations.

Control by sporting clubs in the form of authorised agency safety officers is common place. This control is dependent on the owners of boats being members of the organisation that carries the authorised agency approved marking. Owners of un-affiliated pleasure boats have been required to change their approved marking year on year when they had been unable to obtain the services of a safety officer from the same authorised agency used for the previous year; or if they wish to have their boat surveyed directly by a SAMSA appointed surveyor. The validity of approved markings was becoming an especially troublesome during the period when numerous quasi-authorised agencies, with their own approved marking, were designated by SAMSA. A policy of 'cross-pollination' was instituted by SAMSA that allows safety officers from all agencies to survey any boat with any approved marking in order to alleviate the challenges that had surfaced.

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489 Ibid reg 23(2).
490 Ibid reg 23(1).
491 Ibid reg 25.
492 Ibid reg 29.
493 'Un-affiliated' to any governing body that is designated as an authorised agency.
494 SAMSA Moratorium on the appointment of examiners and "safety officers" Ref SM 20/6/P of 22 March 2011.
A new system of marking for pleasure boats is envisaged for implementation by SAMSA and Agencies. The new system aspires to reduce the number of markings given to boats.

(c) Self-regulated pleasure boats

Boats of less than 100 gross tons that are powered with engines equal to or less than 15 horse-power, sailing boats of less than seven meters in length and boats powered by human power alone are required to comply with the alternative requirements listed in reg 37.

The alternative arrangements do not require these boats to comply with the construction provisions, but they must ensure that sufficient buoyancy is installed to keep the vessel afloat if swamped.\textsuperscript{495} Inspection and marking of these boats is not required. An alternative list of safety equipment is prescribed for these boats.\textsuperscript{496}

Sailing boats of between seven and nine meters in length are required to be constructed and equipped to the same standards applicable to boats that are longer than nine meters in length, however they need not be marked or surveyed for compliance.

\textsuperscript{495} Ibif reg 37(3)(a).
\textsuperscript{496} Ibid reg 37(3)(b).
CHAPTER 6 CONTROL

I ACCESS TO THE SEA AND INLAND WATERS FOR BOATING

(a) Constitutional provisions

The Constitution of the Republic of South Africa 1996 clearly states that local authorities are allowed to make regulations pertaining to the operation of 'pontoons, ferries, jetties, piers and harbours…', local amenities; local sports facilities; and municipal parks and recreation.

Many examples of national control for local areas are also found, including those made in compliance with the ban on driving of cars on our beaches and the subsequent requirement to regulated boat launching sites in accordance with the National Environmental Management Act 107 of 1998.

(b) Launching of boats at sea

National access to the sea is regulated by the Marine Traffic Act 2 of 1981. The Act restricts that access by 'any ship' to South Africa's internal waters to be via harbours and fishing harbours, unless exempt by regulation. Foreign and domestic small pleasure boats are exempt from the requirement to only enter internal waters via harbours and fishing harbours as long as they engage in 'normal activities'.

The Marine Traffic Regulations restrict and prescribe the places where ships can be launched to either a harbour, fishing harbour or a launching site.

497 Constitution of the Republic of South Africa 1996 sec 155(6)(a) and (7).
498 Ibid sch 4 part B.
499 Ibid sch 5 part B.
502 'Ship' is defined in the Marine Traffic Act 2 of 1981 as any 'waterborne craft or structure or any type … but does not include a vessel propelled by oars';
504 Marine Traffic Regulations GN194 GG 9575 of 1 February 1985 reg 4(b) and (c).
506 Means a commercial harbour that is owned by Transnet.
507 Means a fishing harbour as defined in section 1 of the Sea Fishery Act 12 of 1988 (Although the act is now mostly repealed by Marine Living Resources Act 18 of 1998 sect 84 (1)).
508 Means any place, whether artificially constructed or not, approved by a local authority or other Government authority, from or at which a vessel or a vessel of a particular type, as specified, may be launched, beached, moored or berthed, excluding a harbour or fishing harbour;
509 Op cit note 504 reg 17(1).
Launching sites are regulated through provisions of the Sea Shore Act,\(^{510}\) which proclaims that the sea shore and the sea are owned by the State President.\(^{511}\) Portions of the sea shore can be let for the establishment of a launching area or harbour for boats.\(^{512}\) The National Environmental Management: Integrated Coastal Management Act\(^ {513}\) repeals the whole of the Sea Shore Act, unless it has been assigned to the various coastal provinces.

Local Authorities are empowered to control their areas of the sea shore through regulation.\(^ {514}\)

Boats that are propelled by oars\(^ {515}\) are not subject to the Marine Traffic Act or its regulations. Control of these boats is via local authorities and the by-laws that have been put in place.

(c) Launching of boats in inland waterways

Boating is allowed on inland waters in terms of sch 1\(^ {516}\) of the National Water Act when lawful access to the water has been gained. Water use permitted under sch 1 cannot override any other legislation and may be limited or prohibited.\(^ {517}\) Local authorities may restrict boats to launch at approved launch sites.

Boats may only enter 'sheltered waters'\(^ {518}\) at places permitted by regulating authorities.\(^ {519}\) In addition all boats are required to be operated in compliance with the law in force at the particular area where it is operated.\(^ {520}\)

(d) Operation of unseaworthy boats

Unseaworthy boats are prohibited from operating at sea and on inland waters.\(^ {521}\) Boat launching is restricted to approved launch sites only and furthermore

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\(^{510}\) Act 21 of 1935.  
\(^{511}\) Ibid s 2.  
\(^{512}\) Ibid s 3(1)(f) and (g).  
\(^{513}\) Act 24 of 2008.  
\(^{514}\) Sea Shore Act 21 of 1934 sec 3, 4 and 10; and National Environmental Management: Integrated Coastal Management Act 24 of 2008 sec 48 to 50. An example of such regulations includes those made by the Mossel Bay Municipality: Various municipal by-laws: By-law relating to the control of the seashore and sea. Western Cape Provincial Gazette 6879 of 3 June 2011.  
\(^{515}\) Supra note 502.  
\(^{516}\) Which specifies the sec 4(1) and sec 22(1)(a)(i) requirements.  
\(^{517}\) National Water Act 36 of 1998 sch 1 para (2).  
\(^{518}\) 'Sheltered waters' are defined to include tidal rivers and lagoons, waters within ports and all inland waters. Ibid reg 2.  
\(^{519}\) Ibid reg 37(1).  
\(^{520}\) Ibid reg 8(1)(e) and (g).
only seaworthy boats may be launched. By definition 'unseaworthiness' means that the boat 'is not in a fit state to … encounter the ordinary perils of the voyage upon which she is engaged or is about to enter; ….\textsuperscript{522} Safety certification is a good indicator of seaworthiness, but not all boats required to be issued with skipper and safety certification.\textsuperscript{523}

Boats must never the less be seaworthy at the time of launching.

People (and local authorities) who allow unseaworthy small boats to operate are guilty of an offence since the regulations state:

'[w]here the commission by any person of an offence in terms of regulation 34(1) is due to the act of omission of some another person, that other person also commits the offence and may be charged with and convicted of the offence….\textsuperscript{524}

Non-compliance with the following regulations are deemed to be offences, including:\textsuperscript{525}

- the requirements for skipper and safety certification;\textsuperscript{526}
- the safety requirements that must be adhered to by owners of boats that are not required to be surveyed or certificated;\textsuperscript{527}
- the safety of navigation requirements;\textsuperscript{528} and
- the safety requirements for water skiing.\textsuperscript{529}

Persons who are accused of committing an offence may rely on having followed 'reasonable precautions and exercised due diligence' in the avoidance of committing the offence as a defence against the charges.\textsuperscript{530}

It is submitted that local authorities seem to be required to implement a safety system for boaters, whether they proceed to sea or operate on inland waters. Failure of the local authority to take 'reasonable precautions and exercised due diligence to

\textsuperscript{521} MSA s 240.  
\textsuperscript{522} MSA sec 2 definition 'unseaworthy'.  
\textsuperscript{523} Required for power driven boats with installed power equal or more than fifteen horsepower and sailing vessels of more than nine meters in length overall. Merchant Shipping (National Small Vessel Safety) Regulations 2007 Part 4.  
\textsuperscript{524} Ibid reg 35.  
\textsuperscript{525} Ibid reg 34(1).  
\textsuperscript{526} Ibid part 3 and 4.  
\textsuperscript{527} Ibid reg 37.  
\textsuperscript{528} Ibid reg 8.  
\textsuperscript{529} Ibid reg 36.  
\textsuperscript{530} Ibid reg 34(3).
avoid' the owner and skipper being allowed to operate in an unseaworthy state may result the local authority also being guilty of the same offence.  

It must be assumed that the regulations envisage that when boats are launched there should be some sort of control that determines seaworthiness and thus compliance with the legislation. Local authorities have a crucial role to play in determining launching sites and seaworthiness for boats. Examples of local control include the by-laws made by the Swartland municipality regarding the control of the Yzerfontein harbour area. The controls include limiting the number of boats that can be launched to the number of parking bays in the harbour, and the harbour official may restrict entrance to the harbour area in times of congestion. In the interests of safety the harbour official may prohibit boats from launching at the slipway.

(e) Enforcement by peace officers

We have seen that local authorities may make by-laws and other regulations to administer their obligations. Compliance with these requirements is through the local authority's municipal law enforcement officers that are appointed as Peace Officers in terms of the Criminal Procedure Act 56 of 1955 sec 334. Appointment of Peace Officers is regulated; principally they must comply with any conditions that

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531 Ibid reg 34(3).
532 By-Law pertaining to the Control of the Yzerfontein Harbour Area Western Cape Provincial Gazette 6091 of 12 December 2003.
533 Ibid By-law 3.
534 Ibid By-law 9.
535 Ibid By-law 10.
536 Rand Water Board & others v Ottens [2005] JOL 15906 (T) The Rand Water Board were found to not have sufficient legal basis for controlling pleasure boats operating on the Vaal River Barrage Reservoir and consequently stopped controlling access to this high volume boating waterway.
the Minister may prescribe\textsuperscript{538} and be issued with identification cards.\textsuperscript{539} The specifications of their appointments must be \textit{Gazetted}.\textsuperscript{540}

(f) \textit{Enforcement Officers}

Enforcement Officers\textsuperscript{541} may be designated by SAMSA.\textsuperscript{542} They have the power to board and inspect boats and the relevant certification,\textsuperscript{543} and demand the assistance of the skipper or owner of the boat.\textsuperscript{544} Enforcement officers may direct the movement or prohibit the operation of non-compliant boats.\textsuperscript{545} Owners and skippers must comply with the valid instructions of enforcement officers.\textsuperscript{546}

Enforcement powers are exercised in the interests of public safety and to ensure compliance by owners and skippers of boats.\textsuperscript{547} It can thus be seen that enforcement officers would act as 'gate keepers' who ensure that only compliant boats are allowed to launch and operate. Owners may submit their prohibited boats for inspection by SAMSA who may lift, vary or confirm any prohibition.\textsuperscript{548}

The procedures for the designation of enforcement officers are not spelled out in the legislation. The SAMSA Act requires that SAMSA must 'administer [the] laws referred to in section 2(2)...'.\textsuperscript{549} These laws include the MSA and the boating regulations that give effect to Enforcement Officers. Section 5 of the Act allows SAMSA to perform its functions by cooperation or delegation of their statutory powers to other people, including the state, any province or another government or agency of a foreign government. SAMSA seems to be fully empowered to designate Enforcement Officers.

\textsuperscript{538} Criminal Procedure Act 51 of 1977 s 334(3)(c).
\textsuperscript{539} Ibid s 344(2)(a).
\textsuperscript{540} Requirements and Certificate for Peace Officers GN R210 \textit{GG} 23144 of 19 February 2002 as amended by GN R656 \textit{GG} 24849 of 16 May 2003.
\textsuperscript{541} Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 2 also includes all police officials and specifically appointed safety officers.
\textsuperscript{542} Ibid reg 31.
\textsuperscript{543} Ibid reg 31(1).
\textsuperscript{544} Ibid reg 31(1).
\textsuperscript{545} Ibid reg 31(2)(a).
\textsuperscript{546} Ibid reg 31(4).
\textsuperscript{547} Ibid reg 31(2)(a).
\textsuperscript{548} Ibid reg 31(2)(c).
\textsuperscript{549} South African Maritime Authority Act 5 of 1998 s 4(a).
(g) Examples of enforcement in South Africa

There are various examples of delegating official power to non-employed individuals for the purposes of compliance enforcement, including the appointment of an 'honorary marine conservation officers' in terms of the Marine Living Resources Act. These appointments seem to be effective if correctly administered and controlled.

(h) Lessons learnt regarding enforcement

The prohibition of access to the sea for boating was heard by Plasket J in the case of *Clur v Keil and Others*. The case concerned the permanent banning of a commercial boat operator from using the public launch site situated at the Kei Mouth following a suspected breach of the rules relating to fishing within the nearby marine reserve. The launch site is managed 'as a public facility' under licence from Chief Directorate: Environmental Affairs of the Department of Economic Development and Environmental Affairs of the Eastern Cape Province by the Kei River Ski Boat Club. The judgement held that the disciplinary proceedings and sanctions were to be set aside due to there being no 'lawful power to discipline' the users of the launch site through the members of the ski boat club. Plasket J reminded the defendants that they had certain powers as civilians regarding the reporting of crimes and that one of them had even been appointed as an honorary marine conservation officer and had certain powers that could be exercised.

If we consider these findings and refer to designation of Enforcement Officers, we can see that their powers would be limited to those listed in the boating regulations. Owners and skippers have recourse to SAMSA if they have been prohibited from launching their boats on any particular occasion. Careful training and management of these designations would be critical to the long term success and effectiveness of these provisions.

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551 Bushman's Kariega Estuary Care Management Forum Newsletter Nov 2010.
552 2012 (3) SA 50 (ECG).
553 Ibid para 11.
554 Criminal Procedure Act 51 of 1977 s 42.
555 Supra para 25.
II CO-OPERATIVE INLAND WATERWAYS SAFETY PROGRAM

The Department of Transport's advisory committee for the administration of the Merchant Shipping (National Small Vessel Safety) Regulations 2007 has constituted a sub-committee that focuses on the implementation of the boating regulations on our inland waters. The sub-committee was initially called the 'Inland Maritime Safety Program', but was recently re-named to be the 'Co-operative Inland Waterway Safety Program' (CIWSP) to better clarify its purpose.

(a) Vision for inland waterways

The program functions under the chairmanship of the Provincial Department of Transport from the North West Province and is hosted by the Centre for Public Service Innovation. The vision of the program is 'to attain a state of safe inland waterway use in South Africa' by allowing for the cooperation between various government and private bodies in the fulfilment of their individual mandates regarding inland waterways. The Departments of Water Affairs, Environmental Affairs, and Transport; as well as the South African Police Services and SAMSA are the major contributors to the program.

There are four cornerstones of the plan, namely: establishing ownership and control of the water surface and riparian land; control of access to the water, through the delimitation of boat launch sites and access via riparian land; training and appointment of the local authorities for control and enforcement of water users; and efficient response to emergencies. The program seeks to facilitate the interaction and involvement of all participants involved in water safety.

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556 Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 38(1).
557 Renamed on 7 September 2012.
558 Centre for Public Service Innovation was established by the Minister for Public Service and Administration in 2001. The centre aims to see ‘a solution-focussed effective and efficient public sector through innovation.’
560 Ibid Goal 1 intervention 01.7.
561 The program motto is 'Be part of the solution' and is guided by a quote from President Nelson Mandela 'Where people of goodwill get together and transcend their differences for the common good, peaceful and just solutions can be found, even for those problems that seem most intractable.'
(b) **Pilot dams**

The plan has designated five major state owned dams as pilot sights for implementation.\(^{562}\) Resource management plans (RMP) are currently being drawn up for these inland waterways to ensure that the dams are sustainably managed and compliance with the National Water Act 36 of 1998 is achieved.\(^{563}\)

RMP must take into consideration the local communities requirements regarding the management of the water. Community meetings have been held in this regard for the five pilot dams where numerous requests have been made to explore the economic potential of inland waterway. By coordinating the various compliance requirements the programme hopes to achieve its aim. There has, however, been a distinct lack of involvement from local municipalities during these meetings.\(^{564}\)

Recently a sixth pilot area has been added to the plan. The Ekurhuleni Metropolitan Municipality's desire to better manage the Germiston Lakes area has led to their inclusion into the program. This seems to be a good opportunity to engage with a local authority to ensure that their local by-laws speak efficiently to safe boating.\(^{565}\)

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\(^{562}\) Namely: Theewaterskloof Dam, Boskop Dam, Vanderkloof Dam, Midmar Dam and De Hoop Dam.

\(^{563}\) NWA s 113.

\(^{564}\) Minutes of Vanderkloof Dam RMP – Authority Workshop.

\(^{565}\) Memorandum of understanding entered into by Ekurhulenu Metropolitan Municipality and SAMSA dated 31 July 2012.
CHAPTER 7 RECOMMENDATIONS

When considering recommendations for implementation and enforcement of these boating regulations it is difficult to ignore the recommendations made previously by the Reineke Commission and the Burport–Axios–TMT consortiums report. These two reports have much in common, including the focus on the importance and role played by provincial governments, local authorities and water sport clubs; and the need to focus implementation and enforcement where boating activity is highly concentrated.

The legislative backbone of shipping and boating seems to be functional; the change requirements residing in the areas of control and implementation.

I LOCAL AUTHORITIES

Local Authorities are mandated to control their specific geographical areas and control over inland waterways by them is envisaged by the boating regulations. By-laws are the appropriate method of control for municipalities. The South African Local Government Association (SALGA) is the representative body for municipalities in South Africa. Interaction with specific municipalities that have high volume boating on their waterways and coordination through SALGA for the remaining municipalities regarding the content and enforcement of boating regulations and the drafting of appropriate by-laws is most likely the best method to achieve results.

II PEACE OFFICERS

Municipal law enforcement officers are appointed as peace officers and have far reaching powers regarding their local by-laws; and may have extended mandates regarding other pieces of legislation if appropriately trained and appointed. It is recommended that further investigation and interaction with municipalities regarding the implementation of enforcement training regarding the MSA and the regulations applicable to boating should be considered for

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566 Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 8(1)(e) and (g).
567 Constitution of South Africa 1996 s 163.
568 Criminal Procedure Act 51 of 1977 s 334(1)(a)
569 Merchant Shipping (National Small Vessel Safety) Regulations 2007
peace officers and that peace officers are given the powers to enforce the provisions.

III ENFORCEMENT OFFICERS

SAMSA appointed enforcement officers have a crucial role to play in preventing unseaworthy boats from being used on our waters.\textsuperscript{570} They have the power to direct the movement of boats and to prohibit their operation.\textsuperscript{571} Owners have access to SAMSA when their boats have been prohibited from operation by an Enforcement Officer. It is recommended that SAMSA adopts operational policy that allows for the appointment and management of this valuable addition to boating safety.

IV DATABASE OF BOATS

The regulations require the Director-General of the Department for Transport to maintain a database of boats that have approved markings issued in terms of the Merchant Shipping (National Small Vessel Safety) regulations 2007.\textsuperscript{572} Enforcement officers have the power to prohibit the use of a vessel until any ownership issues (marking and safety compliance) are resolved.\textsuperscript{573} Local Authorities would be better equipped to give seaworthy boats access to water if they could consult a database of approved boats. It is recommended that the database be commissioned and access be given to enforcement officers.

V CO-OPERATIVE INLAND WATERWAY SAFETY PROGRAM

The co-operative inland waterway safety program aims to work towards achieving a state of safe waterway use.\textsuperscript{574} This program provides a good opportunity to engage national and provincial governments, local authorities and affected communities into the decision-making process regarding the control of inland boating. This pilot project should be given appropriate resources and attention, with the envisaged goal of extending its application to other local authorities.

\begin{flushright}
\textsuperscript{570} MSA s 240 prohibits any one from permitting unseaworthy boats from being used at sea and on inland waters.
\textsuperscript{571} Merchant Shipping (National Small Vessel Safety) Regulations 2007 reg 31
\textsuperscript{572} Ibid reg 21(2)(c)
\textsuperscript{573} Ibid reg 30(5).
\textsuperscript{574} Coordinated Inland Waterway Safety Program The Strategic Plan 7 September 2012
\end{flushright}
VI SAMSA: CENTRE FOR BOATING

SAMSA is the primary authority regarding boating safety and would be relied upon for leadership in any of the above recommendations.\textsuperscript{575} SAMSA has established the Centre for Boating, which is tasked with the administration of boating matters. The operational policy regarding the functions of the Centre for Boating is not fully explored and does not seem to be functional. It is recommended that the centre's structure and responsibilities should be reviewed and corrected if necessary.

\textsuperscript{575} MSA s 5.
CHAPTER 9 CONCLUSION

Boating in South Africa is heavily regulated and control can be exercised over every description of floating craft used in navigation on our waters, whether they are salt, brackish or sweet in taste. Numerous role players are crucial to the successful implementation of a safe boating regime; perhaps none more important than the local authority where launching sites for boats are located.

Numerous interventions and programs have been put in place at the national level and have resulted in a good foundation for the control of boating, but the same cannot be said for local control through municipalities and other local authorities. Only isolated examples of good control of boating are found along our coastline and even fewer exist for our inland waterways – much work can be done to change this by active interaction with these bodies.

Local authorities and municipalities will surely only actively participate in the regulation of boating if they find some advantage to their local economies in doing so. South Africa continues to emerge from our segregated past, and national, provincial and local authorities have been actively campaigning for change and inclusion of all people into the social and economic life that is enjoyed by so few. The 2008 declaration that incorporated inland waterways into shipping control seems to have been lost in this environment and does not enjoy the forefront of political minds. Boating is still regarded as primarily a sporting code and not a form of transport, it is thus not recognised as worthy of implementation.

While tourism is widely regarded as a revenue earner for municipalities, the connection between safe and controlled boating and tourism income does not seem to have featured as a driving force to establish good local control of boating. SAMSA, as the designated administrator of the legislation, should be encouraged to further investigate this potential and work closely with local authorities in order to achieve a state of safe water way use – allowing people to enjoy such a simple thing as 'messing around in boats'.

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576 supra
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(c) Books


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