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I hereby declare that I have read and understood the regulations governing the submission of the Masters of Commercial law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and the dissertation conforms to those regulations

SIGNED at HARARE on this 4th day of May 2007

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I'd like to thank Professor Midgely from Rhodes University, Professor Kalula and Professor Hare from the University of Cape Town for their belief in my ability. I would not have achieved any of my goals without the support of my family to whom I'm forever grateful.

THE RELEVANCE AND INFLUENCE OF THE SOUTH AFRICAN CONSTITUTION ON MARITIME LAW

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INTRODUCTION

"The new Constitution has invigorated our entire body of legal science... (and) has rejuvenated legal thought across the whole spectrum of law teaching and research"[1]
Professor Marrinus Wiechers.

Maritime Law is no exception to the new era of constitutional democracy that this country has embarked on. It should too be "rejuvenated" or altered, where necessary, to be malleable to the new constitutional dispensation. The South African Constitution is admired as one of the most advanced in the world. This accolade is owed to the progressive Bill of Rights enshrined in Chapter 2 of the Constitution. The Bill of Rights has revolutionized South African jurisprudence in that it both directly and indirectly influences all law in the country, including Shipping Law, whose origins are largely Roman Dutch and English[2] and to some extent international treaties, conventions, and customs[3]. This dissertation shall strive to challenge Maritime Law on its ability to conform to the Constitution, and more specifically the Bill of Rights. Where the dissertation finds shortcomings in Maritime law it shall make suggestions as to necessary changes that ought to be prevailed on to lawmakers to bring the law to conformity with the standards encapsulated in the Constitution.

For one to conduct an investigation that involves a constitutional critique of a specific branch of the common law there must be interpretation of the constitution's principles, which shall be used as a yardstick to measure Maritime Law. This dissertation shall interpret the Constitution and its influence on Maritime law by employing an "innovative, and unorthodox approach to the enforcement of the various rights" as was envisaged by De Vos[4]. It is submitted that the Constitution must at all times be interpreted in a manner that gives all people within the country the full protection of the rights in the Bill of Rights. This submission is supported by section 7 of the Constitution itself which enjoins

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[1] Quote by PRFESSOR MARINUS WIECHERS in Prof GE Devenish *"A Commentary on the South African Constitution"* (1998) viii.
[2] JE Hare *"Shipping Law & Admiralty in South Africa"* (1999) p2-14
[3] R.R Churchill, A.V Lowe *"The Law of the Sea"* 3rd ed (1999) p5-7
[4] De Vos *"Pious Wishes of Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution"* (1997) 13 *SAJHR* 67 at 68.

the state to act positively to enforce the constitutional entrenched rights. Kentrige J quoted the judgment by the Privy Council in *Minister of Home Affairs (Bermuda) v Fisher*[5] where he found that "a generous interpretation...suitable to give individuals the full measure of the fundamental rights and freedoms"[6] ought to be adopted. Kentridge J went further to quote the Canadian judgment of *R v Big M Drug Mart Ltd*[7] where Dickson J found that "the interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the charter's protection"[8]. Reading Kentrige J's judgment leaves no doubt that the *ratio* that must followed here is that ones Constitutional rights must be interpreted to give people the fullest protection of the law.

A constitutional investigation, of this nature, into the entire body of Maritime law is a gargontuan task. It is, therefore, prudent to deal with the elements of Maritime law most likely to be influenced by the Constitution. If one posits that the Constitution and Maritime law are relatively new to each other one has to be both innovative and creative in examining the extent to which the former influences the later. This dissertation takes comfort in the judgment of Mohomed J in *Du Plessis v De Klerk*[9] where he said "the interpretation which I have come to favour has the advantage of giving... a very clear and creative role in the active evolution of our constitutional jurisprudence by examining, and in suitable circumstances expanding, the traditional frontiers of the common law by infusing it with the spirit of Chapter 2 of the Constitution and its purport and objects". It is the ambition of this dissertation to evolve Maritime law to give effect to the spirit of the Constitution.

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[5] (1980) AC 319 (PC) at 328-9
[6] Quoted in *S v Zuma & others* 1995 (4) BCLR 401 at para 14
[7] (1985) 18 DLR (4th) at 321, 395-6
[8] *supra* at para 15
[9] 1996 (5) BCLR 658 (CC) para 87

THE LAW OF WRECK

The common law of wreck entitles those people, who meet the requirements, to own property which can be legally classified as wreck in Maritime law. The effect of section 35 of the National Heritage Resources Act is that new wreck (wreck recovered after the commencement of the Act), and wreck not declared to the authorities in accordance with the Act vest in the state. Wreck declared in terms of section 35(7) of the Act can be owned privately. To the extent that the Act curtails private ownership of new wreck is a potential violation of ones constitutional right to own property. The Constitution would consent to private ownership of property being denied to an individual provided that there is an expropriation in terms of a law of general application. Section 46 of the National Heritage Resources Act, hereinafter called the NHRA, does provide for expropriation of wreck. However, the state can only expropriate what does not belong to them. If one posits that wreck that doesn't belong to the state is wreck that has been legally declared to the authorities for private ownership in compliance with the Act. One can thereby argue that from the wording of section 35 of the Act, that other wreck automatically vests in the state without the need for any expropriation since the state cannot expropriate property that already own. The absence of legal expropriation of new wreck is a limitation of ones right to own wreck that he acquires through *occupatio*. It shall be argued that such a limitation is unreasonable, and unconstitutional.

It is important that wreck is defined to discover whether it is appropriate to classify wreck as property as contemplated by the Constitution. According to the Wreck and Salvage Act 94 of 1996 "wreck includes any floatsam, jetsam, lagan or derelict, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores or equipment of any such ship or aircraft and any portion of personal property on board such ship or aircraft when it was lost, abandoned, stranded or in distress and belonged to any person who was on board that ship or aircraft at the time"[10]. The NHRA defines wreck as "any vessel or aircraft, or any part thereof, which was wrecked in South Africa, whether

[10] Section 1 (xii) of the Wreck and Salvage Act 94 of 1996

on land, in the internal waters, the territorial waters or in the maritime culture zone of the Republic, as defined in the Maritime Zones Act 1994 (Act No. 15 of 1994).

The legislation leaves no room for ambiguity in the definition. Wreck is anything that comes of or from a ship or aircraft regardless of whether it was cargo, part of the ship, personal belongings, fuel, or debris when the ship or aircraft was lost and abandoned at sea. Currie & De Waal argue that property, for constitutional purposes, are physical objects with a market value at any one time that one can have a real right over[11]. This argument is supported by the decision in *Ex Parte Optimal Property Solutions*[12] where it was found that "property for the purposes of section 25 shall therefore be seen as those resources that are generally taken to constitute a persons wealth, and that are recognized and protected by law. Such resources are legally protected by private law rights...real rights in the case of physical resources".

Wreck is definitely physical in nature, but does it have market value to the extent that it constitute a resource which an individual has a real right over, thus initiating the property clause in the Constitution. If the number of tourists that visit wrecks annually the world over, and the vast sums of money that maritime enthusiasts are prepared to pay for the smallest pieces of wreck of ships such as the *Titanic* are anything to go by there is an undeniable wealth in wreck. That is after we consider the value that wreck has in the form of scrap material, and lost cargo. Wreck is a matter of, in some cases, incalculable potential wealth.

For this reason Currie and De Waal make an important qualification that the individual in question must have a 'vested right' in the property in accordance top the common law or legislation, more than a mere expectation[13]. The reasoning is that one cannot complain that they have been arbitrarily deprived of a property right or that property right has been taken without compensation if they didn't have the right in the first place[14]. The case of

[11] I. Currie & J. De Waal *"The Bill of Rights Handbook"* 5th ed (2005) p 537
[12] 2003 (2) SA 136 (C) para 19
[13] Currie & De Waal *op cit* at 540
[14] *ibid*

the *Antipolis* provides a good illustration of this point. The *Antipolis* was one of two scrap tankers which broke loose from a tug and sunk in Table Bay[15]. Many years later two partners, Mills and Reck entered a joint venture to remove copper pipes from the wreck. The partnership was broken before Mills decided to undergo the operation alone. He had started work on the wreck and buoyed some pipes[16]. Before he could resume Reck had sought interdict to prevent Mills from completing the job[17]. Burger J applied the Roman – Dutch principles of *occupatio* and came to the conclusion that Reck had no vested right, and Mills through the rules of 'fairness and justice' was entitled to an interdict preventing those who may interfere in his operation as he had already started his salvage operation[18]. On appeal the Supreme Court upheld the interdict against Mills stating that Mills had failed to prove possession of the pipes as required by the Roman – Dutch remedy of *mandament van spolie* given to those dispossessed persons who enjoy peaceful possession of a thing[19].

Hare is of the opinion that the appeal judgment missed an opportunity to deal with *occupatio* of wreck, which was only dealt with by the High Court[20]. One is inclined to agree with Hare's argument; the Supreme Court should have dealt with the relevant common law, which was in this case the law of wreck or in other words the *occupatio* of abandoned wreck. As Hare points out the *Antipolis* highlights two problems in Maritime law: firstly, acquisition and ownership of wreck, and secondly, the rights of competing salvors[21]. The constitutionality of the later shall be dealt with in the second Chapter of the dissertation. The acquisition of ownership through *occupatio* must be examined to discover whether it gives one a 'vested right' in wreck that is protected by the Constitution.

Maritime Law prescribes two specific requirements for one to acquire ownership of wreck: abandonment, and possession with the intention to become the new owner. The

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[15] Hare *op cit* at 177
[16] *ibid*
[17] *ibid*
[18] *ibid*
[19] Hare *op cit* at 178
[20] *ibid*
[21] *ibid*

wreck must have been abandoned before one goes anywhere with the enquiry. According to Hare the wreck must have be *res derelicta* and thereby *res nullis*, in that the owner must have made proper steps to abandon the wreck, or it must be reasonable to presume that there is abandonment[22]. Without abandonment no one can claim ownership of wreck through *occupatio*, and the law does not lightly presume abandonment[23]. This is evident in *The Thermopolae*[24], which was wrecked near Table Bay, abandoned by the owners and underwriters, and the cargo was strewn over sea bed. For seven years the underwriters did nothing[25]. The defendant syndicate had a salvage license to seek the treasure and recovered copper ignots from the wreck site[26]. The underwriters intervened to prevent the salvage operation and the dispossession of the property[27].

The eminent De Villiers CJ decided that "a person whose property has gone down in a ship wreck cannot be presumed to have abandoned it; he may hope that it shall be recovered"[28]. Furthermore, an owner of wreck may always vindicate his property, but no one else. The underwriters to whom the owners have transferred would become entitled to the wreck; there must be clear proof of complete abandonment. One gets the impression that De Villiers CJ intended to protect the underwriters who may still have interest in recovering the wreck even after the owner has abandoned it, despite the passage of time between the ship wreck and recovery. He does not rule out the situation where one acquires ownership after the owners and the underwriters alike abandoned the wreck.

This situation presented itself in *The Lusitania*[29], which sunk after being hit by a torpedo in 1915, 67 years after undisturbed abandonment 94 items removed from the wreck were contested in the English High Court. Sheen J found that "the owners had abandoned their ship. So far as the owners of the contents were concerned, it was a necessary inference

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[22] Hare *op cit* at 180
[23] Hare *op cit* at 182
[24] *The Thermopolae: Salvage Association of London v SA Salvage Syndicate Ltd* (1906) 23 SC 169
[25] Hare *supra*
[26] *ibid*
[27] *ibid*
[28] *ibid*
[29] [1981] 1 Lloyd's Rep 132 (QBD)

from the agreed facts and from the lapse of 67 years before attempt was made to salve the contents that the owners of the contents abandoned their property"[30]. The *ratio* of *The Lusitania* influenced the South African High Court in *Underwater Construction & Salvage Co v Bell*[31] where Banks J found "it is common cause that the wreck of *The Hypatia* had been abandoned by its owner and had become *res derelicta* ...plaintiff is entitled to acquire ownership by *occupatio*[32]. Where the owners have clearly shown, by the facts, that they have abandoned ship, and the succeeding underwriters the same. There is undeniable authority that wreck can be claimed by another finder provided he satisfies the second requirement for *occupatio.*

When there is evidence that the underwriters tried, or the owners tried, to recover the wreck, and failed one cannot say that such wreck has been abandoned because those who have rights to the wreck still show interest in acquiring it. In *The Central America*[33] where the United States court of appeal overturned a lower courts finding that the salvors acquired ownership of the extra ordinarily large booty that was the wreck of the *Central America* after evidence was led to show that the underwriters had unsuccessfully tried to locate and recover the treasure from the *Central America*[34]. The principle of *The Central America* is that despite the passage of 130 years between the ship wreck and recovery of the wreck the fact the party that had rights to the property did not give up on those rights means that there was no abandonment. Hare opinion is consistent with this approach; he argues that South Africa should follow the conservative approach of *The Central America* in line with the Roman Dutch law principle that there must be intention of the owner to relinquish title before abandonment is presumed[35].

If one can satisfy the abandonment requirement by showing clear factual abandonment of the wreck, he must prove possession of the wreck with the intention to become the

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[30] Hare *supra*
[31] 1968 (4) SA 190 (C)
[32] *supra* at 192B-C
[33] *The Central America: Columbus-America Discovery Group v Atlantic Mutual Insurance Co* (1992) AMC 2705.
[34] Hare *op cit* at 184
[35] Hare *op cit* at 185

owner. In *Reck & Others v Mills*[36] it was decided that "to acquire ownership by *occupatio* the taker must assume physical possession because it is a critical requirement justifying the change of the unowned to the owned... there must be some element of reduction to physical possession which announces to the world that the thing is now owned". The facts of the case are mentioned in the above, but as a reminder, the physical possession was satisfied by attaching a buoy to the pipes to show to the world that he had acquired possession to become the owner. The decision of the Appellate Division is of no relevance here because they did not consider *occupatio* and relied on the spoliation remedy in making their judgment. The decision in *Recks & Others v Mills* is consistent with Banks J's judgment in *Underwater Construction & Salvage Co v Bell*[37] where he asserted that abandonment alone is not sufficient there must seizure with the intention of acquiring ownership. He sites *Voet*, 41.1.9, (*Ganes* translation, vol 6, p.183) *Savigny*, Possession, pp 169-171, amongst others, as his authority.

It is fair, therefore, to argue that provided the finder of wreck which is abandoned takes such wreck with the intention of becoming its owner he would have a 'vested right' or real right to such wreck that is protected by the Constitution of this country. This right to property (wreck) is not absolute.

The effect of section 35 of the NHRA places ones right to own wreck, acquired in the manner extrapolated in the above, in jeopardy. According to section 35 (2) subject to the provisions of subsection (8)(a), all archaeological objects, palaeontological material and meteorites are the property of the state. Wreck, by definition in section 2 (ii)(c), falls under archaeological objects that form the property of the state. Sub section (8)(a) does provide for exceptions to this rule by allowing persons listed under sub section (7) to own wreck for the duration of their lifetime provided that the SAHRA is notified of who the successor is, and that the object is regularly monitored in accordance with regulations by the responsible heritage authority. The objects referred to in sub section 7 are objects listed and lodged to the responsible heritage resources authority within two years of the

[36] 1988 (3) SA 92 (C) at 94I-95B
[37] *supra* at 192C-D

commencement of this Act. Any object which is not listed within the prescribed period shall be deemed to have been recovered after the date on which this Act came into effect. This would mean all wreck not reported to the authorities within this time line, and new wreck found from time to time thereafter automatically belongs to the state notwithstanding the common law which entitles one to own wreck, and the Constitution which protects individual property rights.

To make life even harder for those that own wreck or those that have wreck in their possession at any time, that fail to report their ownership of the wreck or possession of it to the heritage resources authority "immediately" in accordance to section 35 (3) shall be guilty of an offence provided for in section 51 (1) (e) of the Act. That offence is outlined in item 6 of section 51; it could be a fine or imprisonment for a period not exceeding three months or both such fine and imprisonment.

Section 25 (1) of the Constitution states that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. When property is expropriated section 25 (2) states that this may only happen in accordance to law of general application for a public purpose, or interest, and subject to compensation of an amount agreed to by the parties or approved by the court. The aim of this property clause is obvious; to protect individuals from arbitrary deprivations of property to which they have a legal right to ownership. Individuals similar to those individuals who stand to lose their property because of the NHRA. This submission is consistent with Currie and De Waal argument that the purpose of the property clause is: (i) to protect the right to property as a fundamental human right (ii) to provide for claims to immunity against uncompensated expropriation of private property without paying for it (iii) to enforce the moral right to property to enable one to survive or lead a meaningful existence[38]. The property clause is thus both, a shield against unlawful deprivation of property by the State, and also a sword to get their property back when it has been unlawfully deprived. Those who own wreck, whether just for sentimental reasons such as a collector, or financial reasons where wreck is essential in the operation of ones

[38] Currie & De Waal *op cit* at 534

business, can look to the property clause to protect their rights to wreck, which the state infringes upon in terms of the NHRA.

The decision in *First National Bank v Commissioner of South African Revenue Services*[39] by the Constitutional Court would be the starting point for those who wish to challenge the unlawful deprivation of their property by the state.
In the *FNB* judgment the Constitutional court provided a structural analysis in the form of a series of questions that any direct application of the property clause must conform to:

(1) Does the legislation affect property as understood and recognised?
(2) If yes, has there been a deprivation of the property by law or conduct.
(3) If yes, is the deprivation consistent with the provisions of s 25 (1).
(4) If not, is the deprivation justified under s 36 of the Constitution, the limitations clause of the Bill of Right, which allows limitations of fundamental right when reasonable and justifiable.
(5) If the deprivation is consistent with s 25 (1) does it amount to an expropriation for the purposes of s 25 (2)?
(6) If so, does the deprivation comply with the requirements of s 25 (2) (a) and (b).
(7) If not, is the expropriation justified under s 36[40].

It has already been established that wreck understood and should be recognised as property for constitutional reasons. Section 35 of the NHRA with absolute certainty does deprive owners of wreck. To comply with the Constitution s 35 must not deprive wreck in an arbitrary manner. The NHRA, evidently, deprives wreck arbitrarily, and is to that extent unconstitutional. Deprivations must be defined before one considers whether it has been carried out arbitrarily.

The decision in the *FNB* case and the text of Currie and De Waal hold that the difference between deprivations and expropriations is that the later involves a form of

[39] 2002 (4) SA 768 (CC)
[40] *supra* at para 46

compensation. In *FNB* the court defined deprivations as "any inference with the use and enjoyment or exploitation of private property is a deprivation of that property in a constitutional sense"[41]; expropriation involves a form of deprivation but only in a narrow sense as expropriation requires some form of compensation[42]. Section 35 of the NHRA does not mention compensation so it is a general deprivation in that there would be no obligation on the state to compensate. To show that the deprivation is arbitrary, Currie & De Waal argue, involves an investigation that falls between the 'mere rationality' enquiry and the proportionality enquiry, used to assess proportionality enquiry, used to assess the legitimacy of the limitation of right[43]. This means that the deprivation must be rational and proportional exercise of power considering the rights of the individual wreck owner and the purpose of the legislation. The Constitutional Court extrapolated the test in *FNB*:

"a deprivation of property is arbitrary as meant in s 25 when the 'law' referred to in s 25 (1) does not provide sufficient reason for particular deprivation in question or is procedurally unfair.

Sufficient reason is established as follows :-

(a) Evaluation of the relationship between the means employed, namely the deprivation in question, the ends sought to be achieved namely the purpose of the law in question.
(b) The relationship between the purpose of the deprivation and the person whose property is affected.
(c) The nature of the property and the extent of deprivation of such property.
(d) In the case of ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for deprivation.
(e) Sufficient reason may be established by considering the relationship between the means and the ends – requires a proportionality consideration close to that required by s 36 (1) of the Constitution.

[41] *supra* at 57
[42] Currie & De Waal *op cit* at 551
[43] Currie & De Waal *op cit* at 545

(f) Sufficient is a matter to be decided upon all the relevant facts.[44]"

The nature of the property is wreck defined in the above, the ends that the legislation wishes to achieve are spelled out in the preamble of the NHRA which is to "promote good management of the national estate...encourage communities to nurture and conserve its legacy so that it can be bequeathed to future generations"[45]. One cannot dispute the importance of conserving the national estate but is the state the only one who can, and furthermore are they the best at conserving all wreck in the country? The Constitutional Court sets very clear guides to determine what 'sufficient reason' is and it makes it even clearer that the onus is on the state to show that they have sufficient reason. The state does not meet this obligation at all in the NHRA as the blanket deprivation is not proportional to the purpose intended by the Act.

Currie & De Waal interpretation of the above judgment is valuable: "there should be a satisfactory *nexus* between the deprived property and the purpose of the deprivation... Deprivations where the purpose of the law bears no relation to the property and its owner... are *tout court* arbitrary[46]. This nexus does not exist between the purpose of the NHRA and the blanket deprivation of all wreck. To assist in this argument one must consider to what extent does the blanket deprivation serve the public interest. If the deprivation is not in the public interest it cannot be justified.

The Constitution does not define what public interest is exactly, and the matter has been subject to numerous debates in the past. Eisenberg believes 'public purpose' can be divided into 'public use' and 'public interest'. Public use is a narrow view of actual physical use of a thing[47]. Public interest is a form of communal advantage that derives from the thing[48]. Public use is therefore a more restrictive view of public purpose while public purpose is a broader more encompassing liberal interpretation of whether the

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[44] *supra* at para 100
[45] The preamble of the NHRA
[46] Currie & De Waal *op cit* at 549
[47] Eisenberg *"Public Purpose and Expropriation: Some Comparative Insights and the South African Bill of Rights"* 1995 13 *SAJHR* 207 at 208.
[48] Eisenberg *op cit* at 209.

public would benefit from the thing. Eisenberg argues that the overwhelming view is that the liberal view (broader view) of public benefit or advantage is the form of interpretation that should be adopted in considering whether a deprivation is consistent with public purpose[49]. To support his arguments he considers foreign jurisprudence beginning with the United States.

The United States Constitution allows for deprivation, or 'eminent domain' as they refer to it, for a public purpose[50]. Initially the courts followed the strict interpretation of public purpose for situation where the public would physically use the deprived thing, ignoring the indirect benefits that would derive from the property[51]. Many people viewed this approach as being too rigid, and unworkable[52]. As the United States became more industrialised a broader definition of 'public purpose' was accepted[53], as evidenced in *Mount Vernon-Woodberry Cotton Power Co v Alabama Interstate Power Co*[54] where the Supreme Court decided that the public advantage should supersede the literal public use interpretation, and that by 'public advantage' they mean the manner in which the property contributes towards the general welfare and prosperity of the whole community. The US courts were more inclined to accept a public purpose in cases where there was proposed industrial development and it could be argued that there would be a greater public benefit or a public need for such development[55].

The courts in the United States pushed the envelope a little further by allowing the deprivation of property from a private person for another private person or privately owned entity to industrialise certain land for public benefit. In *Berman v Parker* a department store owner in a slum area sought to prevent expropriation of his land by an Act designed to eliminate slums arguing his property was going to be sold to another private party, and therefore amounted to an unconstitutional deprivation[56]. The courts

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[49] *ibid*
[50] *ibid*
[51] *ibid*
[52] Eisenberg *op cit* at 210
[53] *ibid*
[54] 60 L ed 507 (1916)
[55] Eisenberg *op cit* at 211
[56] *ibid*

rejected the argument saying taking from one businessman for the benefit of another businessman can be justified when the public may be as well or better served through an agency of private enterprise than through a government department[57]; "we cannot argue that public ownership is the sole method of promoting public purpose of community redevelopment projects[58].

It is fair to say that US case law on expropriation of property requires a greater public good or advantage usually pecuniary in nature which out weighs the loss to the private party. In the case of depriving one of wreck it would appear that the state would have to show that there is a significant patrimonial advantage to be gained by the public that out weighs the loss suffered by the owner of the wreck. If the state cannot show that by owning the particular property before them the public's gain would out weigh the individual's loss then the deprivation will not be in the interest of the public as required by the Constitution. In the United States the courts may allow a transfer of ownership of property from a private person to another who can use the property for the benefit of the community. There is an essential qualification made though. The transfer would only be permissible where such use primarily for the benefit of society and the benefit to the private party acquiring the property is merely incidental[59]. This development could justify an argument made by a private party that the property in question would be better off in their hands than the states hands when the state clearly cannot afford to take care of the property the way the individual can, and in a way that the public would benefit more from the property staying in that individuals hands.

The Indian courts have a similar liberal interpretation of public purpose. They believe that public purpose is the general interest of the community as opposed to the particular interest of the individuals[60]. It was argued by Das J that the proper approach is to take the scheme (the law expropriating the property) as a whole and then examine whether the

[57] Eisenberg *op cit* at 212
[58] *ibid*
[59] *ibid*
[60] Eisenberg *op cit* at 216

acquisition is for public purpose, private purpose, or for no purpose at all[61]. The existence of a public purpose depends on the specific use of the property in the individuals hands. This would mean that the state has the onus of showing that they are not taking property just because they can. They must show that the property they take there is for a specific reason that is consistent with the interests of the community.

Section 46 (1) of the NHRA empowers the Minister of Arts and Culture to purchase or expropriate, subject to compensation, any property for conservation or any other purpose under the Act provided it is for a public purpose or public interest. The Minister of Arts and Culture must first consult with the SAHRA and the Minister of Finance before he decides that it is within the public interest that the archaeological object or wreck concerned should vest in the state. Moreover, according section 46 (3) the amount of compensation and the time and manner of payment must be determined in accordance with section 25 (3) of the Constitution, and the owner of the property in question must be given a fair hearing before any property is expropriated. This procedure is consistent with the principles spawned from the constitution. Section 23 (3) of the Constitution seeks equitable balance between the public interest and interest of those affected. The compensation contemplated by the Constitution considers time of payment, the market value of the property, and the history of the acquisition of the property, improvements to the property, and the purpose of the expropriation. By taking these factors into account the method of expropriation under section 46 is constitutional, and should be the *modus operandi* whenever wreck is deprived from private ownership.

Unfortunately section 46 is only applicable when the state seeks to obtain ownership of property lawfully owned by private individuals. It cannot be used to expropriate wreck that already vests in the state. The effect of section 35 of the NHRA, as explicated in the above, is that all new wreck, and wreck not declared in accordance with section 35 (7)(a) belongs to the state. Because such wreck belongs to the state it cannot be expropriated using the equitable procedures contained in section 46 of the Act. The wording of section 35, therefore, suggests that new wreck, and wreck not declared is arbitrarily deprived

[61] Eisenberg *op cit* at 217

from the without regard to public interest, public purpose, fair hearing, and consideration of the factors listed in section 25 (3) of the Constitution. Section 46 only applies when the state seeks to expropriate wreck that private parties legitimately own in terms of section 35 (8).

An analysis of the constitutional protection of property rights, embodied in the FNB case above *vis a vis* s 35(2) of the NHRA indicates that to the extent to which the Act arbitrarily deprives new owners of wreck from their lawfully acquired property it is unconstitutional.

It is clear that the NHRA deprives those who have acquired ownership of wreck through Maritime common law. The NHRA is, as perceived by the Constitution, a law of general application. Section 25(1) of the Constitution states "no person may be deprived of property except in terms of a law of general application". The manner of deprivation of new wreck by s 35(2) doesn't amount to an expropriation for the purposes of s 25 (2) of the Constitution. Section 25 (2) states that property may only be expropriated for, (a) a public purpose or in the public interest, and (b) and subject to compensation. Section 35 (2) makes no mention of any compensation for those who may have incurred expenses in recovering wreck, moreover s 35 doesn't justify its deprivation of wreck by furnishing reasons why such deprivation is within the public interest or that it serves a public purpose.

The preamble of the NHRA states that the purpose of the Act is to conserve valuable national resources. It is doubtful that all wreck can be classified as a national resource. Similarly it is inconceivable that the state has the capacity to take ownership of all wreck after the commencement of the Act with the intention of maintaining, and conserving it. The lack of sagacity by the legislators who drafted this provision was noted by Downing who argued that "if ownership in all wrecks had to suddenly vest in SAHRA, there would be a concomitant obligation on SAHRA to effectively manage these wrecks. Taking into account the staff situation, this would be an insurmountable task"[62]. An obligation of this

[62] Unpublished Dissertation by A, J Downing *"A Possible Sollution to Wreck Ownership Issues in South Africa: Section 28 of the National Heritage Resources Act, 25 of 1999".*

magnitude does not serve any purpose at all instead it is a burden that the authorities cannot bear, worse still, it is a violation of individual right to property.

Eisenbergs arguments, in the above, on public purpose maintains the principle that deprivations are only justifiable when the public and community as a whole draw benefits from the thing being in the hands of state authorities[63]. It is submitted that there ought to be a public advantage in respect of the said property, which must contribute to the welfare of the community.

There are objects of wreck that because of various reasons, such as aesthetic value, historical significance, they should vest in the state so that the national community can draw the benefits from the object. The benefits may include international tourism, and the financial dividends associated with the object. Under these circumstances the object ought to be identified by relevant authorities for having characteristics of a national treasure, and after deliberations by plenary members listed in section 46, the object ought to be expropriated following the procedures of that provision. This practice is diametrical to the terse s 35 (2) of the NHRA, which without regard to the considerations above arbitrarily states that "all archaeological objects, palaeontological material and meteorites are the property of the state" irrespective of whether owning the property serves any public purpose, or interest, and any costs expenses incurred in recovering the wreck, and the value of that wreck.

Furthermore s 35 (2) fails to provide sufficient reasons as required by the Constitutional Court in their decision in the *FNB* case mentioned in the above. Namely s 35 (2) doesn't necessarily achieve the purpose of the law in question on the contrary it places an unnecessary burden on state authority, which inhibits its ability to maintain the important wrecks because they will have to maintain a large volume of wrecks. Maritime wreck can be as large and cumbersome as a beached ship or as menial as a clock. According to the *FNB* case all the relevant facts and the nature of the property ought to be considered. The state, it is argued, must show sufficient reasons why they want to deprive an

[63] Einsenberg *op cit* at 209

individual of the clock by showing why it is in the public's interest. Those reasons may differ from the that given for depriving a beached ship. The state must show that their reasons for deprivation are proportional when one considers the relationship between the means and ends. The enquiry is case specific, and thus the merits for deprivation of all objects must be considered in their own right rather than the arbitrary manner encompassed in s 35 (2).

Fundamental rights, including property rights, protected by the Constitution are not absolute, they can be limited provided that the limitation is complicit with s 36 of the Constitution, which provides for limitation of fundamental rights.

According to s 36 (1) the rights in the Bill of Rights may be limited... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

(a) the nature of the right
(b) the importance of the purpose of the limitation
(c) the nature and extent of the limitation
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose

Property rights are very important and ought to be curtailed in exceptional circumstances in order to preserve the essence of an open and democratic society. In this case, as inexorably argued, the limitation of the right to own wreck proposed by s 35 (2) is arbitrary, it serves no purpose, and it isn't in the interests of the community nor is it a vestige of justice. There are less restrictive means available to achieve the purposes of the NHRA. It is submitted that the incorporation of s 46 is a less restrictive means to achieve the desired result, and it is consistent with constitutional principles, as well as the public's interests to preserve national heritage resources.

The conflict between s 35 of the NHRA and the Constitution is not impalacable. By reading s 35 (2) to say all the property, referred to by the Act including wreck, can be expropriated by the State subject to s 46, in place of "all" such property "vests in the State", the constitutionality of s 35 would no longer sully the NHRA. The effect of this change would remove the arbitrary manner of deprivation since s 46 provides for a procedure to determine the financial ability and need to acquire ownership of the objects. It would give effect to the Expropriation Act and the requirements of s 25 (3) of the Constitution, which provide for compensation, previously lacking in s 35 of the NHRA, that considers an assessment into the purpose of the expropriation, current use of the property, market value of the property, and the extent of direct investment, and capital improvements to the property. The cure proposed here is an apt solution to the unconstitutional s 35 (2).

There is amble authority for the proposed method of interpretation of legislation. Section 39(2) of the Constitution states that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Langa J decided in the *Hyundai*[64] case that when interpreting legislation one must give expression to section 1, which lays out the fundamental values which the Constitution is designed to achieve. According to his judgment one is required to read legislation in a manner that gives effect to fundamental values enshrined in the constitution; "when the constitutionality of legislation is an issue, they (the judicial officers), are under a duty to examine the objects and purport of an Act and to read the provision of the legislation, so far as it is possible, in conformity with the Constitution."[65].

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[64] *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) LTD & Others: In Re Hyundai Motor Distributors (Pty) LTD & Others v Smit NO & Others* 2001 SA (1) 545 at para 22

[65] *Ibid*

The decision by the Supreme Court of Appeal in *Govender v Minister of Safety and Security* [66] provides a *modus operandi* for reading legislation through constitutional glasses. One is required to:

(a) to examine the objects and purport of the Act or the section under consideration;
(b) the ambit and the meaning of the rights protected by the Constitution;
(c) ascertain whether it is reasonably possible to interpret the Act or section in such a manner that it conforms with the Constitution;
(d) if one can provide interpretation that conforms with the Constitution one must give effect to it;
(e) if the legislation cannot be interpreted in such a manner then steps must be made to declare the legislation unconstitutional.

This decision is consistent with Goldstone J's decision in *Harksen v President of the Republic of South Africa & Others*[67] where it was found that failure to expressly incorporate terms in the Constitution in legislation doesn't make the legislation unconstitutional. It is unnecessary to expressly incorporate terms into the Constitution provided the legislation is read subject to the Constitution[68].

Not only does the Constitution allow the courts or any tribunal the power to interpret legislation so it conforms with the Constitution, but it specifically instructs the relevant authorities to read that legislation accordingly. This implies that the relevant authorities do have some scope for creativity in arriving at an interpretation that gives effect to the purpose of the legislation, and at the same time it, is in line with the fundamental values in the Bill of Rights.

The courts do, however, provide a qualification or limitation on the method of reading down legislation. Langa J decided that limits must be placed on the application of the

[66] 2001 (4) SA 273
[67] 2000 (2) SA 825 at para 18
[68] *ibid*

principle of reading down legislation[69]. The method of interpretation must be reasonably possible and not unduly strained[70]. This suggests that the authority must not interpret in a way that defeats the purpose of the legislation or places a burden on those affected when such a burden was not envisaged by the legislators who enacted the legislation.

The proposed cure to s 35 (2) doesn't place an unnecessary burden on those affected. Instead by reading s 35 (2) subject to s 46 in the manner suggested the change removes the insurmountable burden created by the arbitrariness of s 35 (2). More importantly the provision would be consistent with all the principles and values envisaged by the Constitution. The constitutional values, the interests of private wreck owners as well as would be private wreck owners, and the purposes of the NHRA would exist in legal harmony without rancour. In saying this one is of the opinion that the authors of s 35 may over looked Maritime common law, and the fact that the common law can give a private individual property rights to wreck. The text of s 35 (2) appears to aim to include many other objects of national importance and heritage besides wreck, which are not influenced by Maritime common law. Therefore one doubts that the legislators were aware of the potential conflict of laws.

THE LAW OF SALVAGE AND TOWAGE

The influence of the Constitution on the law of salvage, and towage is subtle, but nevertheless, significant enough to prevail developments of the common law. In the case of towage, and salvage contracts the Constitution imposes its principles on the agreements reached between parties. The Constitution strengthens the right to life of distressed persons guarded by the Wreck and Salvage Act. It demands both the State and private individuals to their best endeavours to save life at sea. The duty imposed is greater for the former. This Chapter shall delineate constitutional principles influencing private law of contract, and then individually assess the nature of towage, and salvage

[69] *supra* at para 24
[70] *ibid*

agreements to decipher the extent to which the Constitution plays a role in both branches of the Maritime common law. The later part of the Chapter shall justify the argument proposing a positive duty on state organs, and other persons to save life.

The Constitution and South African Contract Law

There is good authority supporting the view in the above that unfair contracts under the Constitution are unenforceable, and that the common law of contract ought to be developed to take cognisance of the right to equality in contractual agreements. Christie argues that the Bill of Rights has had a considerable impact on the law of contract, and will continue to do so[71]. He believes that the common law principles that were created to curb unfairness in the making of the contract such as: quasi mutual assent, misrepresentation and fraud, duress, undue influence, mistake, and illegality still leave a "most noticeable gap"[72]. This gap is the inequality of bargaining power[73]. Christie is adamant that "s 9 of the Bill of rights should be read with the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 gives the opportunity to tackle the problem of inequality of bargaining power by developing the common law further without legislation such as that proposed by the Law Commission".

The Law Commission noticed this gap in the common law that ought to be filled to prevent unfair contracts concluded under inequitable conditions. They proposed that a contract or term in a contract that is unreasonable, unconscionable or oppressive should not be enforceable[74]. The reasoning justifying behind declaring such a contract unenforceable is that an unreasonable agreement would form paternalism inconsistent with the party's freedom of contract[75]. The Law Commission has two criteria: "plainly improper and unconscionable" and "unduly harsh and oppressive", which they propose to make provision in legislation to curb unfairness[76].

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[71] RH Christie "*The Law of Contact*" 4th ed (2001) p20
[72] Christie *op cit* at 16
[73] *ibid*
[74] Christie *op cit* at 17
[75] *ibid*
[76] Christie *op cit* at 18

The problem Chiritie sees with the Law Commission's recommendations is that the above criteria are already included, to a limited extent, in the common law public policy defense[77] and that there is no need for the legislation[78]. Instead, according to Christie, public policy should be developed in light of the Bill of Rights[79]. In Christie's opinion "by accepting the Constitution as a reliable statement of public policy, a court would have no difficulty in declaring a contract which infringed a provision of the Bill of Rights to be contrary to public policy and therefore unenforceable"[80].

To support his argument he refers to the judgments in *Sasfin (Pty) Ltd v Beukes*[81] where it was decided that a court has the power to declare contracts that are *contra bonos mores* unenforceable and "that, while public policy generally favour the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and element of public harm manifest"[82]. Furthermore in *Ryland v Edros*[83] it was decided that a contract flowing from a potentially polygamous Muslim marriage had been held unenforceable as it was contrary to public policy. The *ratio* Christie relies dictates that the courts can declare contracts that offend public policy unenforceable. The Constitution is a reflection of public policy.

Cameron AR judgment in *Brisley v Drotsky*[84] supports this submission. He found that "all law now enforced in South Africa and applied by the courts derives its force from the Constitution. All law is therefore subject to constitutional control, and all law inconsistent with the Constitution is invalid"[85]. Having said that Cameron AR explicitly

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[77] *ibid*
[78] Christie *op cit* at 19-20
[79] Christie *op cit* at 403
[80] *ibid*
[81] 1989 (1) SA 1 (A) at 8C-D
[82] *supra* at 9A-G
[83] 1997 (2) SA 690
[84] 2002 (4) SA 1
[85] *supra* at 33

declares that "the Constitution requires the courts, when developing the common law of contract, to promote the spirit, purport and objects of the Bill of Rights"[86]. He notes that though "these propositions, if they ever were controversial, are no longer so. They derive from the Constitution itself, as the Constitutional Court has interpreted and applied them"[87]. Cameron AR believes that the era where contracts reduced to writing were strictly applicable irrespective of their oppressive, and unfair nature are now over. He argues that in light of the Constitution there is an obligation to develop the common law in light of fundamental constitutional values[88]. Those who may have reservations that this progression of jurisprudence may erode the certainty of the law of contract, Cameron assures that the constitutional considerations of equality do not detract from commercial reliance and social certainty on the contrary it enhances it[89]. The values in the Constitution reflect public policy, the certainty that contracting parties ought to keep in mind in conducting their business is that "contracts that offend fundamentals of our social compact will be struck down as offensive to public policy"[90]. South African courts when confronted with contracts that offend constitutional values of dignity, equality, and freedom should strike them down or decline to enforce them with perceptive restraint[91].

The Supreme Court in upheld this principle in *Bafana Finance Mabopane v Makwakwa* where Cachalia AJA found that a court may not enforce an agreement that seeks to achieve an object that is contrary to 'public policy'[92]. The reason being that 'public policy' is anchored in the founding constitutional values, which include human dignity, the achievement of equality and the advancement of human rights and freedoms[93]. As long as the Constitution is the bastion of 'public policy' the courts will refuse to enforce bargains that are inimical to the values it espouses.

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[86] *ibid*
[87] *ibid*
[88] *supra* at 34
[89] *ibid*
[90] *supra* at 35
[91] *ibid*
[92] 2006 (4) SA 581 at para 11
[93] *ibid*

According to *Afrox Healthcare BPK v Strydom*[94] one who wishes to avoid such a contract must prove to the courts that due to a violation of the Bill of Rights, for instance an inequitable bargaining position, an unfair contract that offends public policy was concluded. The courts decided that s 39 (2) of the Constitution which requires every court to promote the spirit, purport and objects of the Bill of Rights obligates the court to depart from *stare decisis* when the common law was in conflict with a constitutional provision[95].

Towage Contracts and The Constitution

A towage contract is one where a vessel employs the services of another vessel to expedite the voyage where nothing more is required than accelerating of its progress[96]. Usually when the vessel has received no injury and the conditions are not too difficult[97]. Brice argues that towage services often involve a vessel pushing, or pulling another in such a way that the principal is not exposed to danger in exchange for such services the principal pays an agreed price[98]. The general rules of contract law apply in the formation of towage contracts[99]. According to Tetley there are forms of towage contracts:

(a) the hiring of the tug itself without a crew
(b) the hiring of the tug and crew, operating under the orders of the tow; and
(c) the hiring of the tug and crew to perform a specific task[100].

The first type is a form of charterparty, and therefore of no concern to the law of towage. The second involves a contract **of** services (*"locatio operarum"*)[101]. The third is a contract **for** services (*"locatio operis faciendi"*)[102]. These two forms of contract

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[94] 2002 (6) SA 21 at para 12
[95] *supra* at para 26
[96] A, L Parks & E, V Cattell jr *"The Law of Tug, Tow, & Pilotage"* 3rd ed (1994) p 18
[97] *ibid*
[98] G Brice *"Maritime Law of Salvage"* (1993) p 22
[99] TJ Schoenbaum *"Admilralty & Maritime Law"* (1987) p 409
[100] W Tetley *"International Maritime & Admiralty Law"* (2002) p 182
[101] *ibid*
[102] *ibid*

comprise basic towage contract, and are distinguishable from on another by the application of the common law maxim "dominant mind" test[103]. The "dominant mind" test is used in common law jurisdictions to determine the terms of the contract, the circumstances of the case, as to whether the tug or the tow controls the towage operation[104]. The legal significance of the distinction lies in attaching liability should the towage operation cause damage to tug, tow, or any third parties.

In a situation where the towage contract is "of services" there is no presumption of fault on the tug, and the tug is not the "dominant mind"[105]. Rather the tow, which has control of the navigation, would have the presumption of fault[106]. On the other hand, where the contract is one' for services', the tug takes charge of the owner's tow and move it to a particular place[107]. Tetley argues that this form of towage contract remains mixed in that it may be more than a contract for services, but a contract of hire of work and labour[108].

In event of a grounding, or damage during a towage operation the tow usually has the burden of proof that they were not liable. However, when the tow was in the tug's control the burden may shift to the tug[109]. Both the tug, and the tow as equal contracting parties are entitled to enter into non-responsibility clauses indemnifying themselves from liability, such as negligence, during the towage operation. In the United Kingdom, as in South Africa, these clauses are permitted, but are strictly construed[110]. The clause must be communicated to the other party clearly before the towage commences[111]. Usually the non-responsibility clause is coupled with a further provision, empowering the tug owner to claim indemnity from the tow in respect of liabilities, which the tug owner may incur towards third parties in the performance of the towage services[112].

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[103] *ibid*
[104] Tetley *op cit* at 183
[105] Tetley *op cit* at 185
[106] *ibid*
[107] *ibid*
[108] *ibid*
[109] *ibid*
[110] Tetley *op cit* at 188
[111] Tetley *op cit* at 189
[112] *ibid*

In practice in both towage contract 'of services', and 'for services' there may be a situation where either the tug or tow are in a superior bargaining power, and they take advantage of the others desperation for emergency services to compel the other to conclude a contract that offends public policy. For example, a ship may need towage services urgently to avoid further complications, and are presented with an unfair contract of services that exploit their position. This agreement may include provisions that, for example, include a non-responsibility clause that unconscionably indemnifies against all negligence that may encourage the tug to undertake their activities knowing that they not be equipped for the task, and may worsen the situation. When unregulated towage contracts may include various clauses that exploit economic positions of parties in the industry.

Another unfair situation may be where the towage contract states "of services" thus making the tow the "dominant mind" but in practice the tug performs its services in a manner consistent with a towage contract *locatio operis faciendi* ("for services") by taking charge of the operation thus avoiding liability in the event of damage or failure to conduct the operation successfully this would violate the principle of equity enshrined in the Constitution. A good example of such a contract that would offend the Constitution is the *Luna* where the Master of a Dutch vessel who spoke very little Englich and could not read English engaged a tug to tow his vessel by verbally agreeing to the terms and signing a note with a printed clause indemnifying the tug owner from liability[113]. It is clear from this case that the tug unfairly took advantage of the weakness of bargaining power of the Dutch vessel in an inequitable way that, should the matter come before South African courts, it would not be enforced as it is inconsistent public policy reflected by the Constitution.

[113] Parks & Cattel *op cit* at 31

Salvage Contracts and The Constitution

Salvage is services rendered, which require more than towage, to save a ship from imminent danger the salvor would be entitled to a salvage award[114]. The salvage award is the amount due to the salvor of a vessel as reward for efforts made in saving the vessel[115]. The definition of salvage applies to both abandoned ships, and to those still manned but in danger[116]. The same term is used with respect to cargoes, and property involved in wreck salvage, historically classified as flotsam, jetsam, ligan or wreck[117].

Tetley articulates three basic concepts of salvage law:- (a) civil law of "assistance", (b) the common law "helping hand"[118], (c) English maritime law- "no cure/no pay"[119]. In Civil law of "assistance", the "assistant" is remunerated for his services, whether successful or not[120]. For this reason "assistance", and "salvage" are diametrically opposed concepts of salvage[121]. "Assistance" is based on the civil law principle of *"negotiorum gestio"*, dating back to Roman law, and still to be found in codes of civil law of nations[122]. In the English common law one is not remunerated for lending a "helping hand"[123]. English maritime law, however, in respect of salvage took a third position, different from both the civil law and the common law[124]. English Admiralty courts awarded remuneration for salvage services on the "High Seas", provided the services were voluntary, dangerous, and successful[125].

The principle supporting the payment of such an award is that salvors should be adequately rewarded to encourage salvage of life and property. Dr Lushington in *The*

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[114] Brice *loc cit*
[115] Hare *op cit* at 302
[116] W Tetley *"International Maritime & Admiralty Law"* p 322
[117] *ibid*
[118] Tetley *op cit* at 323
[119] Tetley *op cit* at 324
[120] *ibid*
[121] *ibid*
[122] *ibid*
[123] Tetley *op cit* at 324
[124] *ibid*
[125] Tetley *op cit* at 325

Albion[126] commented on the importance of this principle to Maritime law: "It is of the utmost importance to the safety of shipping, that the owners of steam-tugs and other salvors should know that this Court is inclined to reward liberally unusual efforts to assist vessels in distress, wherever those efforts are successful".

The 1910 Salvage Convention adopted the English maritime law principle of "salvage", involving "no cure/no pay", rather than the civil law principle of "assistance", which permitted remuneration no matter what the outcome[127]. The 1989 Salvage Convention maintained the "no cure/no pay" principle provided the salvor produced a "beneficial result" or "useful result"[128].

To be successful in a claim for salvage one must meet the following requirements:

(a) Salvage services of a particular nature; rendered to
(b) Salved maritime property – perhaps coupled with life saved life; giving rise to
(c) A salved fund from which an award is made; to
(d) A salvor whose conduct does not vitiate or reduce the award[129].

All the above requirements must be present before one can successfully claim for salvage. Details of the requirements are not necessary for the purposes of this dissertation, however, it is worth mentioning that public policy plays a role in the decision making process that the courts go through in respect of each requirement. The underlining problem with the ingredients to salvage is that they require success and presume adequate salvage fund. In practice salavors would invest a lot of money into attempting the salvage of a vessel, and because of the no cure no pay policy inherent in the requirements of salvage law they would not receive any profit, or even compensation for their efforts and costs[130]. This discouraged potential salvors from volunteering their services leaving many tankers and other vessels at sea at risk of not getting urgent

[126] (1861) 167 ER 121 at 123, quoted in Hare *loc cit*
[127] Tetley *op cit* at 326
[128] Tetley *op cit* 327
[129] Hare *op cit* at 291
[130] Hare *op cit* at 312-313

services to save their property from running aground. Many of these vessels carried expensive cargo and often dangerous cargo.

The 1910 Convention made no mention of liabilities or avoidance of ecological damage as factors to be considered in the assessment of the award[131]. To encourage potential salvors article 14 of the 1989 Salvage Convention provided for special compensation strictly limited to expenses incurred during the salvage operation[132].

Modern salvage operations included article 14 in salvage agreements invariably dubbed Lloyd's Standard form of Salvage Agreements of LOF for short[133]. The most salient feature of these agreements, whether it was the LOF 1995 or LOF 2000, was that it provided the salvor with special compensation for his "best endeavours" as long as he exercised reasonable care and skill during the operation[134]. The formation of these agreements follow the general rules governing contract law in the jurisdiction concerned[135]. The agreements, can therefore, be set aside on the same grounds that other contracts can be set aside, for instance, fraud, misrepresentation[136]. That being the case, one is inclined to assert that, in South Africa a salvage agreement that offends public policy as reflected by the Constitution is null and void. Regrettably, disputes that arise from the conclusion of these agreements are determined by London Arbitration under English law[137], which does not have a Constitution. Both Tetley and Hare argue that disputes arising from these agreements ought to be decided in the country in which they were concluded to avoid the costs of foreign Arbitration[138]. Having the disputes decided in South Africa, when the salvage agreement was signed here, is not just cost effective, but it empowers South African courts to apply South African law, and its Constitution.

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[131] *ibid*
[132] Tetley *op cit* at 342
[133] Tetley *op cit* at 327
[134] Tetley *op cit* at 335
[135] *ibid*
[136] Tetley *op cit* at 337
[137] C Hill *"Maritime Law"* p 334
[138] Tetley *op cit* at 352, see footnote 145

The Special Compensation Protection and Indemnity Clause (SCOPIC CLAUSE 2000) was introduced after the International Convention on Salvage 1989 spawned as a reaction to the House of Lords decision in *The Nagasaki Spirit* where it was held that the special compensation envisaged by art 14 of the 1989 Salvage Convention did not countenance any form of profit[139]. The clause was the brainchild of ship owners, underwriters, and Protection and Indemnity Clubs (P&I clubs) who wanted to devise a clause that would entitle salvors to profit for their services[140]. The clause, as it exists today, provides salvors with guaranteed remuneration for their exertions, including a margin of profit, whether or not the causualty concerned involved any threat of the environment damage, or whether or not the exertions were successful in preserving property[141].

Salvage agreements, entered in this country, whether negotiated using instruments such as the Lloyds form, SCOPIC or any other treaty should conform to the Constitution of South Africa. This would mean public policy must find salvage agreements acceptable. The Constitution shall be used as a yardstick to reflect public sentiment. It serves as a supreme body of law, which society agrees to be the values of society and any contract entered into must not conflict, with it. The fact that the right to equality is enshrined in the Bill of Rights unfair bargaining power, when used in an unconscionable way to take advantage of an unfair situation between parties in a salvage agreement, should be found unconstitutional.

Even though most salvage operations are done using the LOF doesn't make them immune from abuse. When a salvor enters into such an agreement with or without SCOPIC there is still potential for abuse. A salvor, knowing that he would be remunerated regardless of outcome, may render substandard services. Such practice is inimical to public policy as it violates the Constitutional right to equality. The agreement itself may not necessarily be found unconstitutional, instead the award itself ought to consider the inequity at the time of the conclusion of the agreement. Whether or not a particular salvage agreement offends public policy is a matter specific to the facts of the

[139] Tetley *op cit* at 342
[140] *ibid*
[141] Tetley *op cit* at 343

case. It is suggested that, should salvage disputes be arbitrated in South Africa, due consideration of public policy may influence the courts to determine whether public policy would accept a salvage award (or amount thereof) considering the nature of the services, and the equity of bargaining power of the parties. This would require an objective value judgment by the arbiters.

Constitutional duty to save life in Maritime Law

According to Tetley, there has always been a traditional duty on seamen to save life at sea, however, the moral obligations don't have a judicial base in civil law[142]. Today many national jurisdictions, and international conventions impose on the Master of a ship the obligation to save human life[143]. Should one breach of these duties they may face criminal sanctions but not civil liability[144]. There is a statutory obligation on masters of South African ships to assist distressed persons at sea whose lives are in danger. This duty is consistent with s 11 of the Constitution, which states that 'everyone has the right to life'. The Constitution adds weight to the statutory duty to save life. The effect of the additional weight supporting the legislature enables one to apply his right to life both vertically and horizontally to give effect to this right. The constitutional obligation coupled with the statutory obligation to save life at sea makes services to save life compulsory thus preventing any claim for salvage of life as voluntariness of salvage services are an essential requirement to a claim for salvage.

Section 5 of the Wreck and Salvage Act 94 of 1996 places an obligation on the master of South African ship, on receiving at sea a signal of distress or information from any source that a ship is in distress, shall proceed with all speed to the assistance of persons in distress[145]. Only when the master is unable to assist or when there are special circumstances that make it unreasonable or unnecessary to assist can the master legally

[142] Tetley *op cit* at 353
[143] *ibid*
[144] Tetley *op cit* at 354
[145] Section 5(1) of the Wreck and Salvage Act

absolve himself from his duty to assist[146]. Section 5(3) and 5(4) specifically mention two situations where it is unnecessary for the master to assist distressed persons: firstly when the master is informed of the requisition of one or more ships other than his own and that the requisition is being complied with by the ship or ships requisitioned, secondly when he is informed that his services are no longer required. The qualification in s 5(3) and (4) are not necessary as s 5(1) makes it clear that there must be special circumstances that prevent the master from rendering his assistance when prompted to do so. These circumstance would be when he simply cannot do so, when his help is no longer required after being so informed, or when it would be unreasonable. One presumes an "unreasonable situation" to be where he would place his own vessel at risk by going to the assistance of the distressed seamen. Section 6 of the Act emphasises this right to life by placing an obligation on the master to assist, more specifically, every person who is found at sea in danger of being lost even if that person is from another country. The distinction of what country one is from is, again, irrelevant as once in South African jurisdiction South African laws apply to all persons whether South African or not, whether they are on a South African registered ship or not.

Notwithstanding the Wreck and Salvage Act the Constitutional Court in *S v Makwanyane*[147] described the right to life as the most important of all human rights, and the source of other personal rights in the Bill of Rights; the society envisaged by the Constitution requires recognition of this right above all others. Langa J, the current President of the Constitutional Court, linked the right to life and the right to dignity with the African cultural principle of *ubuntu* that the life of another person is as valuable as ones own[148]. The highest court of the land could not have stressed the magnitude of the right to life in this country more than they did in this case. This right applies equally to both the state vertically, and horizontally to private persons.

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[146] *ibid*
[147] 1995 (3) SA 391 (CC) paras 144-146
[148] *supra* at para 225

Vertical Application.

As far as the states duty to protect life Chaskalson P held that the State is obliged to take action to protect human life[149]. Currie and De Waal argue that this obligation places a positive constitutional duty on the state to protect citizens from life threatening attacks. One is inclined to agree with the court, and to extend this duty to protect the lives of citizens to a duty to protect the lives of every human being whether a citizen or not, and to protect lives not just from life threatening attacks but life threatening situations as well. It is argued that state marine authorities have a constitutional obligation in addition to the obligation created by the Wreck and Salvage Act to protect life of those at sea. The effect of the constitutional obligation is that one can claim against the state for failure to protect life at sea, and can also seek an order to compel the state to save the lives at sea.

In *Carmichele v Minister of Safety and Security*[150] the state was successfully sued in delict by a 28 year old woman who had been brutally assaulted by a man that had in the past been convicted of indecent assault. He had been interviewed by the prosecutor who discovered serious sexual deviation but the Magistrate still gave recommendations that he be let free pending his trial. When he started snooping around the house where the incident took place complaints to the officials were ignored until the brutal assault took place[151]. The Constitutional court held that "the Bill of Rights binds the State and all its organs", and that "there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection"[152]. The ratio from this case provides authority for claiming against the state when it fails to meet its positive obligations to protect the lives it is responsible for.

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[149] *supra* at para 117
[150] 2001 (4) SA 938 (CC)
[151] *supra* at 939G-940C
[152] *supra* at para 44

The only way the State can escape liability, in this regard, is if they could show a reasonable excuse similar to those outlined in s 5 of the Wreck and Salvage Act mentioned in the above. An acceptable excuse is they would have put the lives of the rescuers at risk in attempting to save the people in question. It may not be enough to say that they lacked the resources to undergo the rescue effort; the state may be required by the court to give valid reasons why there was not enough adequate resources available.

Horizontal application.

It shall be argued that the constitutional obligation to save life applies horizontally as well by placing a positive constitutional duty on private vessels, again, in addition to the duty placed by the Wreck and Salvage Act to save the lives of those in danger at sea. This submission is may draw criticism from lawyers who believe that the Bill of Rights should only be applied vertically. It is no secret that the theme of this dissertation champions the Constitution ahead of traditional common law, and that lawyers who disagree with these submissions have failed to keep up with the dynamics of the South African legal system. This bold argument is consistent with the arguments made by renowned legal minds in South Africa.

Section 8 of the Constitution enables the Bill of Right to be applied horizontally. According to s 8(2) 'a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. This undoubtedly means that the Bill of Rights applies to natural persons and juristic persons when the nature of the right makes this right applicable. Currie and De Waal would agree with this interpretation of s 8(2) they believe that s 8(2) clearly envisages direct application of the Bill of Rights; however, the courts have shown that they prefer applying the Constitution horizontally in an indirect fashion[153].

[153] Currie & De Waal *op cit* at 50-51

This changed after the decision in *Khumalo v Holomisa*[154] where a political party leader sued a journalist in delict for publicising an article, which stated that the politician had been involved in a gang of bank robbers. He claimed his right to dignity had been infringed by the article and sought to apply this right horizontally against the journalist. The Constitutional Court found that once it has been determined that a natural person is bound by a particular provision in the Bill of Rights the courts must apply the right, and if necessary, develop the common law to give effect to that right[155]. When one reads s 8(1) and s 8(2) together, it was decided that, it is clear that the Constitution contemplates direct interpretation of the Constitution[156]. The courts cannot adopt an interpretation that would render a provision of the Constitution to be without any apparent purpose[157]. One is inclined to agree with the court that every right in the Bill of Rights can be applied horizontally provided that the nature of the right and the circumstances permit such an application.

Cheadle and Davis in their article support this analysis of the above decision. They argue that the court must take into account the nature of the right and the nature of the duty imposed by the right when deciding whether horizontal application of the Bill of Rights is appropriate[158]. This requires a process that goes beyond strict construction of the text alone as to whether such interpretation is suitable under the circumstances[159].

Currie and De Waal put together a method that can be used in assessing the horizontal applicability of a right in the Bill of Rights. Firstly, one must be sure that it is reasonable to apply the right to a private persons conduct[160]. Secondly, whether a provision in the Bill of rights applies horizontally also depends on the nature of the private conduct in question and the circumstances of the particular case[161]. Thirdly, the purpose behind the provision in the Bill of rights is an important consideration in determining whether it is

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[154] 2002 (5) SA 401
[155] *supra* at para 31-33
[156] *ibid*
[157] *ibid*
[158] H Cheadle & D Davis "The Application of the 1996 Constitution in the Private Sphere"
[159] *ibid*
[160] Currie & De Waal *op cit* at 53
[161] *ibid*

applicable to private conduct or not[162]. In other words the provision in question must have been intended to be applied horizontally in the particular circumstances. Fourthly, the nature of the duty imposed by the right on a private person must not undermine their autonomy to the extent that it puts them on an equal par to government in respect of their responsibilities to society[163]. For example a private hospital must not have the same responsibilities that a state hospital has in giving children basic health services[164].

When one examines this formula and uses it to decipher the extent to which the right to life can be applied to bind private persons it is clear that this right was intended to apply to State organs as well as private persons. As the most important of all rights, according to the Constitutional Court in *Makwanyane*[165], there is no doubt about that. The purpose of the right, it is submitted, was to prohibit both the state and private parties from taking life, and secondly to place a positive duty on both to take reasonable steps to protect life. One accepts the fact that private persons cannot be expected to have a duty similar to the duty the State has to save life at sea. The State is expected to have competent officials skilled at life rescue at sea. A private person or juristic entity cannot be expected to have such services available for the benefit of anyone who may need those services. However, masters of ships owned by private persons are expected to save the lives of distressed persons at sea to the extent, which the Wreck and Salvage Act contemplates. If a master fails to meet this duty he must have a justifiable excuse consistent with s 5 of the Act. Otherwise the master, and the owner of the ship vicariously, would be liable for the loss of life they ought to have saved.

The duty to save life and the Savage Award.

Given that there is an obligation on both the State, and to a lesser extent, private persons to save life there is no voluntariness, in respect of salvage law, in any efforts made by a salvor or any other party that saves the life of a distressed person at sea.

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[162] Currie & De Waal *op cit* at 54
[163] *ibid*
[164] *ibid*
[165] *supra* at note 111

Life salvage, according to Hill, that is independent of property is a rare occurrence[166]. The principle upon, which life salvage is based, like that of salvage of property, is based on actual danger to the person whose life has been saved[167]. Usually the salvage fund pays a little extra in the event that both property and life are saved[168]. Since human life cannot be valued by hard cash, Hill argues, when life is saved alone, unless there is legislation saying otherwise, the salvor is not entitled to an award[169].

This view is consistent with Hare's view that the common law of salvage has traditionally awarded a higher award for a salvor who saves life as well as property at sea[170]. The common law prescribes that the salvage services must be voluntary in nature[171]. When one saves life at sea they are fulfilling duty placed on them by s 5 of the Wreck and Salvage Act backed by s 11 of the Constitution. They cannot save a ship and expect a higher award because they saved life as well since life is invaluable. Life can never have value in this country it cannot be used in any commercial venture to increase ones profits. It is against the spirit and purport of the Constitution to allow this practice to continue. The Constitutional Court in *Carmichelles* case decided that "where the common law deviates from the spirit, purport, and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation"[172]. One is inclined to believe that the courts would not place value commercial value on human life to encourage salvors to save life at sea. Life priceless no amount added to the already existing salvage award is adequate. Salvors must save life first if they can, as they are expected to do, and if they can save property as well then they can look forward to a salvage award.

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[166] Hill *op cit* at 314
[167] *ibid*
[168] *ibid*
[169] Hill *op cit* at 315
[170] Hare *op cit* at 303-306
[171] Hare *op cit* at 292
[172] *supra* at para 33

CONSTITUTIONAL RIGHTS ON BOARD THE SHIP

In the past, according to Hills delineation, seamen were unhappily exploited[173]. The few rights that they had were not clearly expressed, or understood by them, and when their ship left port their health, welfare, and working conditions were subject to the whims of the Master of their vessel[174]. The Masters were often unscrupulous, they would bully, and victimize their crew, they were prone to drunkenness, indiscipline, insubordination, and desertion[175]. The seamen, historically, have been exploited by an oppressive greedy industry. Despite the enaction of the Merchant Shipping Act, which has regulated the industry to appreciate the rights of the seamen their constitutional rights are still infringed.

To the extent that the powers conferred upon the Master enable him to deny the seamen in his charge their basic rights and liberties during their course of employ is unconstitutional. The Master of a ship has a plethora of functions[176]. He is part disciplinarian, part accountant, part lawyer, and more than part seaman/navigator[177]. Hill submits that the Master is a servant of the law, an agent both for the principal, the shipowner, and to some extent represents the owners of the cargo[178]. The Master is the commander of men, he occupies a position of trust, and has a fiduciary relationship with his owners[179]. Owing to the nature of his duties the Master must have at least a basic knowledge, or more, of the legal nature of his responsibilities[180]. There is no legal obligation on a South African Master to posses the legal skills, and knowledge necessary for him to exercise his powers in a just, equitable, and constitutional manner.

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[173] Hill *op cit* at 477
[174] *ibid*
[175] *ibid*
[176] Hill *op cit* at 495
[177] *ibid*
[178] *ibid*
[179] *ibid*
[180] *ibid*

Section 270 of the Merchant Shipping Act states that whilst aboard a 'proper officer' off South African soil can convene a 'Maritime Court' for the following situations:

(a) complaints which appears to a proper officer outside the Republic to require immediate investigation is made to him by the master or any member of the crew of a South African ship; or

(b) the interest of the owner of a South African ship or the cargo thereof appears to such an officer to require it; or

(c) an allegation of incompetence or misconduct is made to him against the master or any of the ship's officers of a South African ship; or

(d) any South African ship is lost, abandoned or stranded at or near the place where such an officer may be, or wherever the crew or part of the crew of any South African ship which has been lost, abandoned or stranded arrives at that place; or

(e) any loss of life or any serious inquiry to any person has occurred on board a South African ship at or near that place.'

According to the Merchant Shipping Act a 'proper officer' means the officer designated by the Authority to be the proper officer at the place or in respect or in respect of the area and in respect of the matter to which reference is made in the provision of this Act in which the expression occurs; or if no such designation has been made:

(a) at the place in the republic, a principal officer or, where there no principal officer, the Controller of Customs and Excise; or

(b) at a place outside the Republic but within a treaty country, in the following order

(i) a career consular representative of the representative of the Republic; or

(ii) a diplomatic representative of the Republic; or

(iii) the person who, in terms of the law in force in the treaty country, is entrusted with the function or charged with the duty to which reference is made in the provision of this Act in which the expression occurs; or

(iv) a consular representative of a treaty country (other than the Republic); or

(v) a diplomatic representative of a treaty country (other than the Republic)

(c) at a place outside any treaty country, the person, and the order, indicated, in subparagraphs (i), (ii), (iv) and (v) of paragraph (b); or

(d) at a place outside the Republic, where there is no proper officer as defined in paragraph (b) or (c), any master of a South African ship who is specially authorized in writing to act as a proper officer by the Authority, but only in relation to the functions and duties in respect of which, and subject to the conditions subject to which, he has been so authorized to act.

It poignant to note that there is no specific requirement that the 'proper officer' have legal qualifications in the definition of who a proper officer is for the purposes of the Act.

According to s 271 (1) of the Act a maritime court consists of the 'proper officer' who convenes it with two other members or four other members. These members, according to s 271 (2), are appointed by the proper officer from persons of suitable nautical, engineering, or other special skill, knowledge or experience, and where possible one will be in active sea going service. Section 273 gives the courts the power to make the following orders:

(a) remove the Master of a South African ship in the interest of the ship, the cargo, the crew, or the owner of the said ship.

(b) Suspend the certificate of competency of a Master of a South African ship found guilty of any act of misconduct, abandonment or strading of or serious damage to any ship, or loss of life or serious injury to any person as a result of such acts.

(c) Discharge a seaman from a South African ship and order the wages of any seaman so discharged or any part of those wages to be forfeited.

(d) Decide on labour matters relating to wages, and fines of seamen.

(e) Direct the manner in which the costs incurred when any seaman is imprisoned outside the Republic be paid out of his wages.

(f) Punish any Master, or member of the crew of a South African ship for any offence brought before the court. The court has the same powers as the Magistrates court in deciding cases and sentences of accused persons. The

'proper officer' has the power to have the guilty person imprisoned on land or on the ship.

According to s 35 of the Constitution every person has a right to a fair trial, which includes a right to a public hearing before an ordinary court. The fact that it not a specific requirement that the presiding officer have a working knowledge of criminal law, criminal procedure, and the Constitution is grounds to argue that the Maritime courts are not 'ordinary courts as envisaged by the Constitution in s 35 (3).

The High Court dealt with a matter relevant to the issue raised in this Chapter in *Freedom of Expression Institute v President, Ordinary Court Martial*[181] where the 3rd and 4th applicants, as members of the defence force, were charged under the Military Discipline Code being the first schedule of the Defence Act 44 of 1957. An ordinary court martial was convened to hear and determine the charges[182]. Acting in terms of s 78 (3) of the Code the convening authority ordered that the court martial to be held *in camera* and all records of the proceedings to be classified as secret[183]. The applicants sought an order declaring various sections of the Act and Code unconstitutional insofar as they denied the 3rd and 4th applicants a trial by an ordinary court as required by the Constitution[184].

It was decided that to the extent that s 78 (3) of the Code empowered the convening authority to order that proceedings of an ordinary court martial be held *in camera* thereby inviting arbitrary interference by an executive official with the due process of the ordinary court martial it was unconstitutional in that not only did it violate the right to a fair trial, which included the right to a public trial before an ordinary court, protected by s 35 (3) (c) of the Constitution, it also violated s 34 of the Constitution, which guaranteed everyone the right to have any dispute decided in a fair public hearing before a court or...another independent and impartial hearing[185]. It was decided that to the extent that neither the Act or the Code required members of the court martial to have any legal

[181] 1999 (2) SA 471
[182] *ibid*
[183] *ibid*
[184] *ibid*
[185] *supra* at para 11

qualifications it was unconstitutional in that it violated s 174 of the Constitution, which requires judicial officers to be "appropriately qualified woman or man who is a fit and proper person", and s 12 (1) (b) read with s 35 (3), which guaranteed the right not to be detained without a public hearing before an ordinary court[186].

It was further held that, because court martial was presided over by laymen, it did not conform to the concept of an 'ordinary court' envisaged by s 35 (3) (c) of the Constitution[187]. The military court was viewed as *sui generis* which could be presided over by laymen notwithstanding its power to deprive convicted accused from their liberty[188]. On appeal the Constitutional Court decided not to decide on the constitutionality of the High Court decision as the offending provisions of the Defence Act had been impugned[189].

In *Van Rooyen and Others v The State & Others*[190] the Constitutional Court decided that in deciding whether a court was to be perceived to be independent and capable of impartially discharging their duties, an objective test properly contextualised was an appropriate test. The perception that was relevant for such purposes was, however, a perception based on a balanced view of all the material information[191]. It was decided that the question was how things appeared to the well informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person[192]. The well informed, thoughtful and objective observer had to be sensitive to the country's complex social realities, in touch with evolving patterns of constitutional development, and guided by the Constitution, its values and differentiation it made between different levels of courts[193].

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[186] *ibid*
[187] *supra* at para 21
[188] *ibid*
[189] *President, Ordinary Court Martial & Others v Freedom of Expression Institute & Others* 1999 (4) SA 682 at para 25
[190] 2002 (5) SA 246 at para 34
[191] *ibid*
[192] *ibid*
[193] *ibid*

The Constitutional Court, moreover, decided that the accused right to a fair trial under s 35 of the Constitution formed part of institutional judicial independence, which as a norm, went beyond and lay outside the Bill of Rights[194]. Therefore the provisions of s 36 of the Constitution dealing with the limitation of rights entrenched in the Bill of Rights were accordingly not applicable to judicial independence, and not subject to limitation[195].

It was held further that any power vested in a functionary by the law (or by the Constitution itself) was capable of being abused[196]. The exercise of the power was subject to constitutional control and should the power be abused the remedy lay there and not in invalidating the empowering statute[197]. The courts, in such a case, are required to read the statute in a way that is consistent with the Constitution, or amend the statute accordingly.

Arguments accusing Maritime Courts of being unconstitutional are completely veritable on a number of grounds. The fact that the 'proper officer' isn't specifically required to have legal qualifications when they have the powers to deny the master or any other seaman of their basic liberties of freedom, which are perceived to be sacrosanct by the Constitution is undeniably unconstitutional. An ordinary court, in accordance to the Constitution, ought to be presided over by an 'appropriately qualified' person, who should understand and appreciate the laws of the country before they are empowered to enforce these laws. This point is not just a right of law, supported by the decision in *Freedom of Expression* as a right that cannot be limited by s 36 of the Constitution, but it appeals to the principles of *boni mores*, common sense, and community justice.

When one looks at the definition pf a 'proper officer' it appears as though such an officer, in practice, should there be a matter raised that is contemplated by s 270 of the Act, the master of the ship on which the Maritime court is convened is likely to be the resident 'proper officer'. Other persons listed as potential 'proper officers', such as diplomatic

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[194] *supra* at para 35
[195] *ibid*
[196] *supra* at para 37
[197] *ibid*

representatives, are unlikely to be on board the vessel. In such a case the master would be highly likely to be the only man qualified to assume the position as the 'proper officer' who convenes the Maritime Court as its 'presiding officer'. In such a case the master will wear the hat of being, the boss of the vessel who raises complaint, in the way a prosecutor would, he would also be the agent of the owner of the ship. He would have the power to choose the members that would assist him deciding the matters brought before the court. These powers in this new constitutional dispensation gives an informed observer who is well informed of the law, and objective in arriving at his opinion to perceive such a court as incapable of discharging their duties in an impartial manner, and to that extent, the said court, is unconstitutional. The above analysis derives from the decision in *Van Rooyen's* case, considered in the above, decided by the Constitutional Court[198].

Section 23 (1) of the Constitution states that 'everyone is entitled to fair labour practices'. The Labour Relations Act 66 of 1995 was created to give effect this right. According to s 188 (1) states that

'a dismissal that is not automatically unfair, is unfair if the employer fails to prove –

(a) that the reason for the dismissal is a fair reason-

  (i) related to the employee's conduct or capacity; or

  (ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure

This means the dismissal must first be substantially fair and then it must be procedurally fair. To be substantially fair the dismissal it must be clear that there was a rule that existed and the employee actually contravened the rule[199]. The rule that was contravened must have been reasonable, and the employee must been aware of its existence[200]. Dismissal of the employee must have been the most appropriate sanction for the contravention of the rule[201]. The seriousness of the misconduct is an important factor

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[198] *supra* at para 34

[199] Basson *et al "Essential Labour Law"* (2002) p 179

[200] Basson *op cit* at 180

[201] Basson *op cit* at 183

when the appropriateness of the dismissal as a sanction is considered[202]. The circumstances of the infringement, nature of the employee's job, and whether other employees have been dismissed for the same misconduct or incompetence are other factors considered[203].

The Maritime Courts when they exercise their powers to dismiss an employee on a South African ship ought to be aware the requirement of substantive fairness. Their decision must take into account the factors listed above, each factor is based on the principle of reasonableness, essential when deciding on the fate of an employee's job. If the presiding officer has little or no knowledge of the Labour Relations Act, which gives effect to s 23 of the Constitution, one cannot contemplate how any decision arrived at by the courts would be influenced by the Constitution.

Section 188 (1) (b) of the Labour Relations Act requires dismissals to be effected in accordance to fair procedure. The procedure that ought to be followed before one is dismissed is not regulated by the Labour Relations Act. The Code of Good Practice does provide a basic standard of procedure that will be listed below:

(1) There ought to be an investigation involving a formal enquiry to determine the grounds for dismissal.
(2) The employee must be given notice by the employer of the allegations against him, in a language that he can understand.
(3) The Chairperson of the enquiry must make the final decision.
(4) The employer must communicate the decision to the employee preferably in writing – and if found guilty the employer must inform the employee of the penalty.
(5) The employee must be informed of the reason for the decision. The employee must be reminded of any rights that he has including the right to take his matter

[202] Basson *op cit* at 184
[203] Basson *op cit* at 186-190

before a bargaining council or the CCMA (Commission for the Conciliation, Mediation and Arbitration) that has jurisdiction to hear any labour complaints[204].

The Maritime Courts do not follow this prescribed procedure. There is mention of an investigation by the Maritime Court. However, there is mention of the allegations being put to him in writing so the accused seaman can prepare a defence. The seaman or master, after the decision has been made, is not informed of his right to have the matter taken before the CCMA. Worse still the Merchant Shipping Act does not allow such seamen to take the matter to the CCMA or the Labour Court. It is unfair that South African seamen do not enjoy the same protection that employees in South African soil enjoy simply because they do not work on land. If they worked on land, and they were dismissed by their employer, they could have the matter taken before a competent skilled lawyer, as is usually the case, at the CCMA. The employer would be expected to show that the decision to dismiss them was substantively and procedurally fair, thus consistent with fair labour practices required by s 23 of the Constitution. But for the fact that they work at sea their labour rights are not as extensive as those on land. This is in itself a violation of s 9 of the Constitution, which states that everyone is entitled to equal protection of the law.

MARINE POLLUTION AND THE CONSTITUTION

The South African Constitution has the potential to be the panacea in curbing marine pollution. The Constitution is an omnipotent force that when applied can compel government to abate abuses of the environment. Similarly it can be applied horizontally in suing for damages caused by the violation of ones right to an environment that is not harmful. Section 24 of the Constitution is the vanguard of environmental protection it was specifically designed prevent, promote, and deter ecological degradation. It shall be argued that the Constitution emboldens both lawmakers, and interested parties to increase the efficacy of environmental laws and conventions aimed at conserving marine life. The

[204] Basson *op cit* at 192-195

lack of effective environmental laws necessitates the action from various stakeholders to strengthen environmental laws under the auspices of the Constitution and its values.

Marine pollution can take various forms. Oil pollution is the most high profile form of marine pollution. There are other more insidious pollutants that damages our waters. Most ships use diesel engines that are harmful to the environment. Ships discharge insidious pollutants during the course of their travel. Oil is no the only dangerous cargo carried by ships: chemicals, and radio active substances are also ferried by sea. The Constitution was designed to tackle not just oil pollution but all forms of environmentally unfriendly substances.

However, oil pollution is the most visable form of pollution, and the most prone to negative publicity. The negativity, according to Tetley, is owed to the technological developments that has increased the capacity for the shipment by sea of large quantities of oil and other environmentally hazardous substances, as well as the exploration and exploitation of oil and natural gas on the seabed and subsoil of offshore areas[205]. The Shipping industry has created marine pollution on an unprecedented scale compelling both national, and international law to prevent pollution of this nature, secure compensation for victims of pollution, and to restore the environment in the event of a maritime pollution disaster[206].

The English common law initially had difficulty in placing marine pollution into its traditional categories of torts (delict in South Africa)[207]. The tort of negligence gradually emerged as the usual ground of liability for causing marine pollution[208]. The common law was unsettled here because of the difficulty in proving damages for "pure economic" loss in pollution claims, and these claims were restricted by certain common law jurisdictions[209]. International Conventions, and national legislation have been regarded

[205] Tetley *op cit* at 447
[206] *ibid*
[207] *ibid*
[208] *ibid*
[209] Tetley *op cit* at 448

as the most effective means to prevent marine pollution, secure damages for victims, and restore the environment.

The MARPOL Act 2 of 1986 was created, conforming to the MARPOL 1973/1978 Convention, to eliminate intentional pollution of the marine environment by oil and other harmful substances and the minimisation of accidental discharge of such substances that are harmful to human health, marine life and other living resources[210]. The Act applies to South African ships wherever it may be, and to any other ship while in the Republic or in its territorial waters[211]. The Act aims to achieve its purpose by setting minimum standards and measures of policing of the design, building and operation of tankers[212]. The punishment serves as little deterrent if one considers the enormity of the catastrophe when a ship carrying tons of crude oil runs aground on the finest beaches in South Africa. The fine ought to be a lot higher, and the prison term a lot longer to effectively deter ship owners and masters from polluting South African waters. Litigation is, therefore, regarded as the most effective means to deterring pollution.

In light of this the most significant International Convention to curb marine pollution is the International Convention on Civil Liability for Oil Pollution 1969 (hereinafter called the CLC). The CLC was born with the following factors in mind:

(i) the dangers of oil pollution inherent in the world-wide carriage of oil by sea;

(ii) the need to ensure that adequate compensation is available to persons who suffer damages caused by pollution resulting from the escape or discharge of oil from ships;

(iii) the desire for adoption of uniform rules and procedures for determining questions of liability and providing adequate compensation;

(iv) governments desire to take decisive action in light of internationally publicized maritime disasters[213].

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[210] MARPOL Art 2 (2)
[211] Hare *op cit* at 418
[212] *ibid*
[213] Hill *op cit* at 431-432

Under the CLC the ship owner is strictly liable, subject to a barrow list of exceptions, for "pollution damage", defined to include contamination by oil pollution, clean up costs, and the costs of preventative measures[214]. The costs include expenditures made where there was a "grave and imminent threat" of pollution, even if no pollution actually occured[215]. The ship owner may limit liability for pollution to 3 million Special Drawing Rights (SDR'S) for a ship not exceeding 5000 gross tons, that limit increases by 420 SDR's for each additional gross ton, up to the global limit of 59.7 million SDR's. The right to limit is lost if it is proved that the pollution damage resulted from the ship owners personal act or omission committed with the intent to cause damage, or recklessly and with knowledge that some damage would probably result[216].

Realizing that the CLC limit might not be sufficient the International Convention on the Establishment of an International Fund for Compensation 1971 (herein after called the Fund Convention) was introduced to provide substantial supplementary compensation to victims of major oil pollution disasters where full even adequate compensation was not possible out of the sums to which a tanker could limit its own liability under the CLC[217]. The was intended to provide:

(a) compensation for damages resulting from pollution in cases where the constituted fund under the CLC was insufficient to cope
(b) to provide relief to tanker owners from the 'additional financial burden' imposed upon them by the CLC[218].

The fund is a legal entity in itself that can sue or be sued in its own right[219]. It is financed by levies made upon receivers of crude oil whose places of business are within States contracting to the Convention[220]. The has no obligation to pay when damages occur because of an act of war, or where the claimant fails to prove that the damage resulted

[214] Tetley *op cit* at 451
[215] *ibid*
[216] Tetley *op cit* at 452
[217] Hill *op cit* at 449
[218] *ibid*
[219] Hill *op cit* at 450
[220] *ibid*

from an incident involving one or more ships[221]. The original Fund Convention provided for compensation not exceeding 450 million Francs[222]. The amended total, in 1995, was 900 million Francs[223].

There have been several amendments to the CLC, and the Fund Convention to meet the escalating costs that a Maritime disaster may have. The 1992 Protocol to the CLC Convention came in to force in 1996[224]. The main purpose of the Protocol was to increase compensation amounts[225]. In the year 2000 ammendments were made to the CLC Convention that increased compensation limits by 50 percent compared to the limits set in the 1992 Protocol as follows:

(a) for a ship not exceeding 5000 gross tonnage, liability is limited to 4.51 million SDR (US$5.78 million) – under the 1992 Protocol the limit was 3 million SDR (US$3.8 million).

(b) for a ship 5000 to 140 000 gross tonnage: liability is limited to 4.51 million SDR (US$5.78 million) plus 631 SDR (US$807) for each additional gross tonne over 5000.

(c) For a ship over 140 000 gross tonnage: liability is limited to 89.77 million SDR (US$115million) under the 1992 Protocol, the limit was 59.7 million SDR (US$76.5million)[226].

The 1992 Protocol also established a 1992 Fund managed by the same London Secretariat as the 1971 fund[227]. The 1992 Fund was amended in the year 2000. The amendments raise the maximum amount of compensation payable from the IOPC fund for a single incident, including the limit established under the 2000 CLC amendments, to 203 million SDR (US$173million)[228]. However, if three States contributing to the fund

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[221] *ibid*
[222] *ibid*
[223] *ibid*
[224] http://www.im.org/conventions/mainframe.asp?topic.id=256&doc_id=66#7
[225] *ibid*
[226] http://www.imo.org/conventions/contents.asp?doc_id=66&topic_id=256#5
[227] http://www.im.org/conventions/mainframe.asp?topic.id=256&doc_id=66#7
[228] *ibid*

receive more than 600 million tones of oil per annum, the maximum amount is raised to 300.740.000 SDR (US$386million), up from 200 million SDR (US$256million)[229].

The 2000 amendments were followed by the 2003 Protocol, which established the International Oil Pollution Compensation Supplementary Fund (IOPC Supplementary Fund)[230]. The aim of the established fund is to supplement the compensation available under the 1992 CLC, and 1992 Fund (as amended) with additional third tier compensation[231]. The Protocol is optional and participation is open to all States Parties to the 1992 Fund Convention[232]. The total amount of compensation payable for any one incident will be limited to a combined total of 750 million SDR (US$1billion) including the amount of compensation under the existing CLC/Fund Convention[233].

The Marine Pollution (Control And Civil Liability) Act prohibits, and makes it an offence to discharge oil unless the discharge was to ensure the safety of life, the ship, or when oil leaked after damage not caused by the lack of reasonable care[234]. The Act imposes strict liability upon the owner for any damages caused by pollution resulting from the discharge of oil from such a ship[235]. There are few exemptions to this clause: (i) where the discharge resulted from an act of war, hostilities or an inevitable and irresistible natural phenomenon (ii) when caused by an action or omission by a person not being the owner or his agent with the intent to do damage (iii) when caused by the negligence or other wrongful act of any government or authority responsible for the maintenance of lights or other navigational aids[236].

The Act, clearly, incorporates the CLC and the Fund Convention, which is an inter governmental measure that establishes a fund contributed by contracting states in proportion to the volume of the imports of their individual oil dealers, and financed by

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[229] *ibid*
[230] *ibid*
[231] *ibid*
[232] *ibid*
[233] *ibid*
[234] Section 2 (2) of the Act
[235] Section 9 of the Act
[236] Hare *op cit* at 415

levies upon oil companies in proportion to the volume of their imports[237]. However, even though South Africa is, as far as the Secretary General of the IMO is concerned, a member of the 1992 CLC, and 1992 Fund Convention there is an additional requirement that these conventions should be incorporated into the national law of the State concerned[238]. Failure to comply with the contemporary IMO, and IOPC Protocols, and amendments vitiates the purpose of membership, it considerably increases the financial burden on the contributors in those States should there be a major oil spill, and increases the possibility that the State will not be in the financial position to compensate victims, and prevent environmental damage[239].

According to Currie and De Waal South Africa is not short of environmental law, but effective environmental law[240]. Three major problems are highlighted: firstly, inadequate enforcement of environmental law; secondly, lack of effective administration of environmental quality control; lastly, few incentives to encourage sustainable industrial practices[241]. Currie and De Waal believe that the best way to protect the environment from abuse is by facilitating environmental litigation so that it may be less restrictive thus encouraging interest groups to enforce environmental law[242]. Administrative justice rights compel the government to give reasons to justify their behavior by furnishing information for their decisions[243]. The government, when challenged in the court, must provide reasons why they have acted or failed to act in the interest of the environment as required by the Constitution. It is submitted that s 8 of the Constitution puts the same onus on private individuals and juristic entities. Public interest litigation is the only way that government[244] and juristic entities shall be forced to comply with environmental controls. Glazewski would support this argument as he asserts that the individual has a private right to a clean environment that is justiciable, the state has a duty to protect it[245].

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[237] Hare *op cit* at 413
[238] http://www.iopcfund.org/FAQs.htm#m2
[239] *ibid*
[240] Currie & De Waal *op cit* at 521
[241] *ibid*
[242] *ibid*
[243] *ibid*
[244] *ibid*
[245] Glazeweski *"The Environment Human Rights and the New South African Constitution"* (1991) *SAJHR* 167 at 172

An interest group that may wish to enforce this right must have standing required by the courts to do so. The common law requirements for standing insisted that one should have direct (usually) pecuniary interest in proceedings[246]. This changed after *Ferreira v Levin*[247] where it was decided that "any person whose rights have been infringed or threatened to be infringed has standing to bring the matter to a competent court of law". This broadened standing to allow any person who has a justiciable right to approach a court to enforce it. Section 24 of the Constitution provides everyone with a justiciable right to an environment that is not harmful to their health or well being and to have that right protected for the benefit of present and future generations through reasonable legislation and other measures that: (i) prevent pollution (ii) promote conservation (iii) secure ecologically sustainable development and use of natural resources.

Section 24 of the Constitution has been rarely been relied on in litigation, but when it has the precedent is unambiguous explicated in the judgment in *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Produce*[248] where Leach J decided that the *Carmichelles* case is authority that the state cannot perform any act that infringes the rights in the Bill of Rights, and that it is obliged to provide appropriate protection through laws and structures designed for that protection. The National Environmental Management Act, it was decided, is an attempt to provide laws and structures designed to afford protection of fundamental rights likely to be adversely affected by pollution[249]. Moreover, the courts are empowered to make any order that protects the environment as required by the Bill of Rights to get rid of the offending pollution[250].

The judgment in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation Environment & Land Affairs*[251] conveys the High Courts perception of the importance of s 24 of the Constitution. The courts advanced the arguments of the admired academic

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[246] Currie & De Waal *op cit* at 523
[247] 1996 (1) SA 984 (CC) at para 167-168
[248] 2004 (2) SA 393 AT 410E-H
[249] *ibid*
[250] *ibid*
[251] 2004 (5) SA 124

Professor Shadrack Gutto who said that constitutional right is on par with the right to freedom of trade, profession, and property[252]. When one deals with environmental rights they should take into account socio economic development and the interests of the present generation and beyond[253]. The courts decided that sustainable development shall influence decisions regarding pollution; pure economic principles will no longer determine in an unbridled fashion whether development is acceptable[254]. Furthermore by elevating the environmental rights to fundamental justiciable human rights South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia* socio economic concerns and principles[255].

The significance of the CLC, and the Fund Convention provides recourse to those whose constitutional right to a clean marine environment have been infringed. A ship owner whose vessel has polluted the marine environment can be held to be strictly liable, and the CLC would provide compensation to the extent of the damage suffered. To be successful one has to be able to prove that his right to an environment that is not harmful to his health or well being has been infringed[256], and be able to accurately calculate the patrimonial damage suffered as result of the infringement[257]. The aforementioned cases would support claims consistent with this submission. The Fund Convention as a legal entity that can sue or be sued provides the person who has suffered from damages, countenanced by the Convention, with a defendant who they can make a legal claim against. Should a situation arise where the pollution damage caused by a ship owners personal act or omission with the intent to cause damage, or recklessly and with knowledge that some damage would result, occurs and the accordingly the CLC refuses to pay compensation one can still claim for pollution damage in the manner contemplated above.

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[252] *supra* at 143
[253] *ibid*
[254] *supra* at 144
[255] *ibid*
[256] Section 24 (a) of the Constitution
[257] Hill *op cit* at 453

Interest groups may take advantage of the Constitutional Courts powers to make any order that protects fundamental justiciable environmental rights by seeking an order to compel government to enact contemporary IMO, and IOPC Protocols, including the 2003 IOPC supplementary fund, and amendments to the extent that they make provision for adequate compensation for persons who suffer from damages caused by pollution. The aforementioned *Hicharge Investment* case provides authority for such an order. If the interest group, or interested person, can successfully show that he has sufficient interest, as envisaged by *Ferreira v Levin,* and he advances solid arguments, which should not be hard to do, that it is in South Africa's interest that the International Conventions concerned are complied with they should be successful. The courts would, no doubt, consider s 36 of the Constitution to decide on whether the right in s 24 of the Constitution should be limited. One is inclined to believe that such a limitation, *vis a vis* the nature and importance of the South African coastline, would not be regarded as reasonable or justifiable.

South African courts are obligated to give the fullest protection of the law whenever a provision in the Bill of Rights is infringed. They are not restricted to a specific order they can give any order to fulfill this obligation.

CONCLUSION

Today's Maritime law is no longer confined to the traditional common law principles that existed in the pre constitutional era. The Constitution, as the Supreme law, pervades the fabric of the legal system, and is now the ultimate guarantor of justiciable Maritime rights in South Africa. The Constitution, however, doesn't curtail the common law principles. Instead, as explicated in the above, it strengthens existing common law principles, such as fairness and equity, which are the cornerstones of the legal system. In the case of Marine Pollution, and the rights of persons on a ship, the Constitution makes it easier for an aggrieved party to access the courts to protect their rights. The Constitution should not be seen as a burden to Maritime lawyers. It ought to be viewed as an essential

apparatus used in seeking justice, and an opportunity to develop the law so as to protect the interests of those involved or affected by the industry.

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