

**The Protection of Historical Wrecks in South African Waters**

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*Dedicated to the Memory of my Father*

Surgeon Rear Admiral PD Gordon Pugh

OBE, MB, B CHIR, FRCS, ROYAL NAVY

(i)

### Acknowledgements

Nineteen Ninety Eight marks 500 years since the Portuguese explorer Vasco da Gama opened up the Cape sea route to the East. Since that first historic voyage, many ships have floundered off the South African coast. Many of them are now of immense historical, archaeological and cultural value.

Accordingly, it seems opportune to reflect on the protection which South African law offers to these historical wrecks.

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**ABBREVIATIONS**

- Draft Legislation - **Annex 2, 'n Stelsel vir die Bewaring van die Materiële Kultuurerfenis in Suid-Afrika.** Verslag: NASOP 02-566 (89/06) (A System for the Preservation of Material Cultural Heritage in South Africa)
- LOSC - **Law of the Sea Convention of 1982**
- New Constitution - **Constitution of the Republic of South Africa Act, No 200 of 1993.**
- NM - **Nautical mile (1852 metres)**
- NMC - **National Monuments Council**
- NYIL - **Netherlands Year Book of International Law**
- VOC - **Vereenigde Geoctroyeerde Oost Indische Compagnie**
- The Report - **'n Stelsel vir die Bewaring van die Materiële Kultuurerfenis in Suid-Afrika.** Verslag: NASOP 02-566 (89/06)
- Turner - **Turner, M Shipwrecks and Salvage in South Africa - 1505 to the Present.** Cape Town: C Struik 1988.
- van Meurs - **Legal Aspects of Marine Archaeological Research.** Special Publication of the Institute of Marine Law, University of Cape Town, 1 (1985)



## 1. INTRODUCTION

Since 1488, when Bartholemeu Dias first rounded the Cape, countless ships have been wrecked off the South African coast. Many of these ships are today of immense historical, archaeological and cultural value. Accordingly, they require protection from the threat of indiscriminate salvors.

In this thesis, I shall examine to what extent current South African legislation protects and preserves historical shipwrecks which lie within twenty-four nautical miles of the South African coast. In so doing, I shall analyse the provisions of the **National Monuments Act**<sup>1</sup> and draft legislation compiled in 1988 dealing with historic wrecks and artifacts<sup>2</sup>. I shall then examine to what extent the draft legislation remedies shortcomings in the **National Monuments Act**.

However, in examining the law relating to historical shipwrecks, a familiarity with the history behind these shipwrecks is both interesting and necessary. Only then does it become evident that South Africa is steeped in shipwreck history, and that the South African coastline is a veritable treasure house.

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<sup>1</sup> No 28 of 1969 (as amended).

<sup>2</sup> Bylae 2, 'n Stelsel vir die Bewaring van die Materiële Kultuurerfenis in Suid-Afrika. Verslag: NASOP 02-566 (89/06), pp 286 - 319 (Annex 2, A System for the Preservation of Material Cultural Heritage in South Africa).

## 2. GENERAL BACKGROUND

### 2.1 Historical Background

The Cape sea route has been used as a sea route to the East for nearly five centuries. In fact, until the opening of the Suez Canal in 1888, it was the only practical sea route between Europe and the East. It is a dangerous route, and the wrecks of Portuguese, Dutch, and English East-Indiamen along our coastline bear testimony to this fact.

#### 2.1.1 The Portuguese

The Portuguese were the first to open up the Cape sea route. In 1488, Bartholomeu Dias rounded the Cape in a small caravel<sup>3</sup>. He then proceeded up the east coast of South Africa to the mouth of the Great Fish River. Here he was forced to turn back because of the strong opposition he faced from crew members. On his return voyage he encountered a ferocious storm off Cape Point. He aptly named it 'Cabo Tormentosa', or Cape of Storms<sup>4</sup>. However, on his return to Portugal, King John II renamed it 'Cabo de Boa Esperanca', or Cape of Good Hope, in anticipation of the riches which were to flow from the Indies<sup>5</sup>.

It was ten years before the trade route around Africa was finally opened, and riches were able to flow from the Indies. In 1498, Vasco da Gama reached India. This was the beginning of a vast Portuguese trade empire, which stretched throughout the East Indies as far as Macao in China.

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<sup>3</sup> Caravels were regarded as ideal for exploration. This was because they were fast, manoeuvrable, and had a shallow draft, enabling them to explore rivers.

<sup>4</sup> This was rather prophetic. In a subsequent voyage in 1501, under the leadership of Pedro Alvares Cabral, Dias perished in a storm off the Cape of Good Hope.

<sup>5</sup> Turner, *Shipwrecks and Salvage in South Africa - 1505 to the Present*, p 12.

Soon a steady stream of galleons and carracks plied the Cape sea route. Outward-bound East-Indiamen carried valuable cargoes of silver with which to pay for goods, whereas the homeward-bound returned heavily-laden with spices, Chinese porcelain, silk, ivory and slaves. For nearly 100 years this route was used only by the Portuguese <sup>6</sup>.

A number of Portuguese East-Indiamen were wrecked off the South African coast. Historically, these wrecks are very important because very little is known about the Portuguese vessels of this era. In fact, to date no remains of any outward-bound Portuguese vessel has been found along the South African coast <sup>7</sup>.

Three homeward-bound Portuguese vessels are worthy of note, because extremely valuable bronze cannons were found at their wreck sites:-

- The **Sao Bento** sank in 1554 at the mouth of the River Msikaba between Port Edward and Port St Johns. Eighteen fine bronze naval cannons have been recovered from the wreck. These cannons are beautifully adorned with Portuguese crests as well as the dividing globe insignia depicting the Treaty of Tordesillas <sup>8</sup>.

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<sup>6</sup> Ibid, pp 13 - 15.

<sup>7</sup> Ibid, p 47. However, historians have been able to gain some insight into outward-bound Portuguese East-Indiamen following salvage operations on the **Santiago**, wrecked on the Bassa da India atoll in the Moçambique Channel in 1585.

<sup>8</sup> Ibid, p 105. It is this treaty which explains the lack of Spanish wrecks along the South African coast. In 1494, Pope Alexander VI divided the New World by drawing a dividing line along the longitude 46° 37.00W. Everything to the east of this dividing line fell within the Portuguese sphere of influence, whereas everything to the west of the dividing line fell within the Spanish sphere of influence. South Africa fell within the Portuguese sphere of influence, hence our coastline has a number of Portuguese wrecks along it. However, there are no recorded Spanish historical wrecks off the South African coast. Spanish wrecks can be found in great numbers west of the dividing line, in areas such as the Gulf of Mexico and off the coast of Florida.

- The **Santissimo Sacramento** and the **Nossa Senhora de Atalaia do Pinheiro** both sank in 1647 off Port Elizabeth and East London respectively. Both included in their cargoes large bronze artillery pieces cast in the city-state of Macao. These pieces are all magnificently decorated with the arms of Macao and the cannon-maker's name, Manuel Travares Bocarro. Furthermore, all the guns are adorned with spectacular lifting-lugs fashioned to look like dolphins<sup>9</sup>.

The finding of these cannons has been invaluable. By comparing the *naval* cannons from the **Sao Bento**, with the *artillery* pieces from the **Santissimo Sacramento** and the **Nossa Senhora de Atalaia do Pinheiro**; historians have been able to increase their knowledge of the differences between naval and land armoury of that era.

The Portuguese monopoly in the East lasted little more than 100 years. Towards the end of the sixteenth century the power of Portugal, united with Spain under Philip II, began to decline. The Dutch were quick to fill the gap.

### 2.1.2 The Dutch

In 1602, the Dutch East India Company<sup>10</sup> was granted its charter. It was formed to protect and regulate Dutch trade in the East. It was not long before the Dutch had firmly established themselves in the East in areas such as Indonesia and Java, with their headquarters at Batavia.

However, the voyage to the East was long and dangerous. Many sailors died en route from scurvy

<sup>11</sup>. The Dutch required a refreshment station en route where vessels could be replenished with

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<sup>9</sup> Ibid, p 51.

<sup>10</sup> Vereenigde Geocroyeerde Oost Indische Compagnie (VOC).

<sup>11</sup> See for example, the case of the **Reigersdaal**, which ran aground on Springfontein Point in 1747. The **Reigersdaal** was an outward-bound Dutch East-Indiaman with a compliment of 297 sailors. By the time she had reached Dassen Island, off the west coast of South Africa, she had lost 125 men from scurvy!

fresh water, vegetables and provisions. Therefore, in 1652, a permanent Dutch presence was established at the Cape under the command of Jan van Riebeeck. Soon Cape Town became a busy port for the hundreds of VOC vessels trading in the East <sup>12</sup>.

Many East-Indiamen were wrecked off the South African coast. It is not possible to mention them all. However, two outward-bound vessels and one homeward-bound vessel are worthy of note because of their importance to historians.

- The **Merestein** was an outward-bound East-Indiaman which was wrecked on Jutten Island in 1702. She is, to date, the most important coin wreck found on the South African coast. A total of 15 000 coins have been recovered from the wreck site. The coins date back to the late sixteenth century. Of particular importance to historians are the silver ducatoons, silver raiders and Dutch Schillings, which were found on the wreck <sup>13</sup>.
- The **Reigersdaal** was an outward-bound East-Indiaman which was wrecked on Springfontein Point in 1747. Aboard was a large hoard of silver specie. A total of 20 000 coins have been recovered from the site. These include perfectly preserved pieces-of-eight, beautiful silver Mexican 'pillar' dollars dating from 1732 - 1744, and a fair number of Guatemalan, Mexican, Potosi and Lima silver cobs <sup>14</sup>.

These two coin wrecks are of particular importance to historians. By studying the coins found at these two wreck sites, historians have been able to link these coins with the Spanish treasure

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<sup>12</sup> Turner, pp 15 - 16. At the height of its success, which lasted for most of the seventeenth century, the Company possessed 40 warships, 150 merchant ships, and employed over 10 000 soldiers.

<sup>13</sup> Ibid, p 48.

<sup>14</sup> Ibid, p 102.

fleets which plied the Atlantic between the New World and Europe. In fact, many of the coins recovered from the **Merestein** and **Reigersdaal** were originally minted in the New World. The coins then made their way into Dutch or English hands after Spanish vessels were captured <sup>15</sup>.

- A number of extremely valuable cannons were also recovered from the wreck of the **Reigersdaal**. They are the best-preserved cannons yet to be found on the South African coast. Included are six large bronze muzzle-loading cannon, bearing the crest of the Amsterdam Chamber of the East India Company and adorned with beautiful curved lifting-lugs in the shape of dolphins; and four bronze muzzle-loading swivel-guns, bearing the Amsterdam Chamber's insignia, which are still mounted on their iron frames <sup>16</sup>. The finding of such well-preserved cannon has helped historians in their understanding of eighteenth century warfare and armoury.
  
- The **Middelburg** was a homeward-bound East-Indiaman which was blown up and sunk in the *Battle of Saldanha* in 1781 <sup>17</sup>. She was carrying a very valuable cargo of Chinese porcelain <sup>18</sup>. This cargo is important to historians and artists alike. Historians have been able to increase their knowledge of Dutch trading habits by establishing where the porcelain was made, while artists have been able to admire and study exquisite eighteenth century Chinese porcelain.

The Dutch dominance lasted roughly 150 years. In 1795, the VOC which had been in financial difficulty for some time, was taken over by the Dutch state, and was declared bankrupt soon afterwards. In the meantime, Britain had emerged as the strongest force in the East.

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<sup>15</sup> Ibid, pp 47 - 48, pp 112 - 115.

<sup>16</sup> Ibid, p 102.

<sup>17</sup> See *infra* 2.3.6 (i).

<sup>18</sup> Turner, pp 75 - 77.

### 2.1.3 The English

In 1601, the English East India Company was granted its charter. It was not long before the English had established a number of trading stations in India. The French also set up trading stations which led to rivalry. In 1757, the English defeated the French and the Indian prince Suraj-ud-Dowlah in the Battle of Plassey thereby ensuring their dominance in India. Their trading influence also spread to China<sup>19</sup>.

When Britain went to war with France in 1793, both countries were determined to capture the Cape so as to command the sea route to the East. In 1795, the British captured the Cape, but after the war, in 1803, they gave it back to the Dutch in terms of the *Treaty of Amiens*. When war broke out again, the British occupied the Cape for the second time in 1806. Thereafter it was to remain in British hands. A rapid expansion in the East soon saw the British Empire stretching as far as China and Australia. A constant stream of ships carrying government officials, soldiers, immigrants, supplies and other goods sailed to and fro past South Africa. The greatest number of shipwrecks on our shores occurred during this period, and most of them were British<sup>20</sup>.

The following wrecks are worthy of note:-

- The **Johanna** was an outward-bound East-Indiaman which sank near Cape Agulhas in 1682. She is the oldest coin wreck which has been found off the South African coast. It was an extremely valuable find. 23 000 Spanish-American silver cobs from Mexico and Potosi, dated

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<sup>19</sup> Ibid, pp 15 - 16.

<sup>20</sup> Ibid, pp 16 - 17.

around 1676 were found; as well as 27 bullion discs of silver from the New World, varying in weight from 4 kgs to 17 kgs <sup>21</sup>.

- The **Dodington** was an outward-bound East-Indiaman carrying supplies to India for the war effort against the French. She was wrecked off Bird Island near Algoa Bay, in 1755. Divers have recovered four bronze field guns bearing the crest of King George II and a substantial quantity of Spanish-American 'pillar' dollars and cobs minted in Mexico City and Potosi <sup>22</sup>.
- The **Grosvenor** was a homeward-bound East-Indiaman which sank off the Pondoland coast in 1782. She was said to have been carrying the fabulous 'Peacock throne' of the great Monguls and a 'treasure' of coins. The wreck has been found but the throne and the coins still elude divers <sup>23</sup>.
- The **SS Maori** was a British steamer en route from London to New Zealand. She was wrecked in 1909 at Duiker Point on the Cape Peninsula. Her cargo included a large consignment of fine English porcelain <sup>24</sup>.

## 2.2 Historical Wrecks in South African Waters

### 2.2.1 Types of historical wrecks in South African waters

The historical wrecks off the South African coast can be divided into two types. On the one hand, one has *outward-bound* East-Indiamen. These were merchant vessels from Portugal, Holland,

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<sup>21</sup> Ibid, pp 47 - 48.

<sup>22</sup> Ibid, p 48.

<sup>23</sup> Ibid, pp 77 - 78.

<sup>24</sup> Ibid, pp 54 - 55.



England, and other European countries which carried *inter alia* money, war materials, trade goods, metals, building materials, administrators and soldiers to the East Indies to supply the growing European populations in those countries. On the other hand, one has *homeward-bound* East-Indiamen which carried *inter alia* spices, slaves, porcelain, cloth, silk, rice, timber, and other manufactured and raw materials to the European markets <sup>25</sup>.

This was the basic pattern of trade between Europe and the East for over 300 years. However, the fairly limited categories of goods carried in earlier centuries changed in the nineteenth and twentieth centuries. Ships plying the Cape sea route were soon carrying every conceivable type of cargo in their holds; from raw materials, such as crude oil <sup>26</sup> or manganese ore <sup>27</sup>; to manufactured goods, such as motor car spares <sup>28</sup> or railway lines <sup>29 30</sup>.

### 2.2.2 The whereabouts of historical wrecks in South African waters

The majority of wrecks in South African waters are to be found in the traditional anchoring spots. Table Bay, a regular anchorage for Portuguese, Dutch and English fleets has more than 200 wrecks; Algoa Bay is second with more than 150; East London is third with more than 85; Durban is fourth with more than 60; and Mossel Bay is fifth, with more than 20 <sup>31</sup>.

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<sup>25</sup> Ibid, pp 15 - 17.

<sup>26</sup> For example, the Spanish tanker **Castillo de Bellver**, which sank off the west coast of South Africa in 1983, with the loss of 267 000 tons of crude oil.

<sup>27</sup> For example, the **MV Kapodistrias**, which sank off Port Elizabeth in 1985.

<sup>28</sup> For example, the **SS Western Knight**, which went aground near Port Elizabeth in 1929.

<sup>29</sup> For example, the **SS Maori**, which sank at Duiker Point on the Cape Peninsular in 1909.

<sup>30</sup> Turner, pp 52 - 61.

<sup>31</sup> Ibid, p 37.

Two areas of coastline also have numerous shipwrecks - the Cape Agulhas area has more than 80, while the coastline between Storms River and St Francis Point has more than 20<sup>32</sup>.

### 2.3 Causes of Shipwrecks on the South African Coast

The South African coastline has a fearsome reputation. Numerous sailors have lost their lives in shipwrecks<sup>33</sup>, the causes of which are many and varied. The following are the major causes.

#### 2.3.1 A dangerous coastline

The coastline is dangerous and inhospitable. There are few navigable rivers and safe natural anchorages and much of the coastline consists of long open beaches which are incessantly pounded by heavy surf. Before enclosed harbours were built in the late nineteenth century, damage sustained at sea often proved fatal, as there were few protected spots where a vessel could be safely beached to effect repairs<sup>34</sup>.

#### 2.3.2 The presence of so-called 'freak waves' off the east coast of South Africa

The east coast is renowned for the presence of so-called 'freak waves'. These massive waves are caused when swells moving up from the Roaring Forties meet with the Moçambique Current.

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<sup>32</sup> Ibid.

<sup>33</sup> See for example, the wrecking of the English East-Indiaman **Dodington** in 1755, where 247 people lost their lives; the wrecking of the Portuguese vessel **Sao Josene** in 1794, where 200 slaves lost their lives; the wrecking of the convict vessel **Waterloo** in 1842, where 190 persons lost their lives; and the wrecking of the troopship **HMS Birkenhead** in 1852, where 445 officers and men perished.

<sup>34</sup> Turner, pp 36 - 37.

Many ships have been lost or damaged as a result. Even today it is not uncommon for large vessels to suffer severe damage as a result of these waves <sup>35</sup>.

### 2.3.3 Gales

Gales have been responsible for many shipwrecks off both of South Africa's coasts.

#### i) Gales off the west coast of South Africa

The north-west wind is primarily responsible for damage caused on the west coast. In winter, 'north-westers' whip up savage storms and mountainous seas <sup>36</sup>. Sir Francis Drake, the great English explorer, wrote "*[the Portuguese] affirm that it [the Cape] is the most dangerous cape of the world, never without intolerable storms and present danger to travellers who come near the shore*" <sup>37</sup>.

Most wrecks in Table Bay have occurred during these dreaded 'north-westers'. In the *Great Gale of 1857*, a total of sixteen cargo ships, three brigantines, two barques, one iron schooner, and seven small boats were wrecked, in a storm which lasted three days <sup>38</sup>.

Eight years later, there was an even more devastating gale - the *Great Gale of 1865*. At least seventeen ships were wrecked and many sailors perished when the mail steamer **Athens** and the wooden barque **City of Peterborough** went down with the loss of all hands. The gale was so ferocious that a number of vessels were driven up against the Castle's walls <sup>39</sup>!

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<sup>35</sup> Ibid.

<sup>36</sup> Accordingly, the VOC had a ruling that Company vessels were not allowed to anchor in Table Bay after May the fifteenth. Instead they had to anchor in the more protected Simon's Bay.

<sup>37</sup> Quoted by Bryce, **Impressions of South Africa**, p 193.

<sup>38</sup> Turner, pp 37 - 39.

<sup>39</sup> Ibid, p 38.

ii) Gales off the east coast of South Africa

Whereas on the west coast, it is the 'north-wester' which wrecks havoc, on the east coast it is the 'south-easter' which is responsible for causing the most damage.

The *Great Gale of 1902* was the most destructive gale in South African shipping history. More than eighteen vessels were wrecked and more than 60 people drowned when a violent 'south-easter' lashed Algoa Bay <sup>40</sup>.

iii) Gales as a cause of wrecking today

As one can see, gales have been a major cause of shipwrecks off the South African coast. However, with improved anchoring systems, the building of sturdier ships, long range weather forecasts and the provision of harbours <sup>41</sup>; the danger which gales posed in olden times has been dramatically reduced <sup>42</sup>.

2.3.4 Fog

The presence of fog has also caused a number of ships to be wrecked off the South African coast. For example, the Dutch barque, the **Juno**, was wrecked off Cape Agulhas in thick fog in 1852. Similarly, the Norwegian cargo steamer **Lyngenfjord** and the Greek cargo steamer **Panaghia** were both wrecked in dense fog in 1938 <sup>43</sup>.

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<sup>40</sup> Ibid, pp 39 - 41.

<sup>41</sup> In *Cape Town*, the first enclosed harbour, the Alfred Dock, was opened in 1870. It was expanded in 1895, by the addition of the larger Victoria Basin. Further modifications and extensions took place before World War II with the construction of the Duncan Docks and the reclamation of the foreshore. In *Port Elizabeth*, the North Jetty was built in 1881, and a properly dredged harbour was completed in 1933. In *East London*, the present turning basin was completed in 1937. In *Durban*, the sandbar across the entrance to the bay was dredged and the port officially declared open for traffic in 1904.

<sup>42</sup> Turner, p 45.

<sup>43</sup> Ibid, p 42, p 56.

However, with the development of radar, fog no longer poses the threat it once did. Nevertheless, fog is still a factor to be reckoned with, especially considering the speed with which fog banks can blanket our coastline “.

### 2.3.5 Faulty navigation and human error

Faulty navigation and human error have been a major cause of shipwrecks off the South African coast, especially in olden days. The early explorers had to make do with instruments such as the astrolabe, the cross-staff, the back-staff and the sextant to navigate their way around our coast. These days navigators have the benefit of satellite navigation, which is so accurate that one can pinpoint the position of one’s vessel anywhere on the globe to within a few metres. Modern navigators also have the benefit of accurate charts, radio, radar, sonar, and lighthouses, all of which reduce the possibility of a ship wrecking “. However, with all the modern navigation equipment in the world and with the most up-to-date charts, ships are still wrecked along our coast as a result of human error. The bulk carrier **MV Daeyang Family**, which was wrecked near Whale Rock off Robben Island in 1986, and the bulk carrier **MV Kapodistrias**, which left Port Elizabeth harbour and promptly ran aground off Cape Recife in fine weather in 1988, serve to illustrate this point well “.

### 2.3.6 Military action

South Africa has never been a great naval battlefield. However, we do have a few historical wrecks which have resulted from military action.

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“ Ibid.

“ Ibid, pp 23 - 29.

“ Ibid, p 45.

i) The Battle of Saldanha (1781)

In 1781, Holland united with the American colonies in a war against Britain. Accordingly, Dutch East-Indiamen required naval escorts to protect them from marauding British vessels. That year, a fleet of five homeward-bound Dutch East-Indiamen, with their valuable cargoes, hid in Saldanha Bay awaiting a naval escort home.

However, they were soon discovered by the British, who lured them into thinking that they were friendly French warships, by flying the French flag. Four of the East-Indiamen were captured. The fifth vessel, the **Middelburg**, sank after her crew set fire to her in order to escape capture by the British. The **Middelburg** was at the time carrying a very valuable cargo of Chinese porcelain<sup>47</sup>.

ii) HMS Birkenhead

**HMS Birkenhead** was the first iron warship to be built for the Royal Navy. She was launched in 1845. In 1852, she sailed for South Africa with a detachment of the 74th Highlanders, who were needed to fight the Xhosa in the Eighth Frontier War. On arrival in Simonstown, fresh supplies and horses were quickly loaded. She then departed for Port Elizabeth. In an effort to transport the troops quickly to Port Elizabeth, the ship's captain steered a course too close to the Cape coast. The vessel struck a rock off Danger Point and sank with the loss of 445 officers and men. The wrecking of **HMS Birkenhead** will be remembered for the discipline and resoluteness displayed by the British soldiers, who stood firm to allow all the women and children to be safely evacuated<sup>48</sup>.

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<sup>47</sup> Ibid, pp 75 - 77.

<sup>48</sup> Ibid, pp 71 - 72.

The wreck of **HMS Birkenhead** is important *historically*, as the first *iron* warship to be built for the Royal Navy and as a *memorial* to the brave British soldiers.

iii) The Second World War (1939 - 1945)

During the Second World War the importance of the Cape sea route was emphasised. German U-boats of the so-called 'Seehunde Pack' <sup>49</sup> accounted for the sinking of 133 merchant vessels and one warship within 860 nautical miles of the coast. In addition, twenty merchant vessels were sunk by raiders, and two merchant vessels sank when they hit mines <sup>50</sup>. A number of Allied ships were also sunk off the east coast of South Africa by Japanese submarines <sup>51</sup>.

iv) The SAS President Kruger

Finally, mention must be made of the tragic sinking of the frigate **SAS President Kruger** in 1982. The frigate sank, with the loss of sixteen sailors, after she collided with the replenishment vessel **SAS Tafelberg** during military manoeuvres.

Although the wreck of the **SAS President Kruger** is only fourteen years old, and could not be described as an 'historical wreck', she deserves protection as a memorial to those sailors who lost their lives in the accident. It is submitted that no potential salvors should be allowed to touch the wreck <sup>52</sup>.

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<sup>49</sup> Young, **South Africa in World Sea Lanes**, p 41.

<sup>50</sup> Turner, p 21.

<sup>51</sup> Young, *ibid*.

<sup>52</sup> At present it would be commercially unviable to attempt such a salvage operation. This is because the wreck lies in excess of 2 400 metres of water. However, what would be of value to potential salvors is the 'Cock of the Fleet' which was erroneously aboard the **SAS President**

## 2.4 The Salvaging of Wrecks in South African Waters

### 2.4.1 Finding the wreck

Often in underwater salvage operations, the most difficult part of the operation is finding the wreck itself. In most cases, rough seas and marine organisms soon destroy the vessel, leaving behind very little concrete evidence of the vessel. This is especially so with old wooden vessels.

Research is normally the starting point in any search for an historical wreck. Archival sources and old maps often provide valuable clues as to the whereabouts of the wreck. For example, in 1982 a Cape Town diving team headed by Gavin Clackworthy found the remains of the **Johanna** (1682), after studying an old map in the Cape Archives. Divers then recovered 23 000 Spanish-American silver cobs and 27 bullion discs of silver from the wreck <sup>31</sup>!

Frequently, wrecks are also found when investigating sites where shards of Chinese porcelain and trade beads regularly wash ashore. The Portuguese galleons **Sao Bento** (1554) and **Nossa Senhora de Atalaia do Pinheiro** (1647) were both found in this way. Both finds proved to be of immense historical value as little was known of Portuguese wrecks which plied our coast during this era <sup>32</sup>.

Finding wrecks has become much easier in recent years with the development of new underwater technology. The following apparatus and equipment are invaluable to the diver <sup>33</sup>:

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**Kruger** at the time of the collision. The 'Cock of the Fleet' is an extremely valuable silver trophy, made between 1787 and 1795, which was presented to the South African Navy as a farewell gift by the Royal Navy in 1967. The 'Cock of the Fleet' is awarded annually to the winning crew of the pulling regatta.

<sup>31</sup> Turner, pp 47 - 48.

<sup>32</sup> Ibid, p 105.

<sup>33</sup> Ibid, p 93.



- The *proton magnetometer* is a survey instrument which is towed behind a research vessel to locate shipwrecks. The magnetometer detects variations in the earth's magnetic field caused by ferrous objects such as cannons and hulls. The magnetometer has been used successfully in South African waters to find the wrecks of the **Johanna** (1682), the **Reigersdaal** (1747) and the **Arniston** (1815).
- The *hand-held metal detector* is invaluable to the diver who is conducting a meticulous search of the sea-bed.
- The *sub-bottom profiler* is used to determine what is lying beneath sand or mud.
- The *side-scan sonar* is ideal for looking for large intact wrecks in deep, flat areas.

#### 2.4.2 The evolution of diving on wrecks in South African Waters

##### i) Free diving

The earliest recorded salvage operation in South African waters was undertaken in 1682 by a Malay pearl diver named Pay Mina. Mina recovered approximately 9 000 pieces-of-eight from the wreck of the **Johanna**, an outward-bound English East-Indiaman, which sank near Cape Agulhas that year <sup>56</sup>.

However, free or unassisted diving is very limited. A free-diver can only stay underwater for three or four minutes at the most. This limitation was remedied in 1715, when John Lethbridge <sup>57</sup>, an Englishman, invented a diving-barrel.

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<sup>56</sup> Ibid, p 87.

<sup>57</sup> See Ibid, p 91.

ii) The diving-barrel

The diving-barrel was first used in South Africa by its inventor, following a devastating gale which lashed Table Bay in 1722. The gale wrecked an entire fleet of outward-bound Dutch East-Indiamen, consisting of the **Lakenman**, the **Rotterdam**, the **Schotse Lorrendraaier**, the **Sandvastigheid** and the **Zoetigheid**<sup>58 59</sup>.

The vessels had been carrying a valuable cargo of specie to the East. This wrecking was a great loss to the Dutch East India Company, so the Company decided to bring Lethbridge to the Cape in an attempt to recover the specie. Lethbridge was fairly successful. He recovered seven cannon and 200 bars of silver from the wreck of the **Rotterdam** and 2 000 silver ducatoons from the wreck of the **Zoetigheid**<sup>60</sup>.

iii) The diving helmet

In the 1820s, the diving helmet or 'hard hat' was developed. It had the advantage that the diver had greater manoeuvrability and could spend greater time underwater. The diving helmet was used successfully to recover a number of cannon off the wreck of the **Grosvenor**, which ran aground off the coast of Pondoland in 1782<sup>61</sup>.

iv) The aqualung

A giant leap forward in diving technology occurred in 1943 when Captain Jacques-Yves Cousteau and Emile Gagnan invented the aqualung. The aqualung enables the diver to operate to depths of up to 54 metres. The big advantage of an aqualung is that the diver operates independently of an air supply from the surface. Wreck diving with an aqualung has become

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<sup>58</sup> Sadly the wrecks of the **Rotterdam**, the **Sandvastigheid** and the **Zoetigheid** now lie beneath the Table Bay harbour development.

<sup>59</sup> Turner, pp 87 - 88.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid, p 88.

a very popular hobby in the Cape<sup>62</sup>. The development of the aqualung has brought many shipwrecks, not situate in the deep ocean, within the reach of treasure hunters as well as archaeologists<sup>63</sup>.

v) Saturation diving

The disadvantage of the aqualung is that the diver cannot operate at great depths. Saturation diving remedies this limitation. Divers are slowly compressed to a little above working depth in a master chamber on board the salvage vessel. Thereafter, they are lowered to the sea-bed and raised again in a diving bell. This method allows divers to intervene at depths of more than 550 metres, and to stay in this closed system for periods of up to a month at a time<sup>64</sup>.

A small saturation diving system was set up for use on the wreck of **HMS Birkenhead**, but it could not be used because of the heavy swells on site<sup>65</sup>.

vi) The atmospheric diving suit

Finally, atmospheric diving suits (ADS) are now being used commercially off the South African coast in various oil searches. The suit has a cast alloy body with segmented arms and legs. The atmospheric diving suit would be ideal for the recovery of cargo from deep-water sites, as it allows the diver to spend long periods underwater at depths of up to 300 metres<sup>66</sup>.

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<sup>62</sup> See Scheepers, 'South African Law of Shipwrecks: contemporary and International Law perspectives', *Sea Changes*, p 58.

<sup>63</sup> Turner, p 89.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid, p 92.

### 3. THE PROTECTION OF HISTORICAL WRECKS IN SOUTH AFRICAN WATERS

#### 3.1 International Law

##### 3.1.1 The Law of the Sea Convention of 1982

International law imposes a general duty on states to protect historical wrecks. Article 303(1) of the **Law of the Sea Convention of 1982 (LOSC)** provides that:

*"States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose."*<sup>67</sup>

The **LOSC** further provides that a coastal state may exercise control over archaeological and historical objects up to a distance of 24 nm from the baseline<sup>68</sup>. This is done by the use of a legal fiction whereby the coastal state may presume that the removal of these objects from the sea bed in the contiguous zone without its approval, would result in an infringement within its territory or territorial sea, of the laws and regulations referred to in that article<sup>69</sup>.

However, while a coastal state may control archaeological and historical objects found in coastal waters within 24 nm, it must respect any private law rights which may exist in such objects. This is evident from a reading of Article 303(3) of the **LOSC**:

*"Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty ..."*

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<sup>67</sup> For a discussion of the meaning of the term '*objects of an archaeological and historical nature*' see Caflish L 'Submarine Antiquities and the International Law of the Sea', **NYIL**, 13 (1982) 3, at pp 7 - 10.

<sup>68</sup> Article 303(2).

<sup>69</sup> Article 33.

### 3.2 South African Law

The protection and preservation of historic wrecks and artifacts on the coast of South Africa is regulated by two Acts, namely the **National Monuments Act**<sup>70</sup>, and the **Maritime Zones Act**<sup>71</sup>.

#### 3.2.1 The National Monuments Act, No 28 of 1969

Historical wrecks and artifacts found on them are principally protected by the **National Monuments Act**<sup>72</sup>. Section 10A of the Act provides that the NMC may declare any wreck in the maritime cultural zone<sup>73</sup> which is 50 years old or older a monument<sup>74</sup>. No person is then allowed to destroy, damage, alter or export any portion of the wreck, or any object derived from the wreck, without first obtaining a permit from the NMC<sup>75</sup>. The permit is issued subject to numerous conditions, one of which is that the salvor must be affiliated to an 'approved museum'<sup>76</sup>. This

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<sup>70</sup> **No 28 of 1969** (as amended).

<sup>71</sup> **No 15 of 1994**. Provisions regulating shipwrecks and salvage are also contained in the **Merchant Shipping Act, No 57 of 1951**, the **Customs and Excise Act, No 91 of 1964**, the **Legal Succession to the South African Transport Services Act, No 9 of 1989** and the **Marine Traffic Act, No 2 of 1981**. However, these acts have little relevance with respect to the protection and preservation of historic wrecks.

<sup>72</sup> **No 28 of 1969**, as amended by the **National Monuments Amendment Acts, No 35 of 1979** and **No 13 of 1981**. The amendments came about as a result of the negative publicity that surrounded the indiscriminate salvaging of the Portuguese East-Indiaman **Santissimo Sacramento** (1647). In 1977, two rival teams of divers discovered the wreck of the vessel which sank near Port Elizabeth in 1647. As a result of the intense competition that developed between the two teams, the wreck site was not properly worked. Over a period of two months, more than forty bronze cannons were hastily removed from the site. See Turner, p 104; van Meurs, **Legal Aspects of Marine Archaeological Research**, p 68ff.

<sup>73</sup> See *infra*, 3.2.2.

<sup>74</sup> Section 10A(1) read together with section 6 of the **Maritime Zones Act, No 15 of 1994**. Section 10A was inserted into the principle Act by section 9 of the **National Monuments Amendment Act, No 35 of 1979**.

<sup>75</sup> Section 12(2B)(d) of the **National Monuments Act, No 28 of 1969**.

<sup>76</sup> *Ibid*, section 12(2C)(b). For the conditions applying to the granting of a permit, see section 4 of the NMC's **Application for a Salvage Permit for an Historical Wreck** (April 1990).

condition ensures that a museum supervises the excavation of the wreck and the recovery and preservation of any artifacts from it.

The NMC may not issue a permit with respect to an historic wreck situated in a security or nature conservation area, without first obtaining the approval of the department concerned <sup>77</sup>. The department concerned may then grant its approval subject to conditions <sup>78</sup>.

All material recovered must then be deposited with the approved museum, which then decides on its disposal in consultation with the salvor and the NMC <sup>79</sup>. Any disputes which may arise must be settled through arbitration <sup>80</sup>. The importance of a permit to the salvor is that it grants him the *sole* right to salvage that particular wreck. He can then plot and evaluate the entire site systematically and remove any artefacts without undue haste, as any other diver who tries to pirate the site risks prosecution <sup>81</sup>.

In addition to the permit, the salvor also requires a salvage licence which is obtained from the Commissioner of Customs and Excise <sup>82</sup>.

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<sup>77</sup> **Ibid**, section 12(2C)(e)(i). Many historical wrecks lie in security and nature conservation areas. Of particular interest to historians are the wrecks of the **Dageraad** (1694) which was wrecked off Robben Island (an area controlled by the Prisons Department); the **Merestein** (1702) which was wrecked off Jutten Island in Saldanha Bay (an area controlled by the Reconnaissance); the **Thomas T Tucker** (1942), a liberty ship which was wrecked off Cape Point (an area controlled by the National Parks Board) while hugging the coast too closely for fear of U-boats; and the many historical wrecks which lie in the Tsitsikamma Coastal National Park. Turner, p 15ff.

<sup>78</sup> **Ibid**, section 12(2C)(e)(ii).

<sup>79</sup> **Ibid**, section 12(2C)(f).

<sup>80</sup> **Ibid**.

<sup>81</sup> **Ibid**, sections 16(1)(a), (j), (k). See Turner, p 107.

<sup>82</sup> **Ibid**, section 12(2C)(a). This is in terms of section 112 of **Customs and Excise Act, No 91 of 1964**. The Commissioner of Customs and Excise is interested in wrecks because customs duties and surcharges must be paid on wrecks landed in the country.

The **National Monuments Act** <sup>83</sup> does not only protect wrecks which have been declared monuments. The Act also protects *any* wreck and *any* object derived from a wreck which is older than 50 years <sup>84</sup>. In fact, the protection offered to a wreck which is older than 50 years, but which has *not* been declared a monument, is exactly the same as the protection offered to a wreck which *has* been declared a monument. Accordingly, no person may destroy, damage, alter or export any portion of the wreck or any object derived from the wreck, without first obtaining a permit from the NMC <sup>85</sup>. A salvage licence is also required <sup>86</sup>.

Finally, contravention or failure to comply with the above provisions of the **National Monuments Act** <sup>87</sup> may render a person liable upon conviction to a fine and/or imprisonment <sup>88</sup>. The maximum fine that may be imposed is R10 000, while the maximum prison sentence is two years imprisonment <sup>89</sup>.

### 3.2.2 The Maritime Zones Act, No 15 of 1994

Section 6(1) of the **Maritime Zones Act** <sup>90</sup> establishes a "*maritime cultural zone*" in South African waters. This zone gives South Africa jurisdiction over objects of an archaeological or historical nature found within 24 nm from the baseline. The zones establishment is in accordance with Article 303 of LOSC <sup>91</sup>.

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<sup>83</sup> No 28 of 1969.

<sup>84</sup> *Ibid*, sections 12(2B)(d), 2(C).

<sup>85</sup> *Ibid*, section 12(2B)(d).

<sup>86</sup> *Ibid*, section 12(2C)(a).

<sup>87</sup> No 28 of 1969.

<sup>88</sup> *Ibid*, Section 16(1).

<sup>89</sup> *Ibid*.

<sup>90</sup> No 15 of 1994.

<sup>91</sup> See *supra* 3.1.

The creation of a *maritime cultural zone* distinct from the contiguous zone<sup>92</sup> is to be welcomed. This is because jurisdiction over archaeological and historical objects is out of place in a contiguous zone. The contiguous zone only has enforcement jurisdiction<sup>93</sup>, whereas the State exercises *both* legislative and enforcement jurisdiction over objects of an archaeological and historical nature found in the *maritime cultural zone*.

The net effect of the new *maritime cultural zone* is to extend the **National Monuments Act**<sup>94</sup> and the National Monuments Council's jurisdiction from 12 nm to 24 nm<sup>95</sup>.

### 3.3 Critique of the Present Wrecks Regime

The legislation relating to historic wrecks and artifacts offers a measure of protection against the threat of indiscriminate salvaging. However, a number of shortcomings can be identified. These include *inter alia*:

- The **National Monuments Act**<sup>96</sup> was designed to protect *land-based* cultural treasures from the past<sup>97</sup>. The incorporation of the wreck provisions in this **Act** is not ideal as wrecks present somewhat different problems when compared to land-based cultural treasures<sup>98</sup>.
- There is no Inspectorate to ensure that the provisions of the **National Monuments Act** are complied with.
- There is no provision in the **National Monuments Act** for rewarding those who come forward with information relating to an offence in terms of the **Act**.
- The NMC does not keep a register of historic wrecks and artifacts.

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<sup>92</sup> Established in terms of section 5 of the **Maritime Zones Act, No 15 of 1994**.

<sup>93</sup> **Ibid**, section 5(2).

<sup>94</sup> **No 28 of 1969**.

<sup>95</sup> See section 6(2) of the **Maritime Zones Act, No 15 of 1994**.

<sup>96</sup> **No 28 of 1969**.

<sup>97</sup> van Meurs, p 76.

<sup>98</sup> See *infra*, 4.2.



#### 4. THE DRAFT LEGISLATION ON HISTORIC WRECKS AND ARTIFACTS

##### 4.1 Background

In 1989, the Department of National Education produced a report (hereinafter referred to as the 'Report') dealing with the protection of cultural property in South Africa<sup>99</sup>. The report contained a specific section dealing with historic shipwrecks and artifacts and draft legislation on the subject<sup>100</sup>. The draft legislation encountered fierce opposition from the South African Historical Wreck Society<sup>101</sup>. Much of the Societies' opposition stemmed from their misunderstanding of the provisions of the draft legislation and their anger at having been allegedly excluded from the drafting process.

Sadly, the Report and the draft legislation have all but been forgotten with the pressing needs of Government in recent years. However, it is hoped that in the near future Government will see fit to re-examine the Report and the draft legislation, and consider implementing some of its suggestions and proposals.

I shall now analyse the provisions of the Report.

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<sup>99</sup> 'n Stelsel vir die Bewaring van die Materiële Kultuurerfenis in Suid-Afrika. Verslag: NASOP 02-566 (89/06). (A System for the Preservation of the Material Cultural Heritage in South Africa.)

<sup>100</sup> Section 7.2.6 and Bylae 2 (Annex 2), pp 286 - 319. This section and the draft legislation on the subject were drawn up by Professor DJ Devine and Mr J Glazewski of the Institute of Marine Law, University of Cape Town.

<sup>101</sup> See **Critique of Proposed Bill for the Preservation/Conservation of Historical Wrecks in South Africa** (August 1989) and the drafter's response in **Comments on Criticisms of the South African Historical Wreck Society on the Proposed Legislation on Historic Wrecks** (October 1989).

#### 4.2 A Separate Wrecks Regime

Under the present regime historic wrecks and artifacts found on them are protected by the **National Monuments Act** <sup>102</sup>. This Act deals with the protection of objects *in general* which are part of the cultural heritage of South Africa <sup>103</sup>. However, wrecks present somewhat different problems when compared to land-based treasures from the past. Accordingly, the Report suggests that a *specific* act should be devoted to the protection of historic wrecks and artifacts found on them <sup>104</sup>. This is because there can be problems associated with the control, protection, ownership and jurisdiction of historic wrecks and artifacts, which are not present when compared to land-based treasures from the past <sup>105</sup>.

To these reasons, I would add a further reason for drafting a *specific* act: under the present regime the provisions relating to the protection of historic wrecks and artifacts are obscured in amendments to the **National Monuments Act** <sup>106</sup>. By taking historic wrecks and artifacts out of this regime, one will both highlight their importance and enhance their status. This will hopefully lead to the authorities increasing their interest and participation in the protection of historic wrecks and artifacts.

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<sup>102</sup> No 28 of 1969. See *Supra* 3.2.1.

<sup>103</sup> *Ibid*, section 2A.

<sup>104</sup> Report, section 7.2.6.1. Many countries deal with the topic of historic wrecks and artifacts separately. The Report mentions by way of example Australia (**Historic Shipwrecks Act, 1976**), Denmark (**Law concerning the Protection of Historic Wreckage, 1963**), France (**Décret of 16/12/1961**), Norway (**Law of 29/6/1951**) and the United Kingdom (**Protection of Wrecks Act, 1973**). See also the United States of America (**Abandoned Shipwreck Act of 1987**). See van Meurs, p 43ff; Larson D 'Ownership of Historic Shipwrecks in US Law', *The International Journal of Marine and Coastal Law*, 9 (1994) 31.

<sup>105</sup> Report.

<sup>106</sup> No 28 of 1969, as amended by the **National Monuments Amendment Acts, No 35 of 1979** and **No 13 of 1981**.

#### 4.2.1 Administration of the wrecks regime

The Report suggests that the existing National Monuments Council (NMC) should be responsible for administering the draft legislation <sup>107</sup>. As pointed out, historic wrecks currently fall under the authority of the NMC <sup>108</sup>. The implication of this suggestion is that the NMC would then administer historic wrecks and artifacts under a separate regime. It would thus administer two regimes, a terrestrial cultural objects regime and a maritime cultural objects regime.

#### 4.2.2 The establishment of an Historic Shipwreck and Artifacts Committee

In terms of the National Monuments Act <sup>109</sup> the NMC may establish committees to assist it in the exercise of its functions and the performance of its duties <sup>110</sup>. Two permanent committees have been established for this purpose - the *Burgergraftekomitee* <sup>111</sup> and the British War Graves Committee <sup>112</sup>. It is submitted that a similar committee should be established to assist the NMC in administering the draft legislation. This is because one of the major shortcomings of the draft legislation is that decisions concerning the protection and preservation of historic wrecks and artefacts are left to the NMC and the Minister of Education. The draft legislation fails to take account of the fact that other parties (eg historians, architects and divers) have an inherent interest in historic wrecks and artifacts. It is submitted that they must be involved in the decision making process as well. The committee would provide an ideal medium for gaining their involvement.

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<sup>107</sup> Draft, sections 1 (viii), 4 - 7.

<sup>108</sup> See *supra* 3.2.1.

<sup>109</sup> No 28 of 1969.

<sup>110</sup> *Ibid*, section 4.

<sup>111</sup> The Citizens Grave Committee.

<sup>112</sup> National Monuments Act, No 28 of 1969, Section 3A.

Its contributions would not only be useful - it would be essential for an effective wrecks regime.

The composition of the Committee is of vital importance. It is suggested that the 'Historic Shipwreck and Artifacts Committee' should include *inter alia*: archaeological experts, historians, academics and representatives of the NMC, "approved museums", and the diving community. Without the involvement of these interest groups (especially the diving community) in decision making, the draft legislation would have little chance of success.

#### 4.3 Application of the Draft Legislation

##### 4.3.1 Objects to be protected

The draft legislation would protect historic wrecks, wreck sites and artifacts in or on certain places or which have been removed from them <sup>113</sup>.

##### i) Historic wrecks

A policy option is available here in defining 'historic' wrecks. One could either extend protection to wrecks 50 years old, 100 years old, 150 years old or of any other age for that matter. Alternatively one could fix a date, eg, 1st January 1900 so that any wreck prior to the fixed date would be historic and protected <sup>114</sup>. The Report favoured using *age* as the

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<sup>113</sup> Draft, sections 1(iii), (iv), (i).

<sup>114</sup> The South African Historical Wreck Society argued that this was the better option. They proposed that 1850 should be chosen as the cut-off year. They maintained that "*virtually nothing of archaeological, technical or historical value, which is not already known can be learned from wrecks after this point,*" see section 7, **Critique of Proposed Bill for the Preservation/Conservation of Historical Wrecks in South Africa**. For the drafters response see **Comments on Criticisms of the South African Historical Wreck Society on the Proposed**

criterion, because age has the advantage of flexibility in that as wrecks advance in age they would *automatically* move into a protected historic category <sup>115</sup>. Accordingly, the Report recommended an age criterion of 80 years <sup>116</sup>. Nevertheless, the Minister of Education would also be able to *declare* a wreck which is *younger* than 80 years old an 'historic wreck' <sup>117</sup>. This is a sensible suggestion as we would have the option of declaring any wreck an 'historical wreck' <sup>118</sup>. In summary, all wrecks of 80 years of age would be protected *automatically* with the possibility of protecting younger wrecks by *declaration*.

## ii) Wreck sites

The draft legislation would protect areas lying around the wreck in which artifacts from the wreck might be found <sup>119</sup>. These areas are called 'wreck sites' <sup>120</sup>. Wreck sites would not be protected automatically as would be the case with historic wrecks. Here, protection would depend on a *declaration* by the NMC that the site is an 'historic wreck site' and *registration* of the site in the Register of Shipwrecks <sup>121</sup>. A wreck site would not exceed 100 hectares in extent <sup>122</sup>. Accordingly, where many wrecks are close together the site would be much smaller than 100 hectares to prevent the overlapping of sites <sup>123</sup>.

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### Legislation on Historic Wrecks, pp 14 - 15.

<sup>115</sup> Section 7.2.6.2(a). The Report refers to the fact that a number of other countries use age as the criterion - Denmark (150 years), Finland (100 years), Netherlands (50 years) and Greece (different age criteria). See also van Meurs, p 43ff.

<sup>116</sup> 7.2.6.2 (a); Draft, section 1(iii)(a).

<sup>117</sup> Draft, section 1(iii)(a).

<sup>118</sup> This option does not exist under the current wrecks regime. Section 10A of the **National Monuments Act** precludes the Minister from declaring a wreck *younger* than 50 years old a monument.

<sup>119</sup> Draft, section 1(iv)(a).

<sup>120</sup> This provision is modelled on the Australian 'protected zone' - see van Meurs, p 52.

<sup>121</sup> Draft, sections 1(iv)(b), (c).

<sup>122</sup> Ibid, section 1(iv)(d).

<sup>123</sup> **Comments on Criticisms on the South African Historical Wreck Society on the Proposed Legislation on Historic Wrecks**, p 3.

### iii) Artifacts

The draft legislation would protect all property situated on or in a wreck or in a wreck site or which has been recovered from such areas <sup>124</sup>.

#### 4.3.2 Area of application of the draft legislation

A number of choices were open to the drafters of the draft legislation here. Protection could be limited to the 12 nm territorial waters <sup>125</sup>, to the 24 nm maritime cultural zone <sup>126</sup>, to a 200 nm zone or to the continental shelf <sup>127</sup>. The draft legislation comes down in favour of protecting wrecks, wreck sites and artifacts within 24 nm of the coast <sup>128</sup>. It is submitted that this is the correct choice as it is the one which is most in harmony with contemporary international law developments as evidenced in Article 303 of LOSC <sup>129</sup>.

#### 4.3.3 Procedures

The main procedure envisaged in the draft legislation is the introduction of an '*Historic Shipwreck Register*' <sup>130</sup>. All 'historic wrecks' which have been declared as such by the NMC will be entered

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<sup>124</sup> Draft, section 1(i).

<sup>125</sup> Section 4(1) of the **Maritime Zones Act, No 15 of 1994**.

<sup>126</sup> **Ibid**, Section 6(1).

<sup>127</sup> Australia claims wreck jurisdiction over its continental shelf in terms of the **Historic Shipwrecks Act, 1976**. It is submitted that this is excessive and somewhat dubious under International Law. See van Meurs, pp 52 - 63; Allen, **Coastal State Control over Historic Wrecks Situated on the Continental Shelf as Defined in Article 76 of the Law of the Sea Convention 1982**, Special publication of the Institute of Marine Law, University of Cape Town, 14 (1991), p 11 and p 20ff.

<sup>128</sup> Draft, section 1(ii)(b); Report, 7.2.6.2 (b).

<sup>129</sup> For a discussion on these developments see Caflish L, 'Submarine Antiquities and the International Law of the Sea', **NYIL**, 13 (1982) 3.

<sup>130</sup> Draft, section 14; Report, 7.2.6.3. The Report points out that a number of countries have Registers. Australia has a 'Register of Historic shipwrecks', France has an 'Inscription Maritime', the Netherlands registers all monuments over 50 years old and the United States has a 'Register of Historic Places' under the **National Historic Preservation Act, 1966**. See van Meurs, p 43ff.

in the register <sup>131</sup>. Declared 'historic wreck sites' will also be registered <sup>132</sup>. The Register will be maintained by the NMC <sup>133</sup>. The introduction of an Historic Shipwreck Register is to be welcomed as it will both facilitate the protection of historic wrecks and artifacts, and also serve as a valuable source of information to historians.

Furthermore, the draft legislation provides that:

*"die register is gedurende kantooreure van die raad vir insae deur enige persoon beskikbaar"*. <sup>134</sup> [underlining my emphasis]

Should the Register be open to *any person* for inspection? Wreck plunderers may use this Register as a source for finding historic wrecks! Would it not be advisable that those inspecting the Register should be people affiliated to museums, for example? If we do limit the right of inspection, might we be infringing the New Constitution? Section 23 of the New Constitution provides that:

*"Every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise or protection of any of his or her rights"?*

It is submitted that we *should* limit the right to inspect the Register. Only those persons who are affiliated to museums should be allowed to inspect the Register. Although this may breach a constitutional right, it is submitted that this is nevertheless reasonable and justifiable in order to protect historical wrecks <sup>135</sup>.

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<sup>131</sup> Ibid, section 14(1).

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Draft, section 14(2). *"The Register shall be available for inspection by any person during the Council's normal office hours."* [underlining my emphasis]

<sup>135</sup> In terms of the limitation clause, section 33 of the **Republic of South Africa Constitution Act, No 200 of 1993**.

#### 4.4 Ownership and Other Private Law Rights

While a coastal state may exercise jurisdiction over archaeological and historical objects found in coastal waters within 24 nm, it must respect existing private law rights in such objects<sup>136</sup>. The draft legislation takes care to protect existing private law rights while at the same time it introduces rules which help in the determination of questions of ownership.

The starting principle in the draft legislation is that *abandoned* wrecks and artifacts belong to the State<sup>137</sup>, and that it is presumed that wrecks and artifacts thereon have been abandoned until the contrary is proved<sup>138</sup>. This will reverse the presumption which exists at present in South African Law that abandonment is not lightly presumed<sup>139</sup>.

If a person wishes to establish ownership, the law of the flag state of the wreck is to be applied<sup>140</sup>. The 'owner' will then have to establish that abandonment has *not* taken place in accordance with that law<sup>141</sup>. In this respect, the draft legislation explicitly excludes a South African court from applying any presumption which might be applicable in that law to the effect that *public* ships have

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<sup>136</sup> See *supra*, 3.1.1.

<sup>137</sup> Draft, section 2(1); Report, 7.2.6.4.

<sup>138</sup> Ibid, section 2(2). The Report points out that other legal systems have similar approaches to the question of ownership. In Denmark wrecks which are older than 150 years belong to the State unless someone can prove ownership. In Finland objects found on a wreck which is older than 100 years belong to the State. In Norway ships and objects in them over 100 years old belong to the government, unless someone can prove ownership. In Sweden if a shipwreck or artifact is recovered it belongs to the State unless someone can prove ownership. In Greece all antiquities on the sea-bed are generally the property of the State if they date from before 1830. See van Meurs, p 43ff.

<sup>139</sup> *Salvage Association of London v SA Salvage Syndicate Ltd* 1906 (23) SA 169, at p 171.

<sup>140</sup> Draft, section 2(3).

<sup>141</sup> Ibid, section 2(2).



not been abandoned <sup>142</sup>. This provision should resolve the controversies that can arise between the coastal state and the flag state over the ownership of a *public ship* <sup>143</sup>.

As far as private rights other than ownership are concerned, there is a presumption in the draft legislation that such rights do *not* exist in historic wrecks or artifacts <sup>144</sup>. Section 3(1) of the draft legislation provides:

*"Daar word geag dat geen bergingsregte of admiraliteitsregte in rem of ander saaklike reg in enige historiese wrak of artefak bestaan nie totdat die teendeel bewys word"* <sup>145</sup>

Hence the 'holders' of such rights will have to establish their existence <sup>146</sup>.

The draft legislation also provides that if within one year of the *declaration* of an historic wreck as such and its *registration* as such in the Register, proceedings claiming ownership have not been brought, then the State shall conclusively be deemed to be the owner <sup>147</sup>. It is submitted that this is a very sensible provision, because it provides a procedure whereby ownership questions will be resolved in favour of the State within one year.

#### 4.5 Public Law Controls

The draft legislation stipulates certain fundamental control principles. These include:

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<sup>142</sup> Ibid, section 2(3).

<sup>143</sup> See the controversy that surrounded the salvaging of **HMS Birkenhead**, Turner, pp 71 - 72.

<sup>144</sup> Ibid, section 3(1).

<sup>145</sup> *"It shall be presumed that no salvage rights or admiralty rights in rem or other real rights subsist in a historic wreck or artifact until the contrary is proved."*

<sup>146</sup> Draft, section 3(2).

<sup>147</sup> Ibid, section 2(4); Report 7.2.6.4.

#### 4.5.1 Prohibition on treasure-hunting for wrecks and artifacts without a permit

The draft legislation provides that no person may **intentionally** search for an historic wreck or artifact without a permit from the NMC <sup>148</sup>. The problem with this provision is that it will be difficult to establish whether a person is searching for an historic wreck as he could be searching for a contemporary wreck (which is not forbidden). He might then conceal the discovery of the historic wreck and apply for a permit. Later, armed with a permit, he would 'discover' the wreck <sup>149</sup>. The drafters have suggested that a licence issued by the Department of Customs and Excise authorising searches for wrecks in general (ie, both contemporary and historic) might provide a solution to this problem.

In the event of an applicant being refused a permit to interfere with a wreck, the applicant may appeal against the decision of the NMC to the Minister. However, the draft legislation does not provide an appeal procedure for an applicant who has been refused a permit to search intentionally for a wreck. This anomaly requires remedying. Furthermore, it is submitted that the constitutional right to have written reasons for administrative decisions should be incorporated into the draft legislation <sup>150</sup>. Accordingly, section 16(1)(g) could read:

*"Wanneer die raad 'n aansoek om 'n permit in paragraaf (a) bedoel geweier het, of daardie aansoek toegestaan het onderworpe aan bedinge, voorwaardes, beperkings of voorskrifte, kan die applikant teen die beslissing van die raad appelleer na die Minister wat dié beslissing kan bekragtig, deur geskrewe redes aan te voer vir sy besluit, of die*

<sup>148</sup> Draft, section 16(1)(a).

<sup>149</sup> *Comments on Criticisms of the South African Historical Wreck Society on the Proposed Legislation on Historic Wrecks*, p 12.

<sup>150</sup> In terms of section 24(c) of the **South African Constitution Act, No 200 of 1994**.

*raad kan gelas om die aansoek toe te staan onderworpe aan dié bedinge, voorwaardes, beperkings of voorskrifte wat die Minister bepaal.*" <sup>151</sup>

#### 4.5.2 Disposal of wrecks and artifacts

The draft legislation provides that the NMC will have the power to dispose of artifacts where the State is owner <sup>152</sup>. Where a wreck or artifact is owned by someone other than the State, the NMC and the owner together will be able to exercise the power of disposal <sup>153</sup>. This is to be done on the basis of agreement between the NMC and the owner <sup>154</sup>. Should there be no agreement the NMC would have the right of preemption over the object on behalf of the State <sup>155</sup>. Reasonable compensation would be payable to the owner <sup>156</sup>. In the case of a dispute as to the quantum of compensation the matter will be referred to compulsory arbitration <sup>157</sup>.

#### 4.5.3 Duty to report the discovery of wrecks or artifacts

The draft legislation confers a duty on all persons who discover a wreck or artifact, to report the discovery to the NMC <sup>158</sup>. The duty to report is criminally sanctioned <sup>159</sup>. This kind of provision, which is in effect a 'duty to report', is found in many foreign jurisdictions <sup>160</sup>.

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<sup>151</sup> "Whenever the Council has refused an application for a permit made under paragraph (a) or has granted such an application subject to any terms, conditions, restrictions or directions, the applicant may appeal against the decision of the Council to the Minister who may confirm such decision, giving written reasons for his decision, or direct the Council to grant the application subject to such terms, conditions, restrictions or directions as the Minister may determine."

<sup>152</sup> Draft, section 9.

<sup>153</sup> Ibid, section 9(3).

<sup>154</sup> Ibid.

<sup>155</sup> Ibid, section 9(5).

<sup>156</sup> Ibid, section 9(6).

<sup>157</sup> Ibid, section 9(7).

<sup>158</sup> Ibid, section 17.

<sup>159</sup> Ibid, section 18.

<sup>160</sup> The Report mentions by way of example Finland, Norway, Australia, France and the United Kingdom. See van Meurs, p 43ff.

#### 4.5.4 Compensation for the discovery of wrecks and artifacts

The draft legislation provides that where a permit holder finds a wreck and reports it to the NMC, or where anyone finds a wreck accidentally and reports it to the NMC, then he shall be entitled to compensation payable by the NMC <sup>161</sup>. However, the draft does not provide any guidelines as to the quantum of compensation in each case. It is submitted that 'reasonable' compensation should be payable for finding historic wrecks and artifacts.

#### 4.6 Enforcement of the Draft Legislation

##### 4.6.1 An Inspectorate

The Report proposes that an Inspectorate should be created to police the observance of the draft legislation <sup>162</sup>. The NMC will be given the power to appoint wreck inspectors from various designated categories of persons <sup>163</sup>. They include: officers and employees of the NMC <sup>164</sup>, officials of a Provincial Administration <sup>165</sup>; employees of the National Parks Board of Trustees <sup>166</sup>; members of the Navy <sup>167</sup>, the Prisons Service <sup>168</sup>; the Customs and Excise Service <sup>169</sup>; and Sea Fishery control officers <sup>170</sup>. Extraordinarily, members of the South African Police Service have been excluded from this list. This is surely an unintentional omission, but if not, it is

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<sup>161</sup> Draft, section 18(1).

<sup>162</sup> Report, section 7.2.6.6; Draft, section 19.

<sup>163</sup> Draft, *ibid*.

<sup>164</sup> *Ibid*, section 19(1).

<sup>165</sup> *Ibid*, section 19(2)(a).

<sup>166</sup> *Ibid*, section 19(2)(c).

<sup>167</sup> *Ibid*, section 19(2)(d).

<sup>168</sup> *Ibid*, section 19(2)(e).

<sup>169</sup> *Ibid*, section 19(2)(f).

<sup>170</sup> *Ibid*, section 19(2)(e).

submitted that section 19(2)(f) of the draft legislation should be amended to include members of the South African Police Service. Accordingly, section 19(2)(f) should be redrafted to read:

*"Die Minister van Justisie, 'n besondere range in the Suid-Afrikaanse Polisie Dienste of die Gevangenisdiens aanwys."*<sup>171</sup>

Honorary wreck inspectors may also be appointed<sup>172</sup>. This is a sensible provision as divers (or any other people for that matter) may become actively involved in the protection and presentation of historic wrecks and artifacts.

The draft legislation confers wide-ranging powers on wreck-inspectors<sup>173</sup>. They include the power to board and search vessels<sup>174</sup>, examine implements<sup>175</sup>, seize artifacts and equipment used or about to be used in commission of an offence<sup>176</sup>, and require persons to produce permits and answer questions<sup>177</sup>. It is submitted that these powers are all necessary for an effective enforcement regime. Furthermore, these powers may be exercised over South African vessels

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<sup>171</sup> *"The Minister of Justice, designates a particular rank or ranks in the South African Police Service or the Prisons Service."*

<sup>172</sup> Draft, section 20. Sections 6 of the **Sea Fishery Act, No 12 of 1988** served as a model for this provision. The drafters of the draft legislation have not followed section 6 in its entirety. Section 6(3) of the Act has been omitted. This is fortunate as section 6(3) is now possibly unconstitutional. It reads *"the Director-General may at any time, without giving reasons, withdraw the appointment of an honorary fishery officer in writing if he deems it desirable"*. Is this a contravention of section 24(c) of the New Constitution, which provides the right to be furnished with reasons in writing for administrative action which affects one's rights or interests? This is an interesting question. What rights or interests of an *honorary* fishery officer could be affected - his right to human dignity (section 10 of the New Constitution)?

<sup>173</sup> They are modelled, with the necessary modifications, on section 53 of the **Sea Fishery Act, No 12 of 1988**.

<sup>174</sup> Draft sections 21(1)(a), (c).

<sup>175</sup> Ibid, sections 21(1)(b).

<sup>176</sup> Ibid, section 21(1)(c).

<sup>177</sup> Ibid, sections 21(1)(h), (d), (g).

wherever they may be <sup>178</sup>, however, they may not be exercised over *foreign* vessels outside 24 nm, unless they are exercised in hot pursuit <sup>179</sup>.

#### 4.6.2 Offences and penalties

The draft legislation is bolstered by a whole series of provisions creating criminal offences <sup>180</sup>. The more important provisions are: intentionally seeking wrecks or artifacts without a permit <sup>181</sup>; interfering with wrecks, wreck sites or artifacts <sup>182</sup>; failing to report the discovery of a wreck or artifact <sup>183</sup>; disobeying the terms or conditions of a permit <sup>184</sup>; and obstructing permit holders in the exercise of their rights <sup>185</sup>. Failure to comply with any of the above provisions may render a person liable upon conviction to a fine and/or imprisonment <sup>186</sup>.

In addition to fines and/or imprisonment, the draft legislation also provides that the court may order the forfeiture of artifacts recovered and implements, boats, vessels or vehicles used in the commission of an offence <sup>187</sup>. This is a sensible provision because it prevents the offending party from benefitting from his own wrongdoing. It also serves as a significant financial deterrent and prevents the offending party from using the same equipment in the commission of another offence.

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<sup>178</sup> Ibid, section 21(4)(a).

<sup>179</sup> Ibid, section 21(4)(b).

<sup>180</sup> Ibid, section 22(1).

<sup>181</sup> Ibid, sections 15(1), 22(1)(a).

<sup>182</sup> Ibid, sections 16, 22(1)(a).

<sup>183</sup> Ibid, sections 17, 22(1)(a).

<sup>184</sup> Ibid, section 22(1)(c).

<sup>185</sup> Ibid, section 22(1)(d).

<sup>186</sup> Ibid, section 22(1).

<sup>187</sup> Ibid, section 23. Section 47 of the **Sea Fisheries Act, No 12 of 1988** served as a model for this provision.

However, the forfeiture section in the draft legislation <sup>188</sup> is poorly drafted and ambiguous. It should be redrafted to read:

*"In die geval van 'n eerste skuldigbevinding, 'n artefak ten opsigte waarvan die misdryf gepleeg is of werktuig wat in verband met die pleeg daarvan gebruik is, of 'n reg van die veroordeelde daarop, aan die Staat verbeurd verklaar ..." <sup>189</sup>*

What would happen if the equipment forfeited were not owned by the offending party? In other words, what would happen if X borrowed Y's boat, and used it in the commission of an offence? Could Y's boat then be forfeited to the State? Section 23(2)(a) of the draft legislation provides:

*"'n Verbeurdverklaring ingevolge subartikel (1) doen nie afbreuk aan regte wat 'n ander persoon as die veroordeelde op daardie boot, vaartuig of werktuig mag hê nie, indien bewys word dat hy alle redelike stappe gedoen het om die gebruik daarvan in verband met die misdryf te voorkom of nie die pleging van die misdryf kon verhoed het nie." <sup>190</sup>*

Accordingly, in our example Y would have the onus of proving that he had taken all reasonable steps to prevent the use of his boat in connection with the offence, or that he could not have prevented the commission of the offence. It is submitted that this is too onerous. I would suggest that this provision be altered and phrased subjectively to read:

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<sup>188</sup> Ibid, section 23(1)(a).

<sup>189</sup> *"In the case of a first conviction, declare any artifact in respect of which the offence was committed or implement used in connection with the commission thereof, or any rights of the convicted person thereto, to be forfeited to the State ..."*

<sup>190</sup> *"A declaration of forfeiture in terms of subsection (1) shall not affect any rights which any person other than the convicted person may have to such boat, vessel or implement, if it is proved that he had taken all reasonable steps to prevent the use thereof in connection with the offence or could not have prevented the commission of the offence."* Section 48(2)(a) of the Sea Fishery Act, No 12 of 1988 served as a model for this provision.

*"'n Verbeurdverklaring ingevolge subartikel (1) doen nie afbreuk aan regte wat 'n ander persoon as die veroordeelde op daardie boot, vaartuig, voertuig, werktuig of artefak herwin mag hê nie, as dit bewys word deur sodanige ander persoon dat hy geen kennis gehad het dat sy boot, vaartuig, voertuig of werktuig gebruik sou word in die pleging van die misdryf nie."*<sup>191</sup>

To facilitate proof of offences under the draft legislation, a number of presumptions have been incorporated into the draft legislation. The first presumption is that persons in boats, vessels or vehicles used to commit offences under the draft legislation, are guilty of such offences, unless they can prove otherwise<sup>192</sup>. The second presumption is that persons found in possession of an artifact within 10 kms of a wreck or wreck-site, are presumed to have removed the artifact from the area in question, unless the contrary is proved<sup>193</sup>. The third presumption is that if it is proved that a person had knowledge of the location of a historic wreck before the Council had acquired knowledge of such location, then it shall be presumed, until the contrary is proved, that the person in question intentionally searched for such a wreck<sup>194</sup>.

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<sup>191</sup> "A declaration of forfeiture in terms of subsection (1) shall not affect any rights which any other person other than the convicted person may have to such boat, vessel, vehicle, implement or artifact recovered if it is proved by that other person that he had no knowledge that his boat, vessel, vehicle or implement would be used in connection with an offence."

<sup>192</sup> Draft, section 24(1). Section 50(2) of the Sea Fishery Act, No 12 of 1988 served as a model for this provision.

<sup>193</sup> Ibid, section 24(3). Section 50(4) of the Sea Fishery Act, No 12 of 1988 served as a model for this provision.

<sup>194</sup> Ibid, section 24(4).



The question is, are these presumptions now in conflict with the provisions of the New Constitution<sup>195</sup>? I would argue that these presumptions will almost certainly be declared invalid following the decisions in *S v Zuma*<sup>196</sup> and *S v Bhulwana*<sup>197</sup>.

In *S v Zuma* the Constitutional court held that a presumption in the **Criminal Procedure Act**<sup>198</sup>, that a confession made to a magistrate is made "*freely and voluntarily*", was in conflict with the presumption of innocence enshrined in the New Constitution<sup>199</sup>. Similarly, in *S v Bhulwana* the Court held that a presumption in the **Drugs and Drug Trafficking Act**<sup>200</sup>, that a person in possession of more than 115 grams of dagga was dealing in dagga, was also unconstitutional<sup>201</sup>.

The reasoning in both of these judgements is that the presumption of innocence is an established principle of South African Law which places the burden of proof squarely on the prosecution<sup>202</sup>. A presumption which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his innocence. Such a presumption is in breach of the presumption of innocence enshrined in the New Constitution<sup>203</sup>.

However the Court in *S v Zuma* stressed that it was *not* invalidating all legal presumptions.

Kentridge AJ stated:

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<sup>195</sup> Republic of South Africa Constitution Act, No 200 of 1993.

<sup>196</sup> *S v Zuma and Others* 1995(2) SA 642 (CC).

<sup>197</sup> *S v Bhulwana, S v Gwadiso* 1996(1) SA 388(CC).

<sup>198</sup> No 51 of 1977, section 217(1)(b)(ii).

<sup>199</sup> p 662 C - D. Section 25(3) of the New Constitution provides that "*every accused person shall have the right to a fair trial, which shall include the right - (c) to be presumed innocent ...*".

<sup>200</sup> No 140 of 1992, section 21(1)(a)(i).

<sup>201</sup> p 397 E - G.

<sup>202</sup> *S v Zuma* at p 650 F - G, p 656 H - J; *S v Bhulwana* at p 393 E - I, p 394 G - J. See also *R v Ndhlovu* 1945 AD 369, at p 386.

<sup>203</sup> *S v Bhulwana*, p 394 H - I.

*"This Court recognises the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist it in this task ... Some [presumptions] may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove ... Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself"<sup>204</sup> [underlining my emphasis]*

The three provisions in the draft legislation impose a burden of proof on the accused. The question we must ask is, how easy will it be for an innocent person to prove his innocence? Take the second presumption for example: If you were found in possession of a silver ducatoon within ten kms of the wreck of the **Johanna** (for example), how easy would it be for you to prove that you did not obtain the ducatoon from that particular wreck? As the historical background of this paper has shown, silver ducatoons are found on *many* wrecks off the South African coast, and in the Cape Agulhas area where the **Johanna** lies there are more than 80 wrecks<sup>205</sup>! In other words it may be very difficult to prove that an artifact in one's possession has not come from a particular wreck.

It is submitted that what the courts are seeking to avoid with presumptions is the possibility of an innocent person being found guilty of an offence. However, as Kentridge AJ has pointed out, there may be presumptions which are necessary if certain offences are to be effectively prosecuted<sup>206</sup>. If that is the case, the State will have to prove that the infringement of the right to be presumed

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<sup>204</sup> p 662 E - H.

<sup>205</sup> See p 10 *supra*.

<sup>206</sup> **S v Zuma** at p 662M.

innocent is reasonable, justifiable and does not negate the essential content of the right<sup>207</sup>. The Court will then weigh the relevant considerations:

*"In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."*<sup>208</sup>

In conclusion it is submitted that the State will have a very difficult task proving that the three presumptions contained in the draft legislation are reasonable and justifiable. This is because the right to be presumed innocent is so fundamental to our New Constitution<sup>209</sup>.

Finally, in an effort to police the regime effectively, the draft legislation makes provision for the payment of compensation to informers who furnish evidence relating to offences committed under the draft legislation<sup>210</sup>. Section 25<sup>6</sup> of the draft legislation reads:

*"Die raad kan, met die goedkeuring van die Minister, verleen met die instemming van die Minister van Finansies, 'n kontantbedrag wat na die oordeel van die raad onder die omstandighede redelik en billik is, betaal aan enige persoon, uitgesonderd 'n persoon in diens van die Staat, wat enige inligting of bewysstuk met betrekking tot 'n misdryf*

<sup>207</sup> Section 33 of the Constitution of the Republic of South Africa, No 200 of 1993.

<sup>208</sup> *S v Makwanyane and Another* 1995(3) SA 391(CC) at par [104].

<sup>209</sup> *S v Zuma* at p 650 F - G, p 656 H - J; *S v Bhulwana* at p 393 E - I, p 394 G - J.

<sup>210</sup> Draft, section 25. Section 49 of the Sea Fisheries Act, No 12 of 1988 served as a model for this provision.

*ingevolge hierdie Wet aan hom verskaf, ongeag of sodanige inligting of bewysstuk tot 'n vervolging en skuldigingbevinding in 'n bevoegde hof aanleiding gee."* <sup>211</sup>

It is submitted that the above section has been drafted too widely. This is because *all* state-employees are excluded from receiving compensation. Accordingly, persons whose jobs are totally unrelated to the enforcement of this draft legislation, but who are incidentally employed by the State (for example, State-employed doctors, teachers or firemen) will be excluded from receiving due compensation. This is unfair. It is submitted that only those state-employees who are privy to such evidence by the nature of their jobs (for example: wreck inspectors or persons employed by the National Monuments Council) should be excluded from receiving compensation. Therefore, it is suggested that the phrase "*uitgesonderd 'n persoon in diens van die Staat*" <sup>212</sup> should be replaced with the phrase "*uitgesonderd 'n persoon in diens van die raad of 'n wrakinspekteur*" <sup>213</sup>.

#### **4.7 Revision of the Draft Legislation**

##### **4.7.1 Repeal of the Territorial Waters Act, No 87 of 1963**

The draft legislation makes a number of references to the **Territorial Waters Act** <sup>214</sup>. The **Territorial Waters Act** was repealed by the **Maritime Zones Act** <sup>215</sup> in 1994. Accordingly, references to the **Territorial Waters Act** must be removed from the draft legislation.

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<sup>211</sup> "*The Council may, with the approval of the Minister, and with the concurrence of the Minister of Finance, pay to any person, excluding a person in the employment of the State, who furnishes them with any information or material of proof with relation to an offence in terms of this Act, irrespective of whether such information or material has led to a prosecution and conviction before a competent court, a remuneration in cash which, is reasonable and fair in the circumstances.*"

<sup>212</sup> "*excluding a person in the employment of the State*".

<sup>213</sup> "*excluding a person in the employment of the Council or a wreck inspector*".

<sup>214</sup> **No 87 of 1963.**

<sup>215</sup> **No 15 of 1994.**

- Section 1(iii)(b) of the draft legislation should now read:

"**'Historiese wrak'** enige skip of vliegtuig of enige gedeelte van 'n skip of vliegtuig wat ...  
b) in die Republiek of binne 'n afstand van vier en twintig seemyle vanaf die basislyn soos omskryf in artikel 1 van die Wet op Maritieme Sones, 1994 (Act No 15 van 1994)." <sup>216</sup>

- Section 1(x) of the draft legislation should now read:

"**'Republiek'** die Republiek van Suid-Afrika met inbegrip van die see binne 'n afstand van vier en twintig seemyl vanaf die basislyn soos omskryf in artikel 1 van die Wet op Maritieme Sones, 1994 (Act No 15 van 1994)" <sup>217</sup>

- Section 21(1)(f) of the draft legislation should now read:

"'n Wrakinspekteur kan in die Republiek - ... (f) die gasagvoerder van 'n boot of vaartuig wat nie in die Republiek geregistreer is nie, gelas om die boot of vaartuig uit die Republiek te verwyder indien die wrakinspekteur redelike gronde het om te vermoed dat daardie boot of vaartuig te eniger tyd in die Republiek gebruik is in verband met 'n bedrywigheid wat 'n misdryf ingevolge hierdie Wet uitgemaak" <sup>218</sup>.

- Finally, Section 22(3) of the draft legislation should now read:

"Vir die doeleindes van hierdie Wet word die regsgebied van 'n landdroshof bedoel in subartikel (2) geag die see tot op 'n afstand van vier en twintig seemyle vanaf die basislyn

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<sup>216</sup> "**'Historic wreck'** means any ship or aircraft or any portion of a ship or aircraft which is ...  
b) situated within the Republic or within a distance of twenty four nautical miles from the baseline, as defined in Section 1 of the Maritime Zones Act, 1994 (Act No 15 of 1994)".

<sup>217</sup> "**'Republic'** means the Republic of South Africa, which includes the sea within a distance of twenty four nautical miles from the baseline, as defined in section 1 of the Maritime Zones Act, 1994 (Act No 15 of 1994)."

<sup>218</sup> "A wreck inspector may within the Republic - ... (f) order the master of a boat or vessel which is not registered in the Republic to remove it from the Republic if the wreck inspector is satisfied, upon reasonable grounds, that such boat or vessel was at any time used within the Republic in connection with any activity that constituted an offence in terms of any law."

*soos omskryf in artikel 1 van die Wet op Maritieme Sones, 1994 (Act No 15 van 1994)*<sup>219</sup>  
*in te sluit."*

#### 4.7.2 Repeal of a provision relating to South West Africa

In section 1(x) of the draft legislation, reference is made to South West Africa. This reference now needs to be removed. Accordingly, the words "*maar uitgesluit die gebied Suidwes-Afrika*"<sup>220</sup> must be deleted.

#### 4.7.3 Application of the draft legislation to the Prince Edward Islands

For completeness' sake, the draft legislation should also apply to the Prince Edward Islands. Accordingly, the following provision should be inserted into the draft legislation:

*"Hierdie Wet is ook van toepassing op die Prins Edward-eilande soos omskryf in artikel 1 van die Wet op Prins Edward-eilande, 1948 (Wet No 43 van 1948)."*<sup>221</sup>

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<sup>219</sup> "For the purposes of this Act the area of jurisdiction of a magistrate's court referred to in subsection (2) shall be deemed to include the sea up to a distance of twenty-four nautical miles from the baseline, as defined in Section 1 of the Maritime Zones Act, 1994 (Act No 15 of 1994)."

<sup>220</sup> "But excluding the territory of South West Africa."

<sup>221</sup> "This Act shall also apply to the Prince Edward Islands as defined in section 1 of the Prince Edward Islands Act, 1948 (Act No 43 of 1948)."

## 5. CONCLUSION

The South African coastline abounds with Portuguese, Dutch and English wrecks. Many of these are of immense historical, archaeological and cultural value. We have a duty to protect them for future generations. The current legislation, although offering a measure of protection, is inadequate.

The draft legislation has taken many of the problematic aspects of the present legislation into consideration and goes a long way towards promoting greater protection of our historic wrecks and artifacts.

This paper has suggested a few modifications to the draft legislation, especially in light of the New Constitution. It is to be hoped that this legislation will be adopted in South Africa in the near future.

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