

**THE NEW SOUTH AFRICAN REGISTRATION REGIME
THE BASIC QUESTIONS ANSWERED (SHIP REGISTRATION FAQ'S)**

What form will the new SA Ships Register take, and where will it be kept?

The SRA establishes the SA Ships Register 'in which must be entered all matters required or permitted' by the Act and the Regulations.¹

The Register is computerised, and can be accessed from all SAMSA offices.

Who will administer the register?

SAMSA will administer the register through its port offices, each of which will still have a Registrar of Ships.

Will existing ships' registries and registered mortgages be affected?

The SRA enacts transitional provisions as Schedule 3. Item 3 deems all existing entries in the register to have been made in the new register in terms of the SRA at the time of their initial entry.² The registrar may recall deemed registries if they do not now comply with the SRA.³

Will there still be ports of registry?

The present ports of registry are retained as the designated home port⁴ of the ship to be registered, although there will be no individual port registers. Search on the central register will be categorised by port and vessel type.

Will there still be Official Numbers and 'Carving & Marking Notes'?

The register will allocate each ship an official number. Ship's particulars will still be required to be etched into their main beam,⁵ evidenced by a Carving & Marking Note.

What is a 'registered agent'?

Each ship on the register must have a 'registered agent' entered on the register. This is the managing owner, or an agent appointed 'in respect of a ship or a person managing the ship'.

Whilst this provision surely seeks to provide an accountable face to the register, its object seems to be defeated by the ability to appoint a juristic person care of its 'principal place of business' as the registered agent.⁶

What tonnage will be used for the Register?

Tonnage measurement is still done under the Merchant Shipping Act that in turn incorporates the Tonnage Convention.⁷

What gives a ship SA nationality?

¹ SRA s 33(1).

² SRA s 61 read with Item 3 of the Transitional Provisions of Schedule 3.

³ SRA Item 6 of Schedule 3. This would include registries considered 'inappropriate' in terms of s 43.

⁴ Regulation 2(1)(b) read with Regulation 45 which lists all the existing ports of registry.

⁵ SRA S 20(1).

⁶ SRA s 40(4)(b).

⁷ Defined in the Merchant Shipping Act s 2(1) as 'the 'International Convention on Tonnage Measurement of Ships done at London on 23 June 1969, as modified by any amendment made under Article 18 of that Convention that has entered into force for the Republic'.

‘South African ships’ are ships *entitled to be registered*, whether actually registered or not.⁸ A ship entitled to be on the South African register is one which is majority owned by South Africans or bareboat chartered to South Africans for more than 5 years.⁹

Who may own a South African ship?

Any person, natural or juristic, may own a South African ship or share in a ship. But South African nationals, including companies, close corporations and trusts, must own the majority of the 64 shares of the ship.¹⁰

Will allowing minority foreign ownership make the new South African register a flag of convenience?¹¹

Flags of convenience, even in the eyes of the ITF, are such because of a number of factors, collectively painting a picture of a lack of administrative control, of responsibility and of accountability. International law requires a ‘genuine link’ between the flag and the ship owner. In South Africa, this link can be tenuous, requiring no more than that the owner be a registered company with a place of business in South Africa.¹² The South African flag administration is committed to a register well regulated according to international standards. It should not be regarded as an ‘FOC’. If its administration slips below industry norms, and if unscrupulous ship owners hide behind that lassitude, convenience status would both justified and deserved.

Must a South African ship be registered?

Registration is only required if a mortgage is to be registered, or if the vessel is foreign going.¹³ Hence coasters may remain unregistered. They are still categorised as South African ships and are subject to the same administrative controls as they would be if registered.

Regulation 43 exempts from registration ships that ply exclusively in the internal waters, territorial sea and exclusive economic zone of the Republic. This would not seem to extend the latitude already extended to non-foreign going ships.

Are any ships prohibited by law from being on the SA Register?

Ships under 3m loa, wooden ships ‘of primitive build’¹⁴ and ships already on another register, unless sold in execution by order of the High Court in Admiralty, or bareboat chartered in to a South African national, in which event evidence of the charterparty and of the consent of the primary register is required.¹⁵

May the registrar refuse to register a ship?

Only where the Registrar of ships is satisfied that it is ‘inappropriate’ for the ship to be on the register having regard to her condition as it has bearing on safety, health

⁸ SRA s 3.

⁹ Also small non-fishing vessels owned and operated by South African residents – SRA s 16.. Commercial fishing vessels are

¹⁰ Or must jointly own more than 50% of the total ownership interest of a maximum of 5 owners of each 64th share in the ship.

¹¹ On flags of convenience and the genuine link requirement, see Hare *op cit* p 131- 134.

¹² Rather than the more common requirement of a ‘principal place of business’.

¹³ SRA s 44 and 45. If she sails for a foreign port she is stripped of ‘any benefit, privilege, advantage or protection usually enjoyed by a foreign ship. See Hare *op cit* p 143.

¹⁴ Regulation 12.

¹⁵ SRA s 19.

and welfare of crew, risk of pollution and the 'interests of the Republic or international merchant shipping'.¹⁶

What do you do if you are to build a new SA ship?

Form 1 is a notice of intention to apply for registration. This form may be sued for both new buildings and acquisitions.

There are Regulations specific to newbuildings.¹⁷

SAMSA is required to survey all ships being built or being brought onto the South African register.¹⁸ A new building is required to have a Builder's Certificate giving full details of the ship's construction.¹⁹ The owner must then submit a declaration of ownership, though there does not appear to be a prescribed form in the Annexure to the Regulations. The content of the declaration is however stipulated in Regulation 15.

What do you do if you buy second hand tonnage and want to bring it onto the SA Register?

Regulation 13 requires an application to be made for registration,²⁰ supported by documentation evidencing the nature of the ship, her condition and the details of her owners, supported by declaration of their nationality.²¹ She is required to be inspected for safety purposes, and her tonnage certificates must be certified.²²

Does registration expire? How is it renewed?

Registration is valid for 5 years after which it must be renewed. Registration of a chartered in ship is valid for 5 years or until the end of the charter period (whichever is the earlier).²³

The Registrar must serve a renewal notice on the owner 3 months before the expiry of the registration. Renewal must be applied for during the 3 months before expiry. The application for renewal must be supported with a refreshed declaration of ownership and nationality.²⁴

May any ship be chartered into the SA Register?

The Regulations prevent registering the following classes of chartered-in ships on the bareboat register

fishing vessels

ships less than 500 tonnes gross

ships not mechanically propelled

ships bareboat chartered for less than 2 years.²⁵

¹⁶ Where the ship complies with her safety convention requirements, the Registrar would have to make a reasoned ruling as to the grounds for refusal. Such a ruling would be subject to review. See Hare *op cit* p 429.

¹⁷ The Merchant Shipping (Notification of Building of Vessels) Regulations, 2002, published under the Merchant Shipping Act as R498 on 26 April 2002, and come into operation on the date of commencement of the SRA.

¹⁸ Regulation 16.

¹⁹ Regulation 14.

²⁰ Form 1 annexed to the Regulations should be used.

²¹ Regulation 15.

²² Regulation 16.

²³ Regulation 18

²⁴ Regulation 20. This is presumably designed to cater for more frequent changes of co-owners, to ensure majority ownership remains South African.

²⁵ Regulation 3 read with SRA s 1(6)(b)

May you charter a South African ship out to a foreign charterer to be placed on a foreign second register, leaving the SA register as the primary registration?

There is as yet no provision made for chartering out. The Minister is empowered to make regulations for both chartering in and out, but thus far the Regulations only provide for chartering in.

What if a ship owner takes in foreign partners?

The foreign partners may own up to 31 shares in the ship for the ship to stay on the South African register. Or the ship may be owned by a company which has any number of foreign shareholders, provided that the company is locally registered and has a 'place of business' in South Africa.

Do you have to use the prescribed forms?

The forms attached to the Regulations must be used, but 'substantial compliance' with those forms is all that is required.²⁶ Thus you may generate computerised versions of the forms, and, provided all the information is present, there would be no objections raised if the format of the forms differed somewhat from those prescribed. It would be preferable to stick to the layout of the forms as far as is possible.

How do you register a mortgage over a South African ship?

Regulation 32 provides that mortgages be on Form 6.²⁷ The mortgage is created not by the execution of the form, as was the case under the Merchant Shipping Act, but by the registration of the mortgage at the register. Priority between two or more mortgages follows the order of registration.²⁸

Form 6 will be used in conjunction with the underlying loan agreement secured by the mortgage. There is no requirement that the loan agreement be filed with the Registrar.

May only the whole of a ship be mortgaged?

Any one or more of the 64 shares in a registered ship may be mortgaged by its owner(s).²⁹ Form 6 requires a statement of the number of shares owned/mortgaged.

Is there any minimum tonnage or monetary limit for SA ship mortgages?

Any ship entitled to be registered may be the subject of a registered mortgage. Thus any ship over 3 m may be mortgaged.³⁰ There is no upper or lower limit for the amount of the loan secured by the mortgaged.

How do you sell a South African ship to a SA buyer(s)?

²⁶ Regulation 2(2).

²⁷ Form 6 should be signed by the mortgagor ship owner. It is not necessary that it be signed by the mortgagee financier. The form as published provides for the signature of both mortgagor and mortgagee on the same line. The reference to 'mortgagee' is erroneous, though counter signature by the mortgagee would not affect the validity of the mortgage. It remains however a unilateral security, referring as it does to the underlying loan agreement. In the unlikely event that there is no underlying agreement, Form 6 could serve as the loan itself (and the instrument creating the security). Hence there is reference on the form to the essential details of amount, interest, and repayment.

²⁸ Item 9 of Schedule 1 to the SRA.

²⁹ *Ibid* – Item 9 states that a ship or a share in a ship may be mortgaged.

³⁰ This will correct the anomalous situation prior to the SRA in which SAMSA refused to register ships under 25 tonnes. Effectively therefore mortgages were only possible for ships over 25 tonnes.

South African ships are sold by means of a Bill of Sale substantially in accord with Form 4.³¹ The Bill of Sale records the number of shares being sold, the particulars of the ship, the purchase price and the details of the purchaser.

How and when does ownership pass? Is the register conclusive proof of ownership or merely evidence?

Item 3 of Schedule 1 of the SRA stipulates that a ship or a share in a ship is transferred 'by registration' of a Bill of Sale. The implication is that the register will therefore be proof of ownership. But it will be rebuttable, as there are circumstances in which ownership passes independent of registration of a Bill of Sale.³²

What happens if a ship is sold to a (majority of) foreign buyer(s)?

The ship then loses its character as a ship entitled to be on the South African register. In that event, no Form 4 Bill of Sale is necessary - it is normal for the buyer's register's sale form to be used. Application must then be lodged in terms of Regulation 21 to delete the ship's records from the register. This is done by letter confirming the details of the foreign buyer(s). Deletion will not take place if there remains a registered mortgage in place. In that event s 42 of the Act requires the Registrar to give 60 days notice of the closure of the register.³³

What happens if a South African ship is scrapped or is lost?

The registered owner(s) of a ship which is lost or scrapped must immediately give notice to the Registrar who then closes the register, noting reasons why.³⁴ Any registered mortgagees would again require 60 days notice of closure of the register, though a mortgage security is extinguished by the loss of the vessel. The ship's registration papers must be handed in to the Registrar within 30 days of the notice.³⁵

What happens if a South African ship is sold in execution by the High Court in Admiralty?

The South African High Court in Admiralty has the power to sell any ship.³⁶ The effect of a High Court order is to sell the ship free of liens and encumbrances, including unsatisfied mortgages - whose mortgagees and other creditors are left then with recourse only against the proceeds of the sale, held in court as an admiralty fund. The SRA makes no specific mention of a sale in execution. In the High Court order, the Registrar should be required to register a transfer of ownership in pursuance of the High Court order. The registrar would be ordered to issue a certificate of deletion if the ship is sold to foreign interests.

A ship may also be sold in terms of the SRA following certain transgressions of the Act. Any such order given in terms of the SRA requires the court making the order to appoint a named person in whom rights to transfer the ship will vest.³⁷

³¹ Previously called a 'Deed of Sale' - the change is to accord with international practice.

³² Such as transfer by 'transmission' - which occurs primarily where a ship or shares in a ship pass to an heir upon the death of the owner.; or as a legal consequence of marriage - Regulation 31(d); or sale by order of a competent court.

³³ SRA s 42(1)(b) and 42(4).

³⁴ *Ibid*, read with Regulation 42(1).

³⁵ Regulation 42.

³⁶ Section 9 of the Admiralty Jurisdiction Regulation Act, 1983.

³⁷ SRA Item 6 of Schedule 1.

By analogy, it would be wise for a High Court sale in execution order to authorise the Registrar of the High Court to sign the required sale documents - especially if the sale is to local interests and the ship is to stay on the local register.

Is the registration of fishing vessels and other small craft different?

Ships of all sizes over 3 metres may be registered.³⁸ Non-commercial recreational boats only require registration if they are to sail for a foreign port, or if they are to be mortgaged.³⁹

Commercial vessels under 100 tonnes, not foreign-going, are required to be licenced in terms of the re-enacted s 68 of the Merchant Shipping Act.

Small vessels under 25 tonnes and longer than 3m, are covered by the Merchant Shipping (Small Vessel Safety) Regulations which will come into effect with the SRA.⁴⁰

Small vessels under 3m do not escape SAMSA attention: they are subject to Regulations published under the Merchant Shipping Act.⁴¹

³⁸ The intention was that commercial boats under 100 tonnes would need to be licensed rather than registered, unless they are foreign going. Licensing provisions have been retained in the Merchant Shipping Act, under which Licensing Regulations have been published as GN R112 in Government Gazette 24275 of 17 January 2003, to take effect with the SRA.

³⁹ cf Hare *op cit* p 152, written in anticipation of the MSA licensing provisions being enacted in the SRA.

⁴⁰ 'Small vessels' are defined in s 1 of the SRA as being less than 25 gross tonnes and more than 3 m, but no further attention is given to this category in the Act or Regulations. Small Vessel Regulations were published in the Government Gazette R400 of 26 April 2001.

⁴¹ The Regulations for the use of vessels of less than 3 m in length, 1981, published in GN R1044 of 15 May 1981 and amended by GN R504 published in Government Gazette 23345 of 26 April 2002.