Acknowledgements

I would like to express my sincere appreciation to the Faculty of Law, UNAM for providing me with the opportunity to write an academic paper of this magnitude. My further thanks are due to my supervisor, Ms. AL Zender for her encouragement, support and guidance in the research and writing of this dissertation. I would also like to thank Mr. Kalundu Kamwi and Ms. Haludilu Helvi, my fellow students for their encouragements without which I would have not decided to do my research in this particular field.

Mr Mainga F Mukwata

Dedication

To my parents

Abbreviations

EHS : Environmental, Health, and Safety

HC : High Court

IFC : International Finance Corporation

NLJ : Namibia Law Journal

SC : Supreme Court

SALJ : South African Law Journal

SWA : South West Africa

WWF : World Wide Fund for nature

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Chapter One Introduction

1.1. Historical background

Maritime law developed alongside the rise of trade relations between European states around the Mediterranean Sea and during the expansion of the Roman Empire. The law that was applied at that time was based on Rhodian law, which was recognised by the Greeks and Romans alike.[1] However, the Romans being the masters of that time, through Emperor Justinian, recorded their laws. This was Roman law, and Roman maritime law was part of it.[2] When the Roman Empire fell, their law did not fall with it but continued to influence most of European laws.

With the rise of the Italian city-states, special tribunals developed to deal with the disputes of seafarers and merchants.[3] This development led to the establishment of maritime customs and codes, existing independently from territorial or municipal legal systems.[4] The most well known maritime code that was developed and compiled at that time is the Rhodian Sea Laws.

Due to the close relationship between maritime law and commerce, maritime tribunals developed in the areas where commercial activities were concentrated, such as the Atlantic and the Baltic. These tribunals applied the law merchant and sea laws such as the Laws of Wisby, the Laws of Oleron and the Laws of the Hanseatic Towns.

It has been recorded that these laws found application in Roman-Dutch law, English law and American law and thus formed the basis of their maritime laws.[5] The eighteenth century saw the fall of the Dutch East India Company, thus Dutch maritime activity. The English and the American on the other hand became increasingly involved in the field of maritime law. England became a leading nation in the development of maritime law.

[1] Hare, J (1999) *Shipping Law and Admiralty Jurisdiction in South Africa.* Cape Town: Juta & Co Ltd, 5.
[2] Ibid. The Justinian's Digest contained general average Rhodian provisions as well as a number of provisions governing, inter alia, the parties to a maritime adventure; the ship owner's responsibility; ownership of ships among others.
[3] Hofmeyr, G (2006) *Admiralty Jurisdiction Law and Practice in South Africa.* Cape Town: Juta & Co Ltd, 1.
[4] Ibid 2. The *Consolato del Mare* was first printed around this time in Barcelona (1494) containing in it maritime codes and customs.
[5] Ibid.

At first, large ports in England got their own Admiral's Court then later Admirals of the West and of the East were appointed. These Admirals applied English maritime law, as contained in the Black Book of Admiralty. According to the Black Book of Admiralty, the Admiral's Court was to be summary, plain and devoid of technicality.[6] However, the jurisdiction of the Admiralty's Courts was viewed as prejudice to the common law of the kingdom. Richard II, in 1389 even decreed that the Admirals should "not meddle with anything done within the real, but only of a thing done upon the sea."[7]

In the 16th century, English commerce became thoroughly maritime and most truly international. This was the time of the Tudors which saw England rise to world trading supremacy, exploration and colonisation. As a result of that, English maritime law developed rapidly and spread to other parts of the world dominated by England.[8] It was under the Tudors the Court of Admiralty was established. This court initially had jurisdiction in relation to disciplinary matters, piracy and spoil but it came to be that it exercised jurisdiction over almost all aspects of shipping law.[9] However, the existence of the Admiralty court and its vast jurisdiction did not please the common law courts. As a result, the common law courts embarked on a mission to curtail the jurisdiction of the Admiralty court and by the end of the eighteenth century, the Admiralty court was only left with little jurisdiction.

As if all hope was lost, the Admiralty court retained its jurisdiction in the nineteenth century, all thanks to Lord Stowell and Dr. Lushington who served as admiralty judges during that period. Their work paid off in the form of legislations; the Admiralty Court Acts of 1840 3 & 4 Vic. C.65 and the Admiralty Courts Act of 1861 24 & 25 Vic. C.10. These acts restored much but not the court's entire jurisdiction. Furthermore, Vice-Admiralty courts were established in the British colonies to exercise the jurisdiction exercised by the English High Court of Admiralty. These courts applied English admiralty law.

On the 25th of July 1890, the Colonial Courts of Admiralty Act of 1890 53 & 54 Vic. c. 27 was passed. This Act abolished the Vice-Admiralty Courts and established the Colonial Courts of Admiralty. Section 2(1) of the Act stipulated that every court of law in a British possession which had unlimited civil jurisdiction shall be a Court of Admiralty. Section 2(2) provided that the jurisdiction of a Colonial Court of Admiralty would exist over the like

[6] Hare (note 1 above) 9.
[7] Ibid 10.
[8] Ibid.
[9] Hofmeyr (note 3 above) 3.

places, persons, matters and things as the admiralty jurisdiction of the High Court of England, whether existing by virtue of any statute or otherwise, and provided that a Colonial of Admiralty could exercise such jurisdiction in like manner and to as full and extent as the High Court in England.

According to Hare, "nineteenth century English Admiralty law and jurisdiction – the whole bundle of statutory and inherent jurisdiction, common law, civilian practice and judicial precedence – was confirmed to be part of the law of the Cape and Natal by the 1890 Colonial Courts of Admiralty Act".[10] The Cape and Natal were British possession, and their supreme courts had original unlimited civil jurisdiction, and so they became Colonial Courts of Admiralty, by virtue of section 2(1) of the Act. English admiralty law was to be applied.

1.2. Admiralty jurisdiction in Namibia

1.2.1. The Reception of English Maritime law in South Africa

South African law comprises of English law and Roman-Dutch law. However, it is clear from existing literature that South African maritime law is mainly English maritime law.[11] When the British occupied the Cape in 1795, they established a vice-admiralty court with jurisdiction not 'only as a court of first instance but also as a price court'.[12] This court, staffed by a single judge, heard cases involving ships from virtually every trading nation of that time[13] and practiced English maritime law. The other courts, the Raad van Justice (court of justice) and the lower courts administered Roman-Dutch law in civil and criminal matters.[14] This British occupation ran from 1795 to 1802 when Britain called a truce with Napoleon Bonaparte and restored all her recent colonial conquests to the victors, including the Cape of Good Hope, which was handed to the Batavian Republic. The records of the vice-admiralty court at the cape were also removed when the British left.[15]

[10] Hare (note 1 above) 14.
[11] See Edwards, A B (1996) *The History of South African Law-An Outline.* Durban: Butterworths, 74-84, Dillon, C & van Niekerk, J P (1983) *South African Maritime Law and Marine Insurance: Selected Topics.* Durban: Butterworths, 4, as well as Friedman, D B 'Maritime Law in Practice and in the Courts' (1985) 102 I *SALJ* 45, 45 and sources cited there.
[12] Edwards (note 11 above) 75.
[13] Ibid.
[14] Ibid.
[15] Ibid.

However, the British retained control of the Cape once again in 1806 after defeating the combined French and Spanish fleets. From that period to 1820, the British government governed the Cape colony as an outpost of the British Empire.[16] This means that there were a lot of legal uncertainties as far as the administration of justice is concerned. With regards to maritime law, the vice-admiralty court was re-established in 1806 but only commenced duties in 1807 under Winchombe Henry Hartley and it continued to exercise the jurisdiction of the earlier court.[17]

It must be noted that the British government did not completely repudiate Roman-Dutch law. The two sources of law continued apply in as far as Roman-Dutch law was considered 'adequate to meet the needs of the community.[18] What happened was rather a gradual penetration and acceptance of English law institutions into the body of Roman-Dutch substantive law. The main drivers of this move were the judges, legal practitioners and businessmen who were directly affected by the law. It is because of that, English law was accepted gradually than directly since the stakeholders mentioned above simply chose readily accessible and workable rules to solve their problems.[19]

It is against this background that English maritime law was accepted in South Africa. It was more readily accessible and workable than Roman-Dutch maritime law. As Friedman puts it " without wishing to detract from the greatness of our Roman-Dutch writers of the seventeenth and eighteenth century, one must point out that much of what they have to say about many of the aspects of maritime law have little application, and cannot be adapted, to modern situations".[20] Without ignoring the inputs of Roman-Dutch writers, it is submitted that English law was accepted as the main source of admiralty jurisdiction in South Africa.

1.2.2. The Transfer of English Maritime law into Namibia

After the First World War, Germany was stripped of its colonies, including South West Africa (SWA), today Namibia, by the Victors of the war. As part of the League of Nation's Mandate system, SWA was put under the administration of Britain as a C class mandate. Britain then tasked South Africa to Administer SWA on its behalf. The Administration of

[16] Ibid 77.
[17] Ibid 79.
[18] Ibid 80.
[19] Ibid 81-82.
[20] Friedman (note 11 above) 45.

Justice Proclamation 21 of 1919 was then passed to transfer all laws applicable in South Africa into SWA. This meant that admiralty laws that were applicable in South Africa became applicable in SWA as of the date of the transfer Proclamation.[21]

In *Freiremar SA v The Prosecutor General of Namibia and another*,[22] Strydom J concluded that "the provisions of the Colonial Courts of Admiralty Act of 1890 was part of the statute law of the Cape of Good Hope whereby section 1 (1) of Proclamation 21 of 1919 the law as existing and applied in that province was introduced into the then South West Africa".

1.3. Problem statement

Namibia is a democratic country. After its independence on 21 March 1990, a democratic constitution with a Bill of Rights was adopted.[23] Article 140 of this constitution provides that all laws in force immediately before the date of independence shall remain in force until repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent court.[24] This means that Namibia still applies the Colonial Courts Act of 1890, which confer limited jurisdiction on the courts[25]. This very old act (about 121 years) has not been repealed by an act of parliament or declared unconstitutional by a competent court, and Namibia still applies English maritime law as it was in 1890. This also implies that the High Court has jurisdiction over maritime claims as it was in 1890. To support this, it has been held in a number of cases,[26] most notably, the *Freiremar case*[27] and the *International Underwater Sampling Limited Case*[28] where it was affirmed that the colonial Courts of Admiralty Act of 1890, as applied in the Cape of Good Hope as of January 1920 was applied to SWA by virtue of Proclamation 21 of 1919.

Surely, things have not remained the same since 1890. The world has changed in form, spirit and knowledge. Territories which belonged to no one back in 1890 are now belonging to

[21] Katjaerua, B (2005) *Maritime Law Class notes* unpublished Reader. Windhoek: University of Namibia 1.
[22] 1996 NR 18, 28.
[23] The Namibia Constitution Act 1 of 1990.
[24] Article 140 (1).
[25] Note that the court with inherent unlimited civil jurisdiction in Namibia is the High Court of Namibia, thus the Court of Admiralty, see Article 78 (4) and 80 (2) of the Namibian Constitution.
[26] In reaching to his conclusion in the Freiremar case, Strydom J referred to *R v Goaseb* 1956 2 SA 698 SWA, *S v Redondo* 1992 NR 133 SC and *S v Kruger* 1993 2 SA 528. Attention is also drawn to the case of *Namibia Ports Authority v NV Rybak Leningrada* 1996 NR 355 HC.
[27] *Freiremar* (note 22 above).
[28] *International Underwater Sampling Limited & Another v Mep Systems (Pty) Ltd* 2010 NAHC 10.

independent, sovereign states and territories which were under the colonial rule of European monarchies are now independent. These independent states are independent politically and economically. Thus, they are free to pursue their own political ideology and economic policy, without fear of external intervention.[29] On the economic front, article 98 (1) of the Namibian constitution provides that "the economic order of Namibia shall be based on the principles of a mixed economy".

This means the economy is comprised of public and private ownership. Following that, Namibia, a coastal state hosts a shipping industry, comprised of the private sector and the government.[30] According to the Environmental, Health, and Safety (EHS) Guidelines for Shipping,[31] "the shipping industry involves a number of entities specialised for various functions including ownership, freight contracting, operation, and management".[32] It involves vessels, generally referred to as ships, which require maintenance and overhaul (repairs). Ship breaking (the process of dismantling a vessel's structure for scraping, disposal, or recycling) is labour intensive and associated with a number of environmental, health, and safety hazards.[33] Shipping operations depend on port, harbour, and terminal infrastructure and services for the movement of cargo.[34] Examples of these services include port traffic control, cargo storage and handling, passenger screening for security purposes, waste management, and mechanical maintenance services.[35]

The government of a coastal state must ensure that there are necessary infrastructures (ports, harbours and terminals) in place for the calling of vessels. Dr Klaus Dierks,[36] in his speech at the conference 'Marketing of the Walvis Bay Corridor' said that:

> When Namibia became independent in 1990 it took over the shipping policies of South Africa, as embedded in various laws for the maritime sector. Now in terms of these laws, South Africa practiced a liberal shipping policy. Essentially shipping was a free trade, and

[29] This is based on the international law principle of sovereignty of states and non-intervention .for a discussion of sovereignty see Steinberger, H 'Sovereignty' in Bernhard, R (ed.) *Encyclopaedia of Public International Law* (2000) 4, 500, 511-513.

[30] See Dr Klaus Dierks' Speech at the Conference: 'Marketing of the Walvis Bay Corridor' on <http://www.klausdierks.com/Walvis_Bay_Corridor/index.html>, last accessed on 05 October 2011. He was then Deputy Minister for the Ministry of Works, Transport and Communications.

[31] International Finance Corporation (IFC) 'Environmental, Health, and Safety Guidelines for Shipping' (April 2007) <www.ifc.org> last accessed on 05 October 2011.

[32] Ibid 17.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Dr Klaus Dierks 'Walvis Bay – Key Element of the Integrated Development Chain for Namibia' (April 1997) <http://www.klausdierks.com/Walvis_Bay_Corridor/index.html> last accessed on 05 October 2011.

there were no restrictions on capacity, pricing and on who was allowed to carry cargo etc. Indeed, South Africa even allowed for international competition in the field of cabotage.

The Ministry of Works, Transport and Communication conducted a review of transport and shipping policies in the early 90s and concluded that there was no need to change the Namibian shipping policies.[37] There Namibian shipping industry was found to be small but competitive with most shipping work being carried out between Namibia and South Africa and a lesser fraction of it involving European operators.[38] In the end, it was recommended that the government should play a passive role – that is to "encourage any Namibian interests to participate in shipping, but without providing direct support in the form of subsidies or applying restrictive measure against lines of other nations."[39] The government also was to create and manage ports. At the time of writing this dissertation, the author found no recent review of shipping policies so it was assumed that no changes have been made to the shipping policy described above.

The shipping industry is a major contributor to a country's economic growth. As Hare puts it, "the economic and social wellbeing of much of the world is closely affected by the efficient flow of imports and exports between trading nations".[40] This entails trade and "over 90% of all trade between countries is carried by ships".[41]Having a shipping industry may be good for the economic development of a country on the one side, but on the converse side, as it will be discussed below, brings a fountain of complicated needs and problems. These problems usually lead to litigation and that is when maritime laws come into play to regulate the vast field of shipping.

But what is a ship? To a layman, a ship would be "a large boat for travelling on water, especially across the sea".[42] In legal terms, a ship is more than just that. According to Hare, "there is no uniform approach by legislature on what constitute a 'ship' in law".[43] Section 2 of the Admiralty Act of 1861 provided that a "ship shall include any description of vessel used in navigation not propelled by oars". This definition only goes as far as describing big ships that were used for adventures and expeditions of the past. It excludes small vessels used

[37] Ibid, researches were conducted in 1991-1995 and then in 1996-1997.
[38] Ibid.
[39] Ibid.
[40] Hare (note 1 above) 116.
[41] WWF 'Marine Problems: Shipping' (?) <http://wwf.panda.org/bout_our_earth/blue_planet/problems/shippin>, last accessed on 05 October 2011.
[42] See Walter, E (ed.) (2008) *Cambridge Advanced Learner's Dictionary* version 3.0 (software) Cambridge University Press.
[43] Hare (note 1 above) 121.

for a wide range of things today, such as fishing, entertainment and research. For that reason, some jurisdictions have enlarged the definition of ship to include:

> Any vessel used or capable of being used on the sea or internal waters, and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar installation, whether self-propelled or not.[44]

Today, a ship includes any vessel that can be used for transportation or any other purpose on or under the surface of the water. Therefore, a wide range of problems are associated with shipping today than in the past, making it necessary to have updated maritime laws. One of the problems central to shipping relates to the employment and welfare of seamen (master and crew). Because of the uniqueness of their working environment, not all employment laws apply to seamen and some apply only to them.[45] Furthermore, they engage in voyages to distant parts and get exposed to special hazards; they are confined on board the ship on and off duty and dangers to the ship are often not attended to fast.[46]

The master commands the ship while the crew run the day-to-day chores. In the wrong hands, ships can cause damage, both ashore and at sea, such as loss of life, damage to property and pollution, among others.[47] The master and the crew retain their basic human rights even on the high seas because human rights know no boundaries. Mistreatment of the crew by the master, or vice versa, is another ground for litigation. The cargo that is carried on the ship must also be taken care of. All these may lead to lawsuits in the courts of the registering country or elsewhere.

Moreover, a ship must be owned and registered. A ship may be owned partly, jointly or by a corporation.[48] Though that is settled, there are still uncertainties when it comes to transfer of ownership of ships as in contracts of purchase and sale of ships, shipbuilding contracts, mortgages and hypothecs as well as charter party contracts. A shipbuilding contract is indeed a complicated one; "it is an agreement for the purchase of a ship not yet in existence",[49] but it proceeds as an agreement of sale with the passing of ownership taking place once the

[44] Section 1 of the South African Admiralty Jurisdiction Regulation Act, 105 of 1983.
[45] Gaskell, NJJ, Debattista, C & Swatton, RJ (1987) *Chorley and Giles' Shipping Law* 8th Edition. London: Pitman Publishing, 109.
[46] Ibid.
[47] Hare (note 1 above) 126.
[48] Ibid, 124.
[49] Gaskell et al (note 45 above) 50.

construction is over.[50] The parties may provide for transfer of property by stages as building proceeds and "a great number of shipbuilding disputes have turned out on such provisions".[51]

Registration on the other hand is essential for the exercise of admiralty jurisdiction and it entitles the ship to certain privileges and protections from the registering state.[52] Namibia being a costal state is exposed to the problem of recognition of foreign maritime liens because ships sail to and from its ports, bringing with them foreign maritime liens incurred in other countries which may have no equivalent in the domestic laws.

The legal implication of these developments is that there will be more disputes between shippers, freight forwarders, transport operators, port operators and even the government. With our outdated laws, it is difficult to cater for these new needs and problems. Why not then develop maritime laws?

The crux of the dissertation is the issue of limited jurisdiction as conferred by the Colonial Courts of Admiralty Act of 1890, the extent of the jurisdiction as it stood 121 years ago and its implications in contemporary Namibia, the extension of jurisdiction to cater for contemporary needs and problems as seen from other jurisdictions, the possible drafting of our own up-to-date admiralty jurisdiction act and matters incidental to will be critically analyzed. In the end, the dissertation seeks to show the ineffectiveness of the Colonial Courts of Admiralty Act of 1890 to provide for admiralty jurisdiction in Namibia.

1.4. Research methodology

The author of this dissertation heavily relied on desktop research whereby secondary sources of information, such as Books, journals, articles, cases and statutes were used. Information was gathered from these secondary sources and presented for critical analysis. The reliance of secondary sources was mainly because of convenience, and that it was the only way the researcher found efficient to acquire information on the subject matter within the given time frame. No empirical study or field work was conducted and the use of questionnaires and interviews was totally avoided.

[50] Ibid.
[51] Ibid, 51.
[52] Ibid, 128.

1.5. Literature review

Hofmeyr, G (2006) *Admiralty Jurisdiction Law and Practice in South Africa.* Cape Town: Juta & Co Ltd

This book is about admiralty jurisdiction in South Africa. It provides a detailed account on the law and practice of admiralty jurisdiction in that country. This book is relevant since it provides an outline of the main stages of the origin and development of maritime law, specifically relevant to admiralty law in the Republic of South Africa. This is also relevant to Namibia since the two countries have a common history. The author intends to use this book to outline the origin and development of admiralty law in Namibia. Furthermore, the book discusses the three English acts that were passed into Namibia by proclamation 21 of 1919, as they provide for admiralty jurisdiction in South Africa. In this book, specific mention of Namibia is made[53] that "Namibia continued to apply the limited jurisdiction conferred by the Colonial Courts of Admiralty Act of 1890". The book also discusses the new South African Act, the Admiralty Jurisdiction Regulation Act 105 of 1983 in which the jurisdiction of the admiralty court was extended and developed. This part is good for comparison.
That being the case, this book is particularly useful in understanding the limited jurisdiction conferred by the 1980 Act, an issue central to this dissertation. However, this book is based on South African law; therefore, it does not depict the status a quo in Namibia. For that reason it will be used as a guiding material in the writing of this dissertation and for comparative purposes only.

Hare, J (1999) *Shipping law and Admiralty Jurisdiction in South Africa.* Cape Town: Juta & Co Ltd

This book is about shipping law and admiralty jurisdiction and practice in South Africa. In this book, the author makes special attention to the era before South Africa passed the admiralty jurisdiction regulation act of 1983 and the period after the act was passed. This allows one to objectively observe the changes that admiralty law went through in that country. Even though it is based on south African law, this book will be a good guiding material in writing this dissertation in as far as the heads of jurisdiction provided by the 1840,

[53] Hofmeyr (note 3 above) 11.

1861 and 1890 English acts on admiralty jurisdiction are concerned. It also provides a good source of comparative study as it contains the recent developments in South African maritime law.

This book goes further than admiralty jurisdiction in South Africa, it also contain general information on shipping law and work. It is a rich material for the understanding of maritime law as a branch of law. For that reason, I used it in conjunction with Kaholongo's unpublished dissertation titled *A Crticial Review of Maritime Legislation in Namibia*[54] in which the author reviews the existing maritime laws in Namibia, from statutes, international conventions to case law. Kaholongo's objective was to find out whether Namibia had adequate maritime legislation in place and (depending on the result), make recommendations on how to improve the efficiency and effectiveness of maritime law in Namibia.[55] This work is helpful to my dissertation in that it is the only piece of work that is Namibian, and it answers a lot of questions hanging over our maritime law.

Dillon, C & Van Niekerk, JP (1983) *South African Maritime Law and Marine Insurance: Selected Topics*. Durban: Butterworths

This book covers aspects of maritime law in general and marine insurance in particular as practiced in South Africa. The authors trace the development of South African maritime law and comments, in detail, on the new South African admiralty regulations act. More interestingly, they discuss what admiralty law and admiralty jurisdiction is, thus distinguishing the former from ordinary jurisdiction of civil and criminal courts. This book is very significant for understanding admiralty jurisdiction before one goes about researching on it. It is an important source for a comparist who wants to compare his/her system with that of South Africa in relation to maritime law and marine insurance. For the purposes of this research, the book will save as a rich source of general principle of maritime law in general and admiralty jurisdiction in particular.

[54] Kaholongo, M N (2010) *A Critical Review of Maritime Legislation in Namibia* Unpublished Dissertation. Windhoek: UNAM.
[55] Ibid, 7.

Tetley, W (1985) *Maritime Liens and Claims.* London: Business Law Publications

This book, as the title goes, is about maritime liens and claims. The purpose of the book is to describe the law merchant in respect to maritime liens and claims as the is to be found in four separate but related nations – the United States, the United Kingdom, France and Canada. It gives a historical account of the development of maritime liens and how they developed in the four nations mentioned above. Furthermore, the book goes in detail to discuss each and every lien recognised by the author as important and give the position of as it was at the writing of the book in the nations mentioned above. Because the United Kingdom is one of those nations, this book is a good source of English maritime law as it stood at 1890. Last but not least, the book has summaries from experts in various nations, including South Africa, about their admiralty law. This book will be used as a definitional source to understand some of the maritime liens or claims as well as a comparative material when comparing Namibia with other jurisdictions.

Friedman, D B 'Maritime Law in Practice and in the Courts' (1985) 102 I *SALJ*

For a considerable time, South African writers debated on the real source of their maritime law. Friedman enters the debate in this article, by pointing out that the position taken by Bamford,[56] that South Africa enjoys its own sources of maritime law, as "a somewhat misleading picture". He goes on to support the position taken by Claire Dillon and Prof. J P van Nikerk.[57] Following that, he traces the history of shipping activity which led to an increase in shipping litigation. This part was useful for comparative purposes in respect of problems and needs South Africa faced and which led to the development of their maritime law.

Not only did the maritime law go through changes, Friedman goes on to narrate how the legal profession was affected by the developments in maritime law; though they coped with substantive cases of a maritime nature quickly, they struggled with procedural deficiencies and anomalies. One such problem was the clash between the common law courts and the admiralty court over claims, as it happened in the *Wm Brandt's Sons & Co Ltd v The 'Waikiwi Pioneer' & others*.[58] It became apparent that if South Africa was to keep pace with

[56] In his book *The Law of Shipping in South Africa* cited at p 45.
[57] Ibid.
[58] 1974 (4) SA 351 (N).

the growing shipping work, reform was necessary. Thus Mr Douglas Shaw QC started a one-man commission to investigate the South African admiralty law and to draft a statute; his work paid off in the form of the Admiralty Jurisdiction Regulation Act of 1983. Namibia could learn from that as we inherited the shipping their shipping legislation and policies. Their new admiralty act is a good piece of legislation on which we can base our law reform.

Friedman's article is supplemented by Forsyth's article.[59] Writing from a conflict of law point of view, the learned author insightfully describes the conflict that existed between common law courts and admiralty courts in South Africa which necessitated the enactment of the Admiralty Jurisdiction Regulation Act of 1983. According to him, the "South African maritime law is a largely uncharted ocean, and the litigant who sets upon it may find himself threatened by unknown and unexpected perils".[60] The same can be said about Namibian maritime law, and perhaps worse, as Kaholongo observes "the fact that Namibia still uses old admiralty laws impacts negatively on administration of the country's maritime affairs".[61]

Other articles that support Forsyth's assessment above include; Mayburgh, P 'Recognition of Foreign Maritime Liens' (1989) 106 II *SALJ* where the author attempts to answer the question of whether or not to recognise foreign maritime liens by reviewing case law;[62] Staniland, H 'Should Foreign Maritime Liens Be Recognised? (1991) 108 II *SALJ* where, following the decision in *Transol Bunker BV v MV Andrico Unity & others; Grecian-Mar SRL v MV Andrico Unity & others*,[63] the author posed several question raised by that decision, namely, should legislation be introduced to provide for recognition, enforcement and ranking of foreign maritime liens? Does such legislation present insuperable drafting problems? And what will the likely effect of such legislation be to flood our courts with bizarre and outlandish foreign maritime liens? He then goes on to answer those questions.

[59] Forsyth, C 'The Conflict Between Morden Roman-Dutch Law and the Law of Admiralty As Administered By South African Courts' (1982) 99 II *SALJ*, 255.
[60] Ibid, 255.
[61] Kaholongo (note 54 above) 13.
[62] In this article, admiralty court had just been faced with such a case, *Brady-Hamilton Stevedore Co & others v MV Kalantiao* 1987 (4) SA 250 (D).
[63] 1989 (4) SA 325 (A), the Appellant Division followed the decision in *Bankers Trust International Ltd v Todd Shipyards Corporation, The Halcyon Isle* 1981] AC 221 (PC) that the lex fori must be applied to the recognition of a foreign maritime lien.

Chapter Two An Overview of Existing Admiralty Laws in Namibia

2.1. Admiralty Jurisdiction in General

Jurisdiction means the power or competence of a court to hear and determine an issue between parties.[64] Jurisdiction is exercised in relation to a number of factors, namely, the amount in dispute, the parties in dispute, territory and subject matter. These factors may limit the extent of the jurisdiction as well as the power of the court to enforce its judgements.

In admiralty, jurisdiction can be understood to be the power or competence of a court to hear and determine matters, statutorily or customarily prescribed, as "maritime claims".[65] Admiralty jurisdiction is generally not limited in terms of territory, nationality of the parties or subject matter, thus in *Kandagasabapathy v MV Melina Tsiris*[66] it was said that:

> this court, sitting as a Court of Admiralty, has jurisdiction even though the claim is between foreigners and in terms of a contract concluded outside its jurisdiction; in short, even though neither parties nor the subject-matter of the claim have any connection with this country.

This means that admiralty jurisdiction may be exercised over a dispute between two peregrines concerning a cause of action which arose outside the court's area of jurisdiction.[67] This was confirmed in the case of *International Underwater Sampling Limited & another v MEP Systems (Pty) Ltd*[68] where the supreme court held that, by virtue of an interaction of three English enactments, namely the Colonial Courts Admiralty Act, 1890, the Admiral Court Act, 1840 and the Admiralty Court Act, 1861, it had jurisdiction to hear a matter the cause of action occurred beyond the territorial jurisdiction of Namibia and the where the parties involved were all peregrines. The first appellant, International Underwater Sampling Ltd (IUS Ltd), was a limited company registered office in the Bahamas, and was the owner of the second appellant ("The Explorer"), which flew a flag of St. Vincent and the Grenadines,

[64] Dillon & Van Niekerk (note 11 above) 7.
[65] Ibid 8.
[66] 1981 (3) SA 950 (N) 952.
[67] Dillon & Van Niekerk (note 11 above) 8.
[68] Case no.SA/2010 (SC).

while the cause of action occurred in Singapore. The respondent, MEP Systems Pte Ltd (MEP Pte 2 Ltd), was a private company registered office in Singapore.

Admiralty jurisdiction is also discretionary, and an admiralty court may, in appropriate circumstances, decline to exercise its jurisdiction, leaving it to the plaintiff to enforce his rights in some other competent forum.[69] With ordinary jurisdiction, attachment or arrest of property belonging to a foreign disputant is vital to found jurisdiction. In admiralty, that is not the case, service of proceedings upon a property within the court's area of jurisdiction is necessary to found admiralty jurisdiction.[70] This can be seen in actions in rem where an admiralty court can exercise jurisdiction over a maritime res itself instead of its absentee owner.[71] The reason why admiralty jurisdiction is as it is can be learnt from the words of Forsyth:

> It seems to me, the legal problems associated with shipping have had two characteristics: first, they will frequently be international in character; and, secondly, such legal problems will often concern acts or even events that take place on the oceans, many miles from home ports (or courts), and it may be uncertain what law, if any, applies to that act or event.[72]

Therefore:

> The convenience of mariners, shippers and all associated with ships and sea transport would to call for a system of law to be established that would do the following: (i) Ensure that an obligation duly incurred in one port could not be evaded through the debtor's slipping off to the high seas, never to be seen in that port again. And the easiest way of achieving this would be to establish liberal jurisdictional rules, so that when the errant vessel enters another port, it can speedily be called to account, notwithstanding that the foreign port has no link or connection with the events that led to the dispute. (ii) Ensure that the law applicable would be certain and well known. Whether the relevant facts and events took place at sea or in distant port, the same certain and well-known law should be applicable.[73]

Furthermore, admiralty jurisdiction is discretionary because of the fact that admiralty jurisdiction rules are liberal so as to make every port a potential forum for an admiralty action. However, this has been criticised that it may lead to forum-shopping.[74] Mere convenience to the defendant should not be the decisive factor in refusing to exercise jurisdiction, thus the court should take all the relevant factors into account in order to balance

[69] Dillon & Van Niekerk (note 11 above) 8.
[70] Ibid.
[71] This issue will be discussed in detail bellow, see *Beaver Marine Ltd v Wuest* 1978 (4) SA 263 (A) 275 for a description of the general features of proceedings in rem.
[72] Forsyth (note 59 above) 257.
[73] Ibid.
[74] Dillon & Van Niekerk (note 11 above) 9.

the advantages and disadvantage to the parties concerned.[75] However, the plaintiff's choice of forum will not be disturbed because he/she is *dominus litis*.[76] The party seeking to persuade the court to refuse to exercise its jurisdiction bears the onus of showing why the matter can and should be more appropriately and justly heard in another forum.[77]

To the court that seats as an admiralty court in Namibia, the above means that it must exercise jurisdiction that is convenient to mariners, shippers and all those associated with ships and sea transport. In other words, admiralty jurisdiction should not be exercised only because it exist legally, but ideally, to fulfil the practical needs of those associated with it. It also imply that the statutes which provide for admiralty jurisdiction must be practical, liberal, certain and well known.

However, as adumbrated earlier, admiralty jurisdiction concerns itself with those matters, in the words of Dillon & Van Niekerk, "which have some general connection with shipping and which may be broadly termed "maritime claims".[78] That is not to say that the admiralty court has unlimited jurisdiction because its jurisdiction is limited to matters that are statutorily[79] or customarily prescribed to be "maritime claims". As it will be shown later, statutes dealing with admiralty jurisdiction in Namibia are old and outdated.

2.2. The Admiralty Court Acts of 1840 and 1861

Before the passing of the admiralty court act of 1840, the jurisdiction of the admiralty court[80] was in relation to "contracts made, and injuries committed upon the high seas; and over prizes taken in time of war"[81] only. In other words, the court of admiralty was twofold, firstly it was the instance court, and secondly, it was the prize court. It was governed by the civil law, the Laws of Oleńon and the custom of the admiralty, and its practice was in accordance with the rules of civil law.[82] Clearly, the jurisdiction of the admiralty court was very limited.

[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid 8.
[79] In Namibia, the relevant statutes are the Admiralty Court Act of 1840, the Admiralty Court Act of 1861 and the Colonial Courts of Admiralty Act of 1890. These Acts read together provide for admiralty jurisdiction in Namibia.
[80] The High Court of Admiralty of England, whose practice and laws were followed by the vice-admiralty courts established in the colonies and whose shadows still hang upon admiralty practice in Namibia today.
[81] Tetley, W (1985) *Maritime Liens and Claims* Montreal: International Shipping Publications, 25.
[82] Ibid 24.

During the middle of the nineteenth century, Dr. Lushington was appointed Judge of the High Court of Admiralty of England. His work, together with that of Dr. Joseph Phillimore, Lord Stowell and Prof. Arthur Browne, helped to expand the jurisdiction of the admiralty court and develop its laws.[83] Their pioneering work gave birth to the Admiralty Court Act of 1840, which considerably increased the jurisdiction of the court.[84] The admiralty court's jurisdiction was further extended by the 1861 Act whose preamble explicitly provided that it was enacted to "extend the jurisdiction and improve the practice of the High Court of Admiralty". The jurisdiction of the admiralty court was extended in the following respects:

2.2.1. Mortgage claims

According to Tetley[85] ship mortgage was known early in England, but the admiralty court had no jurisdiction over it,[86] until 1840. Section 3 of the 1840 Act provides for instances where the court of admiralty has full jurisdiction over vessels in claims of mortgages, and that is:

- Where any ship or vessel is under arrest by process issuing from the court; and
- Where the proceeds of any ship or vessel having been so arrested is brought into and registered in the registry of the court.

In those instances, the court has full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or cause of action in respect of any such claims or causes of action respectively. Section 11 of the 1861 Act extended the court's jurisdiction to cover any claims in respect of a registered mortgage, whether the ship or the proceeds thereof be under arrest of the said court or not. However, this did not remove the conflict that existed between the common law courts and the admiralty court in respect of mortgage claims, therefore, the later court exercises concurrent jurisdiction.[87]

[83] Ibid 24.
[84] The preamble explicitly stated that the act was passed 'to improve the practice and extend the jurisdiction of the High Court of Admiralty of England'. 'This preamble indicates that the 1840 Act was intended to supplement any admiralty jurisdiction then existing [,] not to further restrict the existing jurisdiction'; Hare (note 1 above) 13.
[85] Tetley (note 82 above) 205.
[86] See *The Portsea* (1827) 2 Hagg. 84 and *The Exmouth* (1828) 2 Hagg. 88n.
[87] Tetley (note 81 above) 206.

2.2.2. Ownership

With regards to claims of ownership, section 4 of the Act provides that the court has jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the court after the passing of the Act. This was further extended by section 8 of the 1840 Act which confers jurisdiction to decide "all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered in any port in England or Wales, or any share thereof". This section further empoweres the admiralty court to "settle all accounts outstanding and unsettled between the parties in relation thereto", and to "direct the said ship or any share thereof to be sold and [to] make such order in the premises as to it shall seem fit".

2.2.3. Salvage

In terms of section 6, the admiralty court has jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to any ship or sea-going vessel, on the high seas or within the body of a country. The Privy Council in *The Two Ellens*[88] expressed that salvage constitutes a maritime lien and section 9 of the 1861 Act made the provisions of the Merchant Shipping Act of 1854 (17 & 18 Vic c 104) applicable to salvage claims. This meant that salvage of life fell under the jurisdiction of the court, whether the services were rendered on land, on the high seas or partly in one place and partly in another, and whether the wreck was found at sea or cast upon the land, or partly in the sea and partly on land.[89]

2.2.4. Towage

Jurisdiction was conferred upon the admiralty court in respect of towage for the first time by section 6 of the 1840 Act.[90]The admiralty court was to decide on all claims and demands whatsoever in the nature of towage, whether the towage services were rendered on the high

[88] *Jonson v Black* (1872) 4 L.R, P.C, 167
[89] Section 476 of the Merchant shipping Act of 1854.
[90] Rainey, S (1996) *The Law of Tug and Tow* London: LLP Limited, 233.

seas or within the body of a country. Towage was defined in *The Princess Alice*[91] as "the employment of one vessel to expedite the voyage of another when nothing more is required than the acceleration [of] her progress".[92] Though closely related to salvage, it was said in *The Henrich Bjorn*[93] that towage gives rise to no lien.[94]

2.2.5. Necessaries

Also under section 6 of the 1840 Act, the admiralty court has jurisdiction to decide all claims and demands whatsoever for necessaries supplied to any foreign ship or sea-going vessel, whether the ship or vessel was within the body of a country, or upon the high seas at the time when the necessaries furnished, in respect of which the claim was made.

It was stated in the case of *The Two Ellens*[95] that in the construction of section 6 it has been held in several cases that there is a maritime lien in the case of supplies and necessaries furnished to a foreign ship. Apparently, a claim for necessaries and supplies constituted a maritime lien on the ground that "looking at the subject matter to which that section relates it appears designed to enlarge the jurisdiction which the court of admiralty already had in matters forming the subject matter of a maritime lien".[96] Therefore, it must have been the intention of the legislature that, as in the case of salvage and collision whereby a maritime lien existed when they occur on the high seas, and on the body of a country, "the same rule should apply in the case of necessaries".[97]

The status of claims for necessaries changed with the introduction of section 5 of the 1861 Act which extended the court's jurisdiction to necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales' (the area of jurisdiction of the court). It has been held in a number of cases

[91] (1849) 3 W Rob. 138.
[92] At 138.
[93] (1885) 10 P.D. 48.
[94] At 53.
[95] Note 88 above, 167.
[96] Ibid.
[97] Ibid.

that necessaries only give a statutory right in rem and not a maritime lien.[98] In *The Two Ellens*[99] it was confirmed that a claim for necessaries does not create a maritime lien.

2.2.6. Claims relating to booty

Section 22 of the 1840 Act confers jurisdiction on the admiralty court to "decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please her Majesty, by advice of her Privy Council, to refer to the judgement of the said court; and in all matters so referred the court shall proceed as in cases of prize of war, and the judgement of the court therein shall be binding upon all parties concerned". This meant that the admiralty court could still operate as a prize court, but only in those matters referred to it by the "proper authorities".[100]

2.2.7. Claims relating to building, equipping, or repairing of ships

The English admiralty court had jurisdiction over claims relating to the building, equipping, or repairing of any ship in terms of section 4 of the 1861 Act, provided that, at the time of institution of the cause, the ship or the proceeds thereof were under the arrest of the court. This was a new head of jurisdiction as it was not provided for in the 1840 Act and it means that the admiralty court can decide on claims relating to the building of ships (shipbuilding contracts), equipping and repairing of ships (may also be in the form of contracts to repair or equip a ship).

2.2.8. Cargo claims

Jurisdiction over cargo claims was introduced by section 6 of the Act. This section provides that the admiralty court has jurisdiction "over any claim by an owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or contract on the part of the owner, master, or crew of the ship, unless

[98] *The Henrich Bjorn* (1885) 10 P.D. 44, *The Ripon City* [1897] P. 226.
[99] Note 88 above, 167.
[100] Dillon & Van Niekerk (note 11 above) 27.

it is shown to the satisfaction of the court at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales".

2.2.9. Collision damage

The English admiralty court had inherent jurisdiction over claims in respect of damage done by a ship on the high seas.[101] And as indicated above, such jurisdiction was extended by section 6 of the 1840 Act. Section 7 of the 1861 Act also conferred the same jurisdiction to the court 'over any claim for damage done by any ship'. According to Tetley,[102] collision damage is one of the traditional liens and, as held in *The Tolten*,[103] the admiralty court will have jurisdiction over foreign and domestic ships in respect of damage done by such ships, whether the damage has been done domestic waters or on the high seas or in foreign waters.

2.2.10. Seamen's wages

Section 10 of the 1861 Act confers jurisdiction over claims for seamen's wages. It provides that the court has jurisdiction "over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise". Claims for seamen's wages gives rise to maritime liens,[104] and they survive even against a foreign purchaser,[105] or an illegitimate possessor of the ship (like a thief).[106]

2.2.11. Master's wages and disbursements

Jurisdiction over claims by a master for his wages and disbursements was introduced in section 10 of the Act. In terms of this section, a master could bring a claim before the court of admiralty 'for wages earned by him on board the ship and for disbursements made by him on account of the ship'. Claims for master's wages and disbursements are two separate liens in relation to the master of a ship.

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[101] Ibid, 22.
[102] Tetley (note 81 above) 167-168.
[103] (1945) 79 Ll. L. Rep.127.
[104] Dillon & Van Niekerk (note 11 above) 24.
[105] *The Batavia* (1822) 2 Dodds. 500.
[106] *Phillips v Highland Railway Co (The Ferret)* (1883) 8 App. Cas. 329.

2.3. The Colonial Courts of Admiralty Act of 1890

The preamble of the Act reads: 'An act to "amend" the law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom'. This indicates that the English legislature intended to make some changes to the practice and jurisdiction of admiralty courts in its colonies. What they intended to change from was the Vice-Admiralty courts established under the auspices of the Lord Admiral High of England. The jurisdiction of these courts was regulated by Vice-Admiralty Court Acts passed from time to time by the British imperial parliament,[107] and it was substantially that of the high court of admiralty in England.[108]

In South Africa, vice-admiralty courts functioned in the Cape and Natal and they applied English maritime law, and exercised the inherent jurisdiction of the high court of admiralty as extended by the Acts of 1863 and 1867.[109] When the Colonial Courts of Admiralty Jurisdiction Act came into operation on 1 July 1891,[110] it abolished the vice-admiralty courts and replaced them with colonial courts of admiralty.[111] The Act also repealed the vice-admiralty acts,[112] but left the Admiralty Court Acts of 1840 and 1861 intact.

Upon commencement, and with the vice-admiralty courts abolished in all British colonies, section 2 of the Act established the colonial courts of admiralty and provided for their jurisdiction. In terms of this section, every court of law in a British possession, which had unlimited civil jurisdiction, became a court of admiralty.[113] The jurisdiction of these courts would exist 'over the like places, person, matters, and things, as the Admiralty jurisdiction of the High Court of England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court of England, and shall have the same regard as that Court to international law and the comity of nations'.[114]

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[107] These Acts are; the Vice-Admiralty Courts Act of 1863 (26 Vic c 24) and the Vice-Admiralty Courts Amendment Act of 1867 (30 Vic c 45).
[108] Dillon & Van Niekerk (note 11 above) 14.
[109] Ibid 15, see also *Crooks & Co v Agricultural Cooperative Union Ltd* 1922 AD 423, 433.
[110] Section 16 reads; 'this act shall, save as otherwise in this act provided, come into force in every British possession on the first day of July one thousand eight hundred and ninety-one'.
[111] Section 17 and section 2 of the Act.
[112] Section 18 read together with Schedule 2 of the Act.
[113] Section 2 (1).
[114] Section 2 (2).

At the time of the passing of the 1890 Act, the Cape and Natal were British possessions. Their Supreme Courts had unlimited civil jurisdiction so they became Colonial Courts of Admiralty.[115] In 1910, when the four British became the Union of South Africa, several divisions of the Supreme Court of the Union became Colonial Courts of Admiralty by reason of the unlimited civil jurisdiction they exercised.[116] The relevance of this brief South African account to Namibia is that when our country became a C class mandate in 1919, all laws applicable in South Africa at that time were transferred into Namibia by the Administration of Justice Proclamation 21 of 1919.

The wording of section 2 are clear to mean that the new colonial courts of admiralty were to apply English maritime law and exercise the jurisdiction of the high court of admiralty of England. The questions that remain are (i) what constituted English maritime law and (ii) what jurisdiction did the high court of admiralty exercise?

In the case of *Crooks & Co v Agricultural Cooperative Union Ltd*[117] the question arose of whether admiralty courts were to apply Roman-Dutch law or English admiralty law. The court held that the law to be applied by the Supreme Court, sitting as an admiralty court was English admiralty law and not South African municipal law. It was further pointed out that the colonial courts admiralty act of 1890 merely substituted colonial courts or vice-admiralty courts and that the administration of the substantive law was to continue as before[118]; that there was no clear distinction between the jurisdiction of and the law administered by the admiralty court[119]; that "jurisdiction" in section 2(2) means jurisdiction and law[120] and that admiralty jurisdiction could not conceivably be exercised by a South African admiralty court 'in like manner and to as full an extent as the high court in England' if it did not apply English admiralty law;[121] and that in exercising its admiralty jurisdiction, the supreme court ceases to sit as a domestic court and becomes an English admiralty court applying English maritime law.[122]

[115] Hare (note 1 above) 14.
[116] Hofmeyr (note 3 above) 4.
[117] Note 109 above, 423.
[118] Ibid, 430-451.
[119] Ibid, 439-441.
[120] Ibid, 440, the words of Juta JA 'the words "shall have jurisdiction" may be construed as referring to substantive law'.
[121] Ibid, 429.
[122] Ibid, 447.

One cannot describe the whole body of English maritime law in one sentence but it suffice to say that that English maritime law is to be found in the various sources such as Acts, case law and judicial writings. As to admiralty jurisdiction, what has been discussed above under Admiralty Courts Acts 1840 and 1861 is the starting point.

The important fact to understand at this point is that the Colonial Admiralty Courts established under the 1890 Act were to apply English maritime law and exercise the jurisdiction equivalent to that of the high court of admiralty in England as it was at 1890. This was confirmed in the case of *Tharros Shipping Corp v Owner of the Ship Golden Ocean*[123] where it was held that "the jurisdiction of admiralty courts in South Africa was established as it existed in the high court of admiralty in 1890, subsequent legislative provisions in England extending admiralty jurisdiction having no application in South Africa". The same fact applies to Namibia, our maritime law and admiralty jurisdiction is derived from the 1890 Act as transferred in 1919, subsequent legislative provisions in South Africa extending admiralty jurisdiction[124] do not apply in Namibia, unless it is specifically provided that a particular South African Act applies in Namibia.

The fact that admiralty jurisdiction in Namibia is as it was in 1890 posses some serious threat to the administration of justice in Namibia. The reason for this statement is quite obvious; admiralty jurisdiction as it was at 1890 (that is the 1840 and the 1861 Acts read together with the 1890 Act) is limited, uncertain and underdeveloped.

To understand what the jurisdiction that the High Court of Namibia, which seats as a Court of Admiralty, one must go back in time and compile from the old sources the jurisdiction of the English High Court of Admiralty as at 1890.[125] These sources are; the court's original jurisdiction, the Admiralty Courts Acts of 1840 and 1861 and the English Merchant Shipping Acts. From these sources, one can pick out various heads of jurisdiction over which the Namibian admiralty court can exercise its jurisdiction. This will be discussed in the next chapter.

[123] 1972 (4) SA 316 (N), ruling after *The Yuri Maru, The Woron* [1927] AC 906 (PC) case where the Privy Council in a Canadian appeal held that the Colonial Courts Admiralty Act 1890 did not prospectively incorporate any later statutory changes in the Admiralty jurisdiction of the High Court in England in the jurisdiction of the Colonial Courts of Admiralty.
[124] E g the Admiralty Jurisdiction Regulations Act 105 of 1983 of South Africa
[125] Hofmeyr (note 3 above) 6-11 provided a good summary of such.

Chapter Three Admiralty Jurisdiction in Contemporary Namibia through Case Law

As indicated earlier, Admiralty jurisdiction in Namibia is derived from the old English sources of maritime law. The body of laws that is 'maritime law' is mainly English in nature and content. English maritime law and the jurisdiction enjoyed by the English high court of admiralty were transferred into the territory of South West Africa (SWA) by proclamation 21 of 1919. This was confirmed in the case of *Freiremar*[126] where it was held that the Colonial Courts of Admiralty Act of 1890 was part of the statute law of the Cape when by s1 (1) of Proclamation 21 of 1919 the law existing and applied in that province was introduced into the then South West Africa.

That being the case, the Namibian Constitution provides for succession of laws. Article 140 (1) of the constitution provides that 'subject to the provisions of this constitution, all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court.' This means that other South African Acts that touch on maritime law and admiralty jurisdiction, such as the Merchant Shipping Act 57 of 1951, are applicable in Namibia 'until repealed or amended by Act of Parliament or until [it is] declared unconstitutional by a competent court'. However, for the purposes of this dissertation, those Acts will not be discussed in detail.

Furthermore, article 144 of the Namibian constitution provides that 'unless otherwise provided by this constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this constitution shall form part of the laws of Namibia'. Namibia has ratified and acceded to a number of international conventions on maritime law, and it is also bound by international customs and customary maritime law. These also form sources of admiralty jurisdiction in Namibia. Again, unless there is a direct relationship with the convention or custom of international maritime law with the 1890 Act, they will not be discussed in detail.

[126] Note 22 above, 28 A-D.

Interestingly, and in line with the above, section 2 (2) of the colonial courts of admiralty act of 1890 reads; "and shall have the same regard as that court to international law and the comity of nations". Even though the later was interpreted in *De Howorth v The SS India*[127] not to mean that colonial courts of admiralty must be bound by English decisions, the same regard must be given to international law by an admiralty court established under the Act but 'it is open to it, on any particular point, to form its own opinions as to what international law and the comity of nations requires'.[128]

In sum, the sources of maritime law and admiralty jurisdiction in Namibia are:

1. The inherent jurisdiction of the English high court of admiralty as recorded in textbooks;
2. The Admiralty Court Acts of 1840 and 1861;
3. The Harbours, Docks, and Piers Clauses Act of 1847 10 & 11 Vic. c. 27;
4. The Merchant Shipping Act of 1854;
5. The Colonial Courts of Admiralty Act of 1890;
6. The South African merchant Shipping Act of 1951;
7. International Conventions on maritime law; and
8. Customary International law.

With all these sources in mind, the focus of the paper is on admiralty jurisdiction as it was crystallised into the Colonial Courts of Admiralty Act at 1890. What follows is a narration of the state of affairs in Namibia with regards to admiralty jurisdiction as provided for by the Colonial Courts of Admiralty, 1890, read together with the 1840 and 1861 Acts, and Namibian case law.

3.1. Court practice and procedure

Section 7 of the 1890 Act provides that:

> rules of court for regulating the procedure and practice in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees,

[127] 1921 CPD 451, 457.
[128] Ibid.

> and costs in the said court in the exercise of its ordinary civil jurisdiction respectively are made.

This provision enables the High Court of Namibia, sitting as the court of admiralty to make rules regulating procedure and practice therein. However, no such rules have ever been promulgated by either court as envisaged by section 7 of the Act. Nevertheless, as indicated in *Namibia Ports Authority v M'V Ryback Leningrada*,[129] that the Vice Admiralty Rules made in terms of the 1840 and 1861 Acts apply in Namibia. In *Bourgwells Ltd (Owners of MFV Ofelia) v Shepalov & Others*[130] it was held that the Rules for the Vice-Admiralty Courts in Her Majesty's Possessions Abroad of 1883 are also applicable. Those Rules, together with the Rules of the High Court of Namibia of 1990 are applicable to admiralty practice and procedure.

Those rules lays out the procedure to be followed when instituting a claim in the admiralty court, which can either be a proceeding in rem or a proceeding in personam. For example, rule 29 and 30 of the Vice-Admiralty Court Rules provide that, in an action in rem, the affidavit to lead the warrant of arrest shall state the nature of claim.[131] And in accordance with the High Court Rules, a party to a maritime dispute can issue summons in terms of rule 17; institute provisional sentence proceedings in terms of rule 8; have a property arrested and/or arrested in terms of rule 9; attach a property to found or confirm jurisdiction in terms of rule 9; and institute an action in rem and in personam in terms of rule 9 and 17 read together.[132]

3.1.1. Action in rem

In *Beaver Marine Ltd v Wuesl*[133] the general features of proceedings in rem were described as follows:

> They are directed against the ship itself by having it arrested and kept in custody in order to compel or secure payment of the claim. The arrest is effected by a warrant issued, served, and executed at the instance of the claimant. If the claim is not paid the ship is ultimately sold, the proceeds are lodged in the admiralty court out of which the warrant issued, and, subject to any

[129] Note 26 above.
[130] 1998 NR 307 (HC).
[131] See *Green Fisheries Corporation v Lubrication Specialist (Pty) Ltd & another* 2003 NR 50 (HC).
[132] Kaholongo (note 54 above) 29.
[133] Note 71 above, 275.

preferent or prior rights by other claimants thereto, as determined by that court in the event of any dispute, the claims is paid out of such proceeds.

An action in rem serves two purposes, firstly to secure payment, and secondly, to compel the owner to enter an appearance and/or pay security for to secure the release of the ship while the matter is pending. The arrest of the ship is not necessary to found or create an admiralty court's jurisdiction for an action in rem to commence.[134] It was held in *Foss Launch & Tug Co v SV Commodore*[135] that 'in admiralty an arrest cannot found or create jurisdiction over claims which does not otherwise exist', and in *E P Government of the United States of America: in re SS Union Carrier*[136] that 'the admiralty action in rem commences with the issue of the writ of summons and is thus not dependent upon an arrest "ad fundandam jurisdictionem" in the sense in which it is used in our Law.'

The 'thing' is the object of the action. Meaning that it does not matter whether the owner is available or not. This is so because the action in rem was developed as a procedural device designed to bring the owner of the res before the court.[137] Once the owner enters an appearance, the action proceeds as a hybrid, both in rem and in personam, and the owner become personally liable so that his assets, in addition to the arrested res, becomes liable to execution in satisfaction of the judgement.[138]

To commence with an action in rem, the plaintiff must obviously have a maritime claim/lien over the property to be arrested[139], or if the owner of the property to be arrested would be liable to the claimant in action in personam in respect of the cause of action concerned.[140] Therefore, a person instituting an action in rem must aver the following:[141]

a. A maritime claim as defined in the Act; [142] and
b. That the property to be arrested is that against which the claim lies;
c. A maritime lien over the property to be arrested; and/or
d. A claim against the owner of the property in personam; and/or

[134] Dillon & Van Niekerk (note 11 above) 11.
[135] 1943 NPD 27, 28.
[136] 1950 (1) SA 880 (C) 885.
[137] Hofmeyr (note 3 above) 50.
[138] This was held in *The Dictator* [1892] P 304. Before this position, lack of an entry of appearance by the res owner constituted a limit to his/her liability in that the owner would simply be 'excused' from liability of the claim.
[139] Hare (note 1 above) 64.
[140] Ibid.
[141] Ibid 65-66.
[142] The 1890 Act and its concomitant Acts.

e. That there is no alternative way to enforce the claim; and
f. That there is no security, or insufficient security and good reason for proceeding notwithstanding.

3.1.2. Action in personam

This action refers to the bringing of personal action against the owner of the ship or the person in whose lawful possession the ship is. In this instance, no ship is arrested but the matter proceeds by the issuing of a combined summons which sets out the cause of action to which the defendant must answer.[143]

The old English maritime law recognised the action in persona provided that the allegedly liable defendant against whom proceedings may be taken is available and existing.[144] Under English law, the most common was the procedure in rem. With procedure in persona, it was problematic where the defendant was inaccessible and the summons could not be served on him directly. Seizure of the defendant's property to secure or confirm jurisdiction was not part of the persona procedure[145] nor was attachment required to found jurisdiction of the court.[146] All the claimant needs to do is to serve, through the sheriff, summons on the defendant in a matter over which the court has jurisdiction. Sadly this is the situation in Namibia and it severely curtails the liability of defendants, leaving the claimant with few options. Unlike in South Africa,[147] Namibia has not introduced the common law procedure of attachment into admiralty practice.

However, in the *Bourgwells case*[148] the court said that "an applicant seeking an order of attachment to found or confirm jurisdiction must show that:

- There is a prima facie cause of action against the proposed defendant;
- The proposed defendant is a peregrines; and

[143] Katjaerua (note 21 above) 12, see also Rule 17 0f the High Court Rules.
[144] Dillon & Van Niekerk (note 11 above) 10.
[145] Hofmeyr (note 3 above) 101.
[146] See *Foss Launch & Tug Co case*, note 135 above, 28.
[147] Section 3 (2) (b) of the Admiralty Jurisdiction Regulations Act of 1983 which provides that an action in personam may be instituted against a person whose property within the court's area of jurisdiction has been attached to found or confirm jurisdiction.
[148] Note 130 above, 309.

- The proposed defendant is within the area of jurisdiction of the court or that property in which the proposed defendant has a beneficial interest is within that area.

3.2. Maritime liens

Tetley writes:

> A traditional maritime lien is a secured right peculiar to maritime law (the *lex maritima).* It is a privilege right against property (a ship) which attaches and gains priority without any court action or any deed or any registration. It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a secret lien which has no equivalent in the common law; rather it fulfils the concept of a "privilege" under the civil law and mercantile law.[149]

In *The Bold Buccleugh*[150] maritime lien was defined as follows:

> A claim or privilege to upon a thing carried into effect by a legal process (called action in rem), [such] claim or privilege travelling with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached'.

The term maritime lien is as old as maritime law itself because it is purely a product of the evolution of maritime law through statute, custom and case law.[151] Maritime liens have been rightly described as *sui generis*[152], arising *ex lege* as an automatic incident of a particular relationship between parties or the occurrence of a particular event[153], and it is a right, found in maritime law, and a privilege, in the civilian tradition.[154]

In essence, a maritime lien is a privileged charge upon a maritime res which comes into existence immediately the facts giving rise to it occur, travelling with the res secretly and unconditionally, and remaining inchoate until enforced by an action in rem.[155] It was explained in *The Halcyon Isle*[156] that the charge is described as privileged because of the priority which the lien enjoys over certain other claims. And in *The Bold Buccleugh*[157] it was

[149] Tetley (note 81 above) 40.
[150] (1851) 7 Moo PC 267, 284.
[151] Ibid 36.
[152] Hofmeyr (note 3 above) 142.
[153] Ibid 148-149.
[154] Tetley (note 81 above) 37-38.
[155] Hofmeyr (note 3 above) 148.
[156] Note 63 above, 328.
[157] Note 150 above, 267.

explained that the lien is said to be secret and unconditional because, despite the absence of notice, the lien attaches to and travels with the res and is binding on and effective against third parties including bona fide successors in title to the res owner. When enforced, by an action in rem, the lien results in the arrest and sale of the ship and, subject to the payment of prior claims, the application of the proceeds of the sale in satisfaction of the claim of the holder of the lien.[158] In sum, maritime liens are also maritime claims.

3.2.1. Traditional maritime liens

In the *Freiremar* case[159] it was said that, 'by virtue of the Colonial Court of Admiralty, 1890 some six maritime liens exist and are therefore recognised according to admiralty law, applicable in Namibia, namely those of (1) salvage, (2) collision damage, (3) seamen's wages, (4) bottomry, (5) master's wages and, (6) master's disbursements'. A few of these liens have been decided upon by our admiralty court and important principles have been laid down.

3.2.1.1. The salvage lien

Inherently, the admiralty court of Namibia has jurisdiction to decide over claims relating to salvage services rendered to ships on the high seas.[160] But by virtue of section 6 of the 1840 Act, the admiralty court has jurisdiction to decide all claims whatsoever in the nature of salvage for services rendered to any ship or sea-going vessel, whether such ship or vessel was on the high seas or within the territory of Namibia at the time the cause of action arose.

Section 9 of the 1861 Act further extended the jurisdiction of the admiralty court by extending some provisions of the Merchant Shipping Act of 1854 to admiralty jurisdiction.[161] The effect of this was to allow a salvor of life from a vessel to claim an award for salvage from the vessel and its cargo if these had also been salved.

[158] Hofmeyr (note 3 above) 148.
[159] Note 22 above.
[160] Dillon & Van Niekerk (note 11 above) 23.
[161] Sections 458 and 459 of the English Merchant Shipping Act of 1854.

Although the point was not decided, it seems that a maritime lien arose by implication.[162] Tetley maintains that salvage gives rise to a maritime lien and it attaches at the moment of the successful performance of the salvage services.[163] In sum, salvage gives rise to a maritime lien which can be enforced through an action in rem. The admiralty court has jurisdiction to hear such claims whether the cause arose on the high seas, within the body of Namibia or on its coastal waters.[164]

3.2.1.2. The Collision damage lien

The admiralty court of Namibia has jurisdiction to hear claims relating to damage caused by a ship to another ship. This is first derived from the original jurisdiction that the English admiralty court had, that is jurisdiction over claims in respect of damage done by a ship on the high seas.[165] In terms of the 1840 and 1861[166] Acts, the admiralty court has jurisdiction over 'any claim for damage done or received by a ship',[167] 'whether such ship or vessel may have been within [Namibia] or upon the high seas at the time when the damage [was] received'.[168]

Furthermore, section 13 of the 1861 Act provides that 'whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act, 1854'. Part 9 of the later Act concerned the liability of a shipowner[169] where any ship or vessel, or the proceeds thereof, are under the arrest of the admiralty court, and admiralty jurisdiction was conferred over claims for the limitation of liability, the determination of the amount of that liability and the rateable distribution of such amount among several claimants. Damage claims give rise to maritime liens, meaning that the consequences of a maritime lien discussed above apply here.

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[162] Hofmeyr (note 3 above) 7.
[163] Tetley (note 81 above) 136.
[164] See section 458 of the English Merchant Sipping Act, 1854 which gives right to property salvage in coastal waters.
[165] See Dillon & Van Niekerk (note 11 above) 22 and Hofmeyr (note 3 above) 6.
[166] Section 7 of the 1861 Act.
[167] A ship here means 'any description of vessel used in navigation not propelled by oars' in terms of section 2 of the 1861 Act.
[168] Section 6 of the 1840 Act.
[169] Section 514 of the Merchant Shipping Act, 1854.

3.2.1.3. The seamen's wages lien

The inherent jurisdiction of the admiralty court enabled it to decide on claims by seamen for their wages, but only if the seamen were employed on usual terms and not by special contract.[170] By virtue of section 10 of the 1861 Act, the admiralty court of Namibia has jurisdiction to decide over any claim by a seamen of any ship for wages provided those wages were earned by him/her on board the ship, and it does not matter whether the wages were due under a special contract or not. In the *Bourgwells case*[171] the High Court of Namibia exercised its admiralty jurisdiction in relation to seamen's wages. In that case, the vessel was attached pursuant to a writ of execution for the judgement debt. The debt was in respect of wages for a number of crew members of the vessel.

3.2.1.4. Master's wages lien

Jurisdiction over claims for master's wages and disbursements is exclusive to section10 of the 1861 Act. The admiralty court of Namibia can hear claims by the master of any ship for wages provided they were earned while on board the ship, and for disbursements provided they were made by the master on account of the ship.

3.2.1.5. Master's disbursement lien

Jurisdiction over claims for master's wages and disbursements is exclusive to section10 of the 1861 Act. The admiralty court of Namibia can hear claims by the master of any ship for wages provided they were earned while on board the ship, and for disbursements provided they were made by the master on account of the ship.

3.2.1.6. Bottomry

Jurisdiction over claims on bottomry and respondentia bonds is derived from the original jurisdiction of the English admiralty court. The admiralty court of Namibia has jurisdiction in respect of maritime hypothecation made in a foreign country, either of the ship, freight and/or

[170] Dillon & Van Niekerk (note 11 above) 24.
[171] Note 130 above.

cargo (bottomry) or the cargo alone (respondentia bond).[172] A maritime lien is conferred by a claim arising out of a bottomry or respondentia bond. The former is a contract similar to a mortgage of a ship, whereby the owner who borrows money in circumstances of necessity to enable the vessel to complete the voyage pledges the keel or bottom of the ship as security for repayment.[173] Respondentia is where the cargo is hypothecated. However, it has been authoritatively held that bottomry is now obsolete.[174]

3.2.2. Enforcement of maritime liens

Section 35 of the 1861 Act stipulates that 'the jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in persona'. This section read together with Rule 9 and 17 of the High Court Rules means that a maritime lien can be enforced through an action in rem or an action in personam.

3.3. Maritime claims

3.3.1 Towage claims

In *The Princess Alice*[175] towage was defined as 'the employment of one vessel to expedite the voyage of another, when nothing more is required than the acceleration of her progress.' Towage is a service rendered to another ship 'as a mere means of saving time or from considerations of convenience'[176] which can be claimed by the person rendering the service. Section 6 of the 1840 Act confers on the admiralty court jurisdiction over all claims whatsoever in the nature of towage. Though this is clear, it is not clear whether towage claims give rise to a maritime lien.

Before 1840, many English authorities granted a maritime lien for towage services because they assimilated towage to salvage, for which services on the high seas here had always been a maritime lien.[177] This meant that the admiralty court could exercise its jurisdiction only if

[172] Dillon & Van Niekerk (note 11 above) 24.
[173] Hofmeyr (note 3 above) 6.
[174] See *The Halcyon Isle* case above, 328.
[175] Note 91 above, 140.
[176] *The Flottbek* 118 F. 954 (9 Cir. 1902).
[177] Tetley (note 81 above) 304.

the towage constituted salvage.[178] However, there are other authorities that indicate that even simple towage on the high seas falls within the traditional admiralty jurisdiction.[179]

With the advent of the 1840 Act, through section 6, the admiralty court was granted jurisdiction over towage. In essence, towage was made a statutory right which a claimant can enforce through an action in rem for towage service rendered on the high seas or within the body of the country. This also meant that admiralty jurisdiction does not only exist where there is a maritime lien, but also where there is a statutory right.[180]

3.3.2. Ownership and possession

It was the inherent jurisdiction of the admiralty court to decide over claims to recover possession of ships,[181] in other words 'to restore ships to their true owners.'[182] This was obviously not enough to cover all questions of ownership of ships. Thus, section 4 of the 1840 Act extended the jurisdiction to include the power to 'decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry.' This means that the court not only has power to determine who the true owner of a ship is, but also has power to restore to him/her the ship. Furthermore, the court can also determine questions of ownership or title to proceeds of a sold ship or vessel provided such proceeds are in the custody of the admiralty marshal (sheriff), whether such arose from a salvage claim or any of the grounds for possession mentioned above.

The position was further changed by section 8 of the 1861 Act to include the power to 'decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in Namibia, or any share thereof. This was meant to carter for disputes between co-owners of a ship or vessel. Section 8 also enabled the court to settle all accounts outstanding, and unsettled between

[178] See *The Watage* (1856) Swab. 165, 167 where Dr. Lushington said that admiralty had no jurisdiction for towage.
[179] See *The Isabella* (1838) 3 Hagg. 427, *The Henrich Bjorn* (1886) 11 App. Cas. 270, 283 and *Westrup v Great Yarmouth Co* (1889) 42 Ch. D. 421.
[180] See *The Minerva* (1933) 46 Ll. L. Rep. 212, 216 where it was said that …'there are great many cases where there is a remedy in rem and there is no maritime lien where the jurisdiction of this court [admiralty division] is exercised.. by arresting the ship.'
[181] Dillon & Van Niekerk (note 11 above) 25.
[182] Hofmeyr (note 3 above) 7.

parties in relation thereto, and to direct the said ship or any share thereof to be sold, and to deal with the ship as it deems fit.

3.3.3. Mortgage claims

The ship mortgage is derived from the common law and not from the *lex maritima* or the *lex mercatoria*.[183] It arose when the bottomry bond became inadequate to carter for the needs of investors. Therefore, the mortgage of a ship emerged as a viable form of security on ships as it had become on the other chattels.[184] At first the admiralty court did not have jurisdiction over the ship mortgage. But in 1840, limited jurisdiction over mortgage was granted to admiralty by section 3 of the 1840 Act. Admiralty jurisdiction was limited to cases where the 'ship or vessel [is] under arrest by process issuing from the [court], or the proceeds thereof having been so arrested [is] brought into and be in the registry of the [court].'[185] In terms of section 11 of the 1861 Act, admiralty jurisdiction over the ship mortgage has been extended to include 'any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854,' whether the ship or the proceeds thereof be under arrest of the said court or not.'

The problem that remains, as reflected in *Banco Exterior De Espana SA & Another v Government of the Republic of Namibia & Another*,[186] is the question of recognition of foreign mortgage bonds as giving rights in terms of domestic law.[187] In this case, some Spanish fishing vessels, whose masters were convicted for contravening section 22A (4) of the Sea Fisheries Act of 1973, as amended, were declared forfeited to the state of Namibia in terms of section 17 (1) of the Sea Fisheries Act of 1973. The applicant banks, alleging that they held mortgage bonds over the vessels, sought (in effect) as against the respondents declarators recognising their bonds and, should the vessel be sold, that they be paid their capital and interest.[188]

The question was whether the word "right" refers only to legal rights which are recognisable and enforceable in Namibia, and which rights would give the holder thereof an indefeasible

[183] Tetley (note 81 above) 207.
[184] Ibid.
[185] Section 3 of the 1840 Act.
[186] 1996 NR 1 (HC).
[187] In this case, rights in terms of section 17 (1) of the Sea Fisheries Act 58 of 1973, as amended by the Territorial Sea and Exclusive Zone of Namibia Act 3 of 1990.
[188] Note 186 above, 2 B-D.

preference in the event of sale or disposal of the asset concerned, or whether it means any rights which a third party may have including rights in and arising from contracts entered and registered in a foreign country.[189]

It was held that the issue of mortgage (and/or liens) had to be decided according to the lex fori and following the law of Namibia, the applicant's mortgage gave no rights in Namibia. The court reasoned that the interpretation of the word "right" in section 17 (1) to include bonds registered in foreign countries would place foreigners in a substantially better position in Namibia than Namibians, or any person carrying on legitimate business in Namibia, or the state itself. Further, that if such foreign bonds were recognised, a foreign vessel could pirate Namibian waters fearlessly, because, in the event of its being forfeited, the Namibian state would derive no benefit from such forfeiture since the full value of the vessel, or an amount exceeding it could be due to the foreign bond holder.[190]

3.3.4. Necessaries

Tetley warns that the terms necessaries has a different meaning in each jurisdiction and that meaning has changed over time.[191] In Namibia, the issue arose in the *Namibian Ports Authorities* case.[192] The definitions referred to in that case indicate an inclination to the English definition of necessaries. Necessaries can therefore be understood to mean 'whatsoever the owner of a vessel, as prudent man, if present, would have ordered as being fit and proper for the service on which the vessel was engaged.'[193] Typical examples of necessaries are goods such as anchors and cables, provisions, crew's wages, ships charges, repairs and fuel.[194] Pilotage may also be considered to be necessaries,[195] as well as stevedoring services[196]. The position is not clear in Namibia. But it was indicated in *Green Fisheries Corporation v Lubrication Specialist (Pty) Ltd & another*[197] that necessaries

[189] Ibid, 7.
[190] Ibid, 2 D.
[191] Tetley (note 81 above) 233.
[192] Note 26 above.
[193] *The Riga* (1872) 26 LT 202.
[194] Hofmeyr (note 3 above) 8.
[195] See *Quick & Low & Moore Ltd v SS Almoural* 1982 (3) SA 406 (C) 411.
[196] Hofmeyr (note 3 above) 8.
[197] Note 131 above.

include "payments for supplies, salaries, insurances and repairs, so as to keep the vessel operational".[198]

Amidst the uncertainty, the Supreme Court of Namibia got the opportunity to decide on what constitute necessaries. This came as an appeal from the High Court in the *International Underwater sampling case*.[199] In terms of a contract entered into between the parties, MEP Systems (Pty) Ltd (respondents) delivered to the appellants equipment to be fitted to the vessel 'The Explorer' before it embarked on a voyage to the coast of Namibia where it was going to be used to undertake seabed mineral sampling. While in Namibia, an action in rem was instituted in the High Court and the vessel was arrested. IUS Ltd launched an application by notice of motion to have the summons in rem set aside, and the vessel released from arrest. In the High Court, the motion was dismissed and IUS Ltd appealed.

One of the issues on appeal was whether or not the equipment supplied by the respondent to the appellants and on which the summons in rem and the arrest of the vessel were premised were, in terms of admiralty law, necessaries.[200] The court cited the English case of *Webster v Seekamp*,[201] a decision before the 1840 and 1861 Acts, where it was said that:

> The general rule is, that the master may bind his owners for the necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is absolutely necessary. If, however, the jury are to enquire only what is necessary, there is no better rule to ascertain that, than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of the opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term "necessary," as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable.

According to the court, this was a common law doctrine and it was followed in many other cases. Urgency of the necessity, as argued by the appellant is not the determining factor; therefore, the fact that there was a six month period to deliver the equipment after payment of the deposit was irrelevant. The timing factor is to be reckoned at the point of need, and not at the point of usage of, the equipment.[202] In essence, the Supreme Court has ruled that the

[198] Ibid, 53.
[199] Note 68 above (the Supreme Court case).
[200] Ibid, 4.
[201] (1821) 4 Ban & Aldm 352 Vol.23 Revised Reports, 307.
[202] Ibid,24.

liberal and wide meaning of necessaries should be followed in defining necessaries in Namibia.

It was held in *Namibian Ports Authority* that in order to constitute necessaries, the service rendered must arise from an agreement with the owner or owner's agent and must relate to the provision of necessaries to enable the ship to prosecute its voyage. And in *Foong Tai & Co v Buchheister & Co*[203] it was held that not only a person who supplied necessaries but a person who paid for necessaries and a person who advanced money to enable such payment to be made had claims for necessaries, and such claims fell within the jurisdiction of the admiralty court.

Jurisdiction over claims for necessaries is derived from section 6 of the 1840 Act read together with section 4 and 5 of the 1861 Act. These sections enable the admiralty court of Namibia to decide over all claims whatsoever for necessaries supplied to any foreign ship or sea-going vessel,[204]and may be in the form of claims for the building, equipping, or repairing of any ship, if at the time of the time of the institution of the cause, the ship or proceeds thereof are under arrest of the court,[205] and to enforce payment thereof, whether such ship or vessel may have been within the body of the country, or upon the high seas at the time when the necessaries were furnished in respect of which such claim is made.[206]

Section 5 of the 1861 Act extended the jurisdiction of the court to include 'any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner of part owner of the ship is domiciled in Namibia.'

3.3.5. Claims relating to building, equipping, or repairing of ships

One of the sub-issues that arose in the *International Underwater Sampling case* above is whether or not the materials supplied to the appellants were equipments in terms of section 4

[203] [1908] AC 458 (PC).
[204] Section 6 of the 1840 Act.
[205] Section 4 of the 1861 Act.
[206] Section 6 of the 1841 Act.

of the 1861 Act or necessaries in terms of section 5 of the same Act.[207] Chomba AJA answered the question in the following terms:

> On a close perusal of the decided cases, which I have cited hereinbefore and which a variety of goods and services have been held to be necessaries, the impression I have derived therefrom is that there is no watertight compartmentalisation between goods and services dealt with in section 4 as against those in section 5 of the 1861 Act. Furthermore, the liberal and wider construction of the term "necessaries" is implicitly all inclusive. For instance it includes 'all necessary repairs done, and supplies provided to the ship'. It then goes on to and refers to 'whatever is fir and proper for the service on which the vessel is engaged'. It would appear therefore that the inclusion of an item of a hybrid nature in a claim for necessaries is not inevitably fatal to an action in rem for necessaries.[208]

3.3.6. Cargo claims

The Admiralty court of Namibia has a limited jurisdiction, derived from section 6 of the 1861 Act in respect of cargo claims. Due to the length of section 10, it will not be repeated here but the reader is referred to chapter 2, page 14 for the full text of the Act. It suffice to say that the general intent was to give an effect to the local merchant to whom goods were not delivered in accordance with the contract of carriage.[209]

In *The Ironsides*[210] it was held that proceedings in rem under section 6 (read with section 35) of the 1840 Act could only be taken against the ship in which the goods were carried into the jurisdiction. This liberal interpretation enjoys considerable support as it was approved by the Privy Council in *The Pieve Superiore*[211] and in *The Blanco*[212] where it was held that 'it is wholly unnecessary in order to found jurisdiction under the statute that the goods should be carried into [a Namibian port] for the purpose of delivery, or in pursuance of a contract.'[213] On this view, Hofmeyr concludes, 'it would be sufficient if the goods were purely fortuitously carried into the port, for example a port of refuge.'[214] It was further held that the breach or the cause of action did not have to arise before the goods were carried into the port in question.[215]

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[207] Note 68 above, 25.
[208] Ibid, 25-26.
[209] Hofmeyr (note 3 above) 9.
[210] (1862) Lush 458.
[211] (1874) 2 Aspinall 319 (PC).
[212] (1913) 12 Aspinall 399.
[213] Ibid, 401.
[214] Hofmeyr (note 3 above) 10.
[215] Ibid.

3.3.7. Pilotage

Pilotage refers to assistance by pilots to ships. For this reason, Pilotage was assimilated to salvage and sometimes pilots did salvage work.[216] Jurisdiction over Pilotage claims is apparently inherent. The early cases gave the admiralty court jurisdiction to hear claims for Pilotage fees[217] and extra Pilotage fees[218] against the ship. It is not clear what Pilotage is in Namibia, i.e. whether a maritime lien or a statutory right in rem since it was not provided for in the 1840, 1861 or 1890 Acts.

Other heads of jurisdiction that the admiralty court has jurisdiction over, as at 1890 are:

1. Booty of war;[219]
2. Fees and expenses of a receiver of wreck;[220]
3. Damage sustained by the owner or occupier of land used to facilitate the rendering of assistance to wreck;[221]
4. Damage done by a ship to a harbour, dock, pier, quay or works;[222]
5. Jurisdiction to enforce the admiralty court's original jurisdiction.[223]

[216] Tetley (note 81 above) 200.
[217] See *The Bee* (1822) 2 Dodds. 498.
[218] See *The Nelson* (1805) 6 C. Rob. 227.
[219] Section 22 of the 1840 Act.
[220] See Section 455 of the Merchant Shipping Act of 1854 which provides that the receiver shall, in respect of his fees and expenses, have the same rights and remedies as a salvor.
[221] See Section 446 of the Merchant Shipping Act of 1854 which provides that such damage shall be recoverable in the same manner as salvage.
[222] Section 74 of the Harbours, Piers and Docks Clauses Act of 1847 which provides that the owner of a ship which damages a harbour, dock, pier, quay or works is answerable for the damge done by a ship or any person employed about her.
[223] See Hofmeyr (note 3 above) 10-11 for a discussion of this.

Chapter Four The Development of Admiralty Jurisdiction in South Africa: A Comparative Analysis

As indicated in chapter 1, the law applied to maritime matters in South Africa is mainly English Law and civil in nature. Like Namibia, South Africa was affected by the passing of the 1890 Act which made English maritime law applicable in its colonies as at 1890, for which its laws remained static. It is for that reason, in addition to the historical political and legal background of the two sovereigns, that they are compared. At present, South Africa has extended its admiralty jurisdiction in the form of an Act of Parliament to be discussed below. The aim is to find out to what extent, compared to Namibia, has admiralty jurisdiction been extended in South Africa.

4.1. The lessons South Africa learnt

The first was on the sources of maritime law. Some authors, like Bamford, were of the opinion that South Africa has its own sources and that the application of English maritime law was unnecessary.[224] Bamford refers, in the first place, to the 'riches of Roman-Dutch law literature, produced by jurists as learned as law has ever known – and a time when their country was enjoying maritime pre-eminence' and, in the second place, to reports of hundreds of court cases fought during the formative years of South African maritime law.[225] Friedman rightly commented that those statements, in his view, presented a 'misleading view'. He said so because, much of what the Roman-Dutch writers of the seventeenth and eighteenth century "have little application, and cannot readily be adapted, to modern situations".[226] The same goes to the court cases referred to.

What was learnt here was that reliance on old authorities not completely fruitful, given the increase in shipping litigation due to a number of factors such as the closure of the Suez Canal in 1967.[227] The resultant consequence was an increase in the volume of ship traffic to

[224] See Friedman (note 11 above) 45.
[225] Ibid.
[226] Ibid.
[227] Ibid, 46.

South Africa, which further increased shipping work (repairs and insurance) and ultimately, shipping litigation. All these developments took the South African legal system, its lawyers and its courts by surprise. But, apparently, it became clear to the world that litigating in South African courts was advantageous.[228] As a result, a number of lawyers began to take an interest in maritime law, and a few universities began offering it as a compulsory subject.[229] What followed then was a transformation of the legal system and profession to fit the practice of maritime law and this when the second lesson was learnt – which is that "the law is not something which is easily categorised, many basic principles are common to many branches of the law",[230] and maritime law is no exception.

The legal profession began to cope well with the problems of substantive law associated with the increase in cases of a maritime nature, but they discovered "deficiencies and anomalies in [their] procedural law".[231] One of the problems that arose was the conflict between Roman-Dutch law and admiralty law,[232] and the other is whether or not the Colonial Courts of Admiralty Act of 1890, an enactment of the British Parliament, had survived in South Africa after the advent of the Republic.[233] With those problems in mind, Mr Douglas Shaw QC initiated the reform process. The Maritime Law Association of South Arica was also formed to keep in contact with its counterparts in other countries on the subject and to make representations to the relevant authorities with regard to possible legislative amendments affecting marine and shipping law.[234]

With all those efforts, the South African Admiralty Jurisdiction Regulation Act 105 of 1983 was enacted and came into operation on 1 November 1983, repealing in its entirety the Colonial Courts of Admiralty Act and sought to prescribe the admiralty powers to be exercise by South African Provincial and Local Divisions.

Undoubtedly, Namibia has gone through, if not more by now, the same problems as South Africa but the lessons have not been learnt yet. Pronouncements have been made in some cases that our maritime law providing for admiralty jurisdiction is outdated, but nothing has been done to reform it.

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[228] Ibid, 47.
[229] Ibid, 48.
[230] Ibid.
[231] Ibid, 50.
[232] See Forsyth (note 59 above).
[233] Freidman (note 11 above) 52.
[234] Ibid, 53-54.

4.2. The South African Admiralty Jurisdiction Regulation Act of 1983

According to the preamble, the act was enacted to:

> provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court of South Africa [now the High Court], and for the extension of those powers; for the law to be applied by, and the procedure applicable in, those division; for the repeal of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, in so far as it applies in relation to the Republic; and for incidental matters.

Clearly, the Act is cast in wide parameters, as stated in *Katagum Wholesale Commodities Co Ltd v The MV Paz*[235] 'it contains a number of sections with novel, unusual and at times far-reaching provisions with which our courts will be required, at some times in the future, to deal". And as Friedman describes it, "it is, what is more, a measure that has a realistic regard, first, to the need for the expeditious handling of maritime work and, secondly, to the ever shrinking world of international trade in shipping matters".[236] This is indeed what maritime law in general, and admiralty jurisdiction in particular calls for.[237]

Section 2 of the Act provides for the admiralty jurisdiction of the Supreme Court. in terms of that section, 'each provincial and local division of the Supreme Court shall have admiralty jurisdiction to hear and determine any maritime claim (including in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.'[238] Furthermore, subsection 2 defines the area of jurisdiction of the admiralty court to include "that portion of the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction."

Having defined the geographical parameters of the court's jurisdiction, the act confers a *numerus clausus* of heads of jurisdiction in section 1. But what is defined there as 'maritime claims' also include:

> Any matter not falling under any of the previous paragraphs in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict c 27), of the United Kingdom, was empowered to exercise admiralty jurisdiction

[235] 1984 (3) SA 261(N), 263A.
[236] Friedman (note 11 above) 54.
[237] See Forsyth (note 59 above) 255-257.
[238] Section 2 (1).

> immediately before the commencement of this Act, or any matter in respect of which a court of the Republic is empowered to exercise admiralty jurisdiction;[239]
>
> Any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs.[240]

The effect of ss (dd) is to give a general meaning to the term maritime claim while ss (ee) is to the effect that the South African admiralty court has jurisdiction limited only by the requirement that the claim be by its nature or subject matter, marine or maritime.[241]

In determining those matters, section 6 provides for the law that should be applied. The South African courts have interpreted that section many ways but according to Staniland, it essentially mean that the admiralty court shall apply the law which the High Court of Justice of the UK would have applied in those matters a court of admiralty of the Republic referred to in the 1890 Act had jurisdictions, in so far as that law can be applied, with regard to any other matter, Roman-Dutch law shall be applied.[242] In addition to that the section also means that:[243]

- Appropriate South African statute will prevail.[244]
- Choice of law terms will be upheld.[245]

Now looking at the 1840, 1861 and 1890 Acts above, there are new maritime claims introduced by the 1983 Act. Hare reviews the old English jurisdiction as at November 1983[246] and gives the novel South African jurisdiction.[247] From that, the following, among others, appear to be the new heads of jurisdiction that were not in the three Acts under discussion:

1. Marine insurance. It was not covered by the English Admiralty Acts and marine insurance matters were adjudicated at common law in England.[248]
2. The carriage of goods in a ship, or any agreement for or relating to such carriage.[249]

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[239] Section 1 (1) (dd).
[240] Section 1 (1) (ee).
[241] Hare (note 1 above) 44.
[242] Staniland, H 'What Is The Law To Be Applied To Charterparty Disputes? (1992) Vol. unkwnown III, 528, 529.
[243] See Hare (note 1 above) 18.
[244] Section 6 (2).
[245] Section 6 (5).
[246] Hare (note 1 above) 25.
[247] Ibid, 26-27.
[248] Ibid, 27. See section 1 (1) (u).

3. Any container and any agreement relating to any container.[250]
4. Charter party or the use, hire, employment or operation of a ship, whether such claim arises out of any agreement or otherwise.[251]
5. The forfeiture of any ship or any goods carried therein or the restoration of any ship or such goods forfeited.[252]
6. Piracy, sabotage or terrorism relating to property mentioned in section 3 (5), or to persons on any ship.[253]
7. Pollution of the sea or the sea-shore by oil or any other substance on or emanating from a ship.[254]
8. Ancillary maritime claims such as judgements and arbitration awards,[255] contribution, indemnity, damages or security,[256] and wrongful arrest.[257]

While that list is not exhaustive, some maritime claims provided for in the English Admiralty Acts were extended:

1. **Ownership and possession:** in terms of sections 1 (a), (b), and (c) of the 1983 Act, the admiralty court has jurisdiction to decide any claims relating to the ownership of a ship or to the shares of a ship. According to Hare, this jurisdiction would include the disputes of co-owners relating not only to ownership issues, but also to possession, sale, delivery, employment or earnings of a ship.[258] This has done away with the "complex formula" envisaged by section 4 of the 1840 Act.[259]
2. **Mortgages and other like charges:** in terms of section 1 (d) mortgages, hypothecation, right of retention, pledge, and bottomry or respondentia bonds fall under the jurisdiction of the admiralty court. With regard to mortgages, it does not matter anymore whether it was registered or not, or whether it was foreign, registered or not. Thus, unlike in Namibia, [260] South Africa gives effect to foreign mortgages.

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[249] Section 1 (1) (h).
[250] Section 1 (1) (i).
[251] Section 1 (1) (j).
[252] Section 1 (1) (v).
[253] Section 1 (1) (cc).
[254] Section 1 (1) (z).
[255] Section 1 (1) (aa).
[256] Section 1 (1) (ff).
[257] Section 1 (1) bb).
[258] Hare (note 1 above) 47.
[259] Ibid.
[260] See *Banco Exterio Espana SA & Another v Government Republic of Namibia & another* where it was held that a foreign mortgage gives no right whatsoever in Namibia.

3. **Necessaries claims:** in terms of section 1 (m), (n) and (o), necessaries are given a broad meaning. All manner of necessary goods and services for the employment, protection or preservation of a ship, made by a person or by another on his behalf is sufficient to constitute a necessaries claim.
4. **Shipbuilding and repair:** in Namibia, there is a big confusion as to whether there is a difference between necessaries as provided for in section 5 of the 1861 Act and claims relating to building, equipping, or repairing of ships under section 4 of that Act. It was held in *International Underwater Sampling* that "there is no watertight compartmentalisation between goods and services dealt with in section4 as against those in section 5. But in South Africa, section 1 (q) of their Act creates the design, construction, repair or equipment of any ship as a maritime claim.

Furthermore, though not changing the *numerus clausus* of the six maritime liens recognised in English law,[261] the 1983 Act was cast in a language that the scope of jurisdiction of the court over some of the liens was extended:[262]

1. **The damage lien:** while the 1861 Act uses the words 'damage done by a ship', section 1 (1) (e) refers to "damage caused by or to a ship, whether by collision or otherwise.[263] The damage lien thus covers damage done by a ship, whether or not such damage resulted from the actual physical contact and whether or not such damage is in the form of damage to property or personal injury.[264] All the claimant has to prove is that the ship was the instrument of damage and such damage was caused by a breach of duty on the part of those in control of the ship.
2. **The master's disbursement lien:** section 10 of the 1861 Act conferred jurisdiction in respect of any claim by the master of any ship or disbursement by him on account of the ship. This was extended by section 1 (1) (o) to include disbursement claims made by a shipper, charterer, agent or any other person.
3. **The salvage lien:** section 6 of the 1840 Act confers jurisdiction over salvage rendered to any ship not only on the high seas but also within the body of a country. In terms of section 9 of the 1861 Act, this included life salvage. The 1983 Act significantly increased the jurisdiction of the court by firstly, including salvage claims under the Wreck and Salvage Act 94 of 1996, which incorporates the International Convention

[261] See *Freiremar case* where the court mentioned those liens.
[262] See Hofmeyr (note 3 above) 151.
[263] This was adopted from the International Convention Relating to the Arrest of Seagoing Ships of 1952.
[264] Hofmeyr (note 3 above) 156.

of Salvage of 1989. Therefore, to the extent English law is silent on salvage, the former Act will apply.

4.3 Evaluation

It is obvious that our admiralty jurisdiction as provided by the 1890 is limited and insufficient to cater for the needs of a coastal state that Namibia is. South Africans on the other hand realised the need for reform in the field of maritime law as early as the 80s. Dillon & Van Niekerk gives reasons why reform was in need; firstly, that there [was] a problem of conflict between the admiralty courts, applying admiralty law, and the ordinary courts, applying Roman-Dutch law, and secondly, it [was] totally unsatisfactory that South African admiralty law and jurisdiction be tied to the jurisdiction and law of the English admiralty court as it stood in 1890. [265]

Hofmeyr specifically mentions that 'Australia, Namibia and the Republic (prior to the passing of the 1983 Act) were the only countries that continued to apply the limited jurisdiction conferred by the Colonial Courts of Admiralty Act 1890.'[266] He further writes, 'the system in this country of two separate jurisdictions applicable to the same subject matter but applying different law was clearly unsatisfactory'[267] and thus concludes 'the need to reform was obvious, namely, to provide for the extension of admiralty jurisdiction in the Republic to all truly maritime matters, to provide that such jurisdiction be exclusive and to provide for the law to be applied to the extended jurisdiction conferred.'[268]

The result of this hard work, which can be largely attributed to Douglas Shaw QC,[269] paid off in the form of an Act of Parliament discussed above. This Act repealed in its entirety the 1890 Act and conferred unlimited jurisdiction on the High Court of South Africa. Namibia faces the same problems that South Africa faced, therefore, the lesson must be learnt.

Namibia has been independent for 21 years now but nothing has been done to address this appalling situation. It is up to our lawmakers, and the legal fraternity at large, to come up

[265] Dillon & Van Niekerk (note 11 above) 27.
[266] Hofmeyr (note 3 above) 11.
[267] Ibid.
[268] Ibid.
[269] See Friedman (note 11 above) 52.

with real projects to reform maritime law in Namibia. Guidance can be sought from the South African situation as well as international conventions on maritime law.

Chapter Five Conclusions and Recommendations

5.1. The lacunae in our law

The 1890 Act and its sister Acts are the main jurisdictional statutes that provide for admiralty jurisdiction in Namibia. By virtue of Article 140 of Constitution of Namibia, the 1890 Act shall remain in force until it is repealed by an Act of Parliament or declared unconstitutional by a competent court. This means that our admiralty court will continue to apply the limited jurisdiction conferred by the 1890 Act,[270] until that point of realisation which will result to some action by our lawmakers to repeal the said Act.

This is not a favourable situation at all. As seen in Chapter 1,[271] there is enough shipping activity in Namibia that can bring about thousands of legal problems of a maritime nature. But for the fact that our admiralty court can only exercise limited jurisdiction, as illustrated in Chapter 2 and 3, these problems will not be given the full consideration they deserve and Namibian citizens finding themselves in such disputes will be prejudiced.

5.1.1. Admiralty jurisdiction jurisprudence

The first admiralty case that is of interest is the *Freiremar case*[272] where it was stated that there are only six maritime claims by virtue of the 1890 Act. In South Africa, it has also been stated in a number of cases that there is a settled and closed list of maritime liens. In *Oriental Commercial and Shipping Co Ltd v MV Fidas*[273] Nienaber J stated there are maritime liens for salvage, collision damage, seamen's wages, bottomry, master's wages and master's disbursement. The same maritime liens were mentioned in the *Freiremar case* but the situation is not completely the same with South Africa as they have extended the scope of their admiralty court's jurisdiction in respect of the salvage lien, the master's disbursement lien and the salvage lien.[274] Sadly, admiralty jurisdiction in respect of all liens recognised in Namibia still remains as it was in 1890.

[270] See Hofmeyr (note 3 above) 11.
[271] See 1.3 at page 6 of this dissertation.
[272] Note 22 above.
[273] 1986 (1) SA 714 (D), 715F-G.
[274] Hofmeyr (note 3 above) 151-166.

Following the English categorisation of maritime liens, one can say that waters are not settled on the question of recognition of foreign maritime liens in Namibia. The leading English case is the *Halcyon Isle*[275] where majority of the Privy Council decided that in such cases, the lex fori must be applied. In Namibia, that issue arose in the *Banco Exterior Espana SA case* [276] and the High Court of Namibia held that the issue of foreign liens must be decided according to the lex fori and ruled that foreign liens or mortgages gives no right whatsoever in Namibia.[277] In South Africa, there has been conflicting decisions on that subject. In *Southern Steamship Agency Inc & another v MV Khalij Sky*[278] the court followed the minority decision in the Halcyon Isle while in *Transol Bunker BV v Andrico Unity*[279] the court followed the majority decision of the Privy Council. In 1989, the latter case came before the Appellant Division and it upheld the decision of the court a quo.

While the issue of recognition of foreign maritime liens remains debatable in Namibia and South Africa, recognition of foreign mortgages was settled by the 1983 Act in South Africa. In terms of their section 1 (1) (d), foreign mortgages, whether registered or not are recognised. This is a step forward in the direction of recognition of foreign maritime liens, as such would not flood the courts with bizarre claims.[280]

The question which remains is whether there can be a closed list of maritime liens. The orthodox view is that there is and it has been supported by a number of authorities in SA.[281] However, Staniland is of the view that there is no such thing as there is actually no list of six maritime liens in English law; instead, there are established liens and uncertain liens.[282] He argues that there are, in English law, maritime liens for pilotage, loss of life, personal injury and damage done by a ship in the form of pollution. To the Namibian lawmaker, these are some of the things that should be taken into consideration when attempting to reform our maritime law.

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[275] Note 63 above.
[276] Note 186 above.
[277] See Chapter 3, 3.3.3 at p 35-37.
[278] 1986 (1) SA 485 (C).
[279] Note 63 above.
[280] See Staniland, H 'Should Foreign Maritime Liens Be Recognised?' (1991) 108 II *SALJ*, 293, 305.
[281] *Southern Steamship Agency & another v MV Khalij Sky*, *Transol Bunker BV v MV Andrico Unity* and *Oriental Commercial and Shipping Co Ltd v MV Fidas.*
[282] Staniland (note 280 above) 299-300.

The second case relates to necessaries, and that is the case of *International Underwater Sampling v MEP Systems (Pty) Ltd*.[283] In this case the court did not find it necessary to distinguish between materials supplied in terms of section 4 and those supplied in terms of section 5 of the 1861 Act. The Supreme Court laid down a rule that there is no difference. With respect, I am more inclined to disagree with the finding of the court. I agree, rather, with the argument of the appellant when they argued that:[284]

1. The court a quo gave the term necessaries was given an anachronistic interpretation;
2. The goods wherewith the case was concerned was concerned were for equipping the vessel in terms of section 4 and therefore not necessaries as provided for in section 5;and
3. In their heads of arguments, that "to consider the claim in casu as a necessaries claim would make nonsense of the distinction drawn in the English Admiralty Act, 1861 in sections 4 and 5"and that, "if all claims for equipping of a ship were to be considered as necessaries claims, the distinction drawn between the heads of jurisdiction in sections 4 and 5 would not have been made."

Following the development of admiralty jurisdiction in South Africa, one can see that it is necessary to distinguish between the two. Thus, such distinction was made in the 1983 Act. However, the confusion is still there so the nature of the work must be closely examined. In the *Nautilus*[285] the court decided that a substantial retif was not construction within the meaning of section 1 (1) (q), but that it was rather repair as envisaged by the sub-section or one for the supply of goods or the rendering of services to the ship as intended by section 1 (1) (m).

In *Kandangasabathy v MV Melina Tsiris*[286] the nature of admiralty jurisdiction was described to the effect that it should not be limited in terms of territory, subject matter or the nationality of the parties to the dispute. This is also supported by the *International Underwater Samplig case* where the first appellant was a limited company registered office in the Bahamas, and was the owner of the second appellant ("The Explorer"), which flew a flag of St. Vincent and the Grenadines, while the cause of action occurred in Singapore. The respondent, MEP

[283] Note 68 above.
[284] Ibid, 16.
[285] 1994 (2) SA 528 (C).
[286] Note 66 above, 952.

Systems Pte Ltd (MEP Pte 2 Ltd), was a private company registered office in Singapore. The court exercised it admiralty jurisdiction over a claim for necessaries in terms of the admiralty Acts.

However, admiralty jurisdiction as provided by the 1890 Act is limited geographically in some cases. Thus in *Banco Exterior De Espana SA & Another v Government of the Republic of Namibia & Another* [287] where one of the issues concerned the recognition of foreign mortgage bonds concluded in a foreign country. It was held that, following Namibian law, the applicant's mortgage would give them no rights whatsoever in Namibia.[288] Essentially, this means that foreign mortgages cannot be enforced in Namibia.

5.1.2. Court Procedure

Launching proceedings in the admiralty court can either be in rem or in personam.[289] However, the Acts[290] did not define proceedings in rem or in personam. The matter was left for interpretation. In Namibia, the matter has been discussed in a number of cases and the following has emerged:

An action in personam is when a person (owner or interested party in the ship) is sued personally to recover a sum of money resulting from a cause committed by or on the ship. In *Green Fisheries Corporation v Lubrication Specialist (Pty) Ltd*[291] an action in rem was brought on the basis of rules 29 and 30 of the Vice Admiralty Court Rules. The court, in refusing the action in rem, indicated that 'the applicant and first respondent's claims are claims in personam. If the order to sell the vessel is set is set aside, both will equally be able to sue and attempt to recover their indebtedness against Epapa Fishing (Pty) Ltd as the contracting party, to whom the necessaries were supplied and delivered.'[292]

At 1890, admiralty practice in England did not include attachment of property of a defendant to found or confirm jurisdiction.[293] This was a common law concept peculiar to admiralty. Therefore, if the defendant could not be found and served, the claimant could not successfully

[287] Note 186 above.
[288] Ibid, 2.
[289] Section 35 of the 1890 Act read together with rule 9 and 17 of the High court Rules.
[290] The 1840, 1861 and 1890 Acts.
[291] Note 131 above.
[292] Ibid, 53.
[293] Hofmeyr (note 3 above) 98.

proceed with an action against him/her. This is still the situation in Namibia. Fortunately, Rule 9 of the High Court Rules enables one to attach and a defendant's property to found or confirm jurisdiction.

In South Africa, this confusion has been cleared. Section 3 (2) of the 1983 Act has introduced the common law concept of attachment to admiralty.[294] Furthermore, proceedings can be brought against a person who has consented or submitted to the jurisdiction of the court.[295]

The only recourse that remains for the Namibian claimant is the action in rem. But even with that action, it was held in the *Green Fisheries case*[296] above that 'an action in rem could only be founded on a vessel registered outside the country.' And since 'the vessel was registered in Namibia and the owner or part owners were registered in Namibia, and no allegation was made that the necessaries were supplied outside Namibia, [the] supply of necessities did not constitute act action in rem.'[297]

5.2. Conclusion

Admiralty jurisdiction in Namibia as provided by the 1890 Act and its concomitant authorities is so limited that it does not address the practical reality of shipping as described by Forsyth;[298] that shipping problems are international in nature and that they arise far away from the home courts. Our admiralty jurisdiction rules are not liberal enough to ensure that:

- Obligations duly incurred in other ports are not evaded by the perpetrator's trickery; and
- Namibia, a coastal state, is a suitable or a potential forum for settling maritime matters. This will lead to underdevelopment of our maritime jurisprudence and a state of inertness.

Furthermore, the limited admiralty jurisdiction cripples the administration of justice in general, and the handling of Namibia's maritime affairs. This in turn will disadvantage Namibians who find themselves in maritime related disputes and also make Namibia

[294] Section 3 (2) (b).
[295] Section 3 (2) (c).
[296] Note 131 above, 50.
[297] Ibid, 53.
[298] See Chapter 2 page 11 of this paper.

vulnerable to piracy, sabotage, terrorism, pollution as well as exploitation of marine resources. As indicated throughout the paper, our admiralty jurisdiction is like a blanket with holes that lets all the cold air in, freezing the little guy under it.

5.3. Recommendations

Namibia is the only country still applying the limited jurisdiction conferred by the 1890 Act. Australia, South Africa and England have extended their admiralty jurisdictions. In doing so, they followed a number of international conventions on maritime law to reform their laws and provide for unlimited admiralty jurisdiction for their courts.

Namibia has so far enjoyed 21 years of independence and 121 years have passed since the Act providing for admiralty jurisdiction was passed. Law reform is thus overdue. My recommendation is that we come up with a bill on admiralty jurisdiction modelled on the South African Act of 1983, taking into account the various international conventions that Namibia are party to. This bill must be all inclusive and not only focused on clarifying the jurisdiction of the courts but maritime law in general.

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