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GENERAL NOTICE

NOTICE 306 OF 2009

DEPARTMENT OF TRANSPORT

MERCHANT SHIPPING ACT, 1951 (ACT No. 57 of 1951)

Draft Merchant Shipping Amendment Bill

Draft Merchant Shipping (Courts of Marine Enquiry Amendment) Regulations

The Minister of Transport intends to make the Regulations in the Schedule under section 356 of the Merchant Shipping Act, (Act No. 57 of 1951).

Interested persons are invited to submit their written comments on these regulations to:

Director General: Transport
Department of Transport
Private Bag X 193
Pretoria
0001

For the attention of Mr. Terrence Mabuella

Tel: 012 309 3070, Fax 012 309 3124, E-mail: mabuelaf@dot.gov.za

Closing date: 30 April 2009

MR. JEFF RADEBE, MP
MINISTER OF TRANSPORT

REPUBLIC OF SOUTH AFRICA

DRAFT MERCHANT SHIPPING AMENDMENT BILL

*(As introduced in the National Assembly as a section 75
Bill)*

(The English text is the official text of the Bill)

(MINISTER OF TRANSPORT)

[B —2009]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the **Merchant Shipping Act, 57 of 1951**, so as to rectify the lacunae and to enhance the effectiveness of various procedures and processes in the **Merchant Shipping Act, 57 of 1951**.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 9 of Act 57 of 1951

1. Section 9 of the Merchant Shipping Act, 57 of 1951 (hereinafter called the principal Act) is amended—

(a) by the insertion after subparagraph (vii) of the following subparagraphs:

- (viii) direct any person not to destroy, amend or in any way alter the content or appearance of any document or other item of evidence;
- (ix) require any person who is not usually resident in the Republic and who may be required to attend as a witness at a preliminary enquiry or a court of marine enquiry to sign an undertaking in the prescribed form that he will return to the Republic to give evidence at such preliminary enquiry or court of marine enquiry;
- (x) in addition, or as an alternative to the power provided in sub-section (ix), take steps to prevent any person referred to in that sub-section from leaving the Republic until he has provided security in an amount and form to be determined by the Authority, but such amount not to exceed R1 000 000.
- (xi) in the event of the person referred to in sub-section (ix) being unable to furnish the security required by the Authority, take steps to prevent the sailing of any ship on which such person has been serving until the owner or

operator of such ship has established security to the satisfaction of the Authority to cover the living expenses of such person whilst he remains in South Africa.”; and

(b) by the insertion after subsection (2) (e) of the following paragraphs:

(f) directed in terms of paragraph (viii) of subsection (1) not to destroy, amend or in any way alter the content or appearance of any document or other item of evidence shall take all such steps as are reasonable and necessary to preserve such document or item of evidence;

(g) required to sign an undertaking contemplated in paragraph (ix) of subsection (1) shall sign such undertaking in the prescribed form;

(h) who has signed an undertaking contemplated in paragraph (ix) or provided security as contemplated in paragraph (x) of subsection (1) shall, if subsequently requested to attend a preliminary enquiry or a court of marine enquiry, and whose reasonable expenses have been paid or offered to him in respect of such preliminary enquiry or court of marine enquiry, attend at the time and place specified, or make himself available to give evidence, whether in person or on commission or by such other means directed by the officer presiding over the preliminary hearing or court of marine enquiry and remain in attendance or available until excused by the officer.

or other person or court from further attendance or remaining available;

(i) who has been required to establish security in terms of paragraph (x) of subsection (1), shall provide such security which:

(i) shall, if it is in cash, be held in an interest bearing account by the Authority and earn interest for the benefit of the person who has deposited such security;

(ii) may be forfeited to the Authority should the person fail to comply with his obligations in terms of paragraph (h) of sub-section (2);

(iii) shall be paid into the Maritime Fund in the event of the occurrence contemplated in sub-paragraph (ii) hereof;

(iv) shall be returned to such person together with any applicable interest should he return to the Republic as contemplated in sub-section (ix).

(j) who has been required to establish security in terms of paragraph (xi) of subsection (1), shall provide such security which:

(i) shall, if it is in cash, be held in an interest bearing account by the Authority and earn interest for the benefit of the person who has deposited such security;

- (ii) may be used by the Authority to cover any living expenses of such person;
- (iii) shall be returned to the person who provided the security, together with any applicable interest and after using so much as necessary pursuant to sub-paragraph bb. as soon as the preliminary enquiry or court of marine enquiry has commenced its first sitting.".

Insertion of section 9A of Act 57 of 1951

2. The following section is inserted in the principal Act after section 9 (5) (f) (ii):

"Preservation of evidence

- 9A.** (1) Following an accident involving a South African ship which is reportable under section 259, the persons mentioned in paragraph (3) shall so far as is practicable ensure that all—
- (a) charts;
 - (b) log books;
 - (c) electronic and magnetic recording and video tapes, including information from a voyage data recorder or any other recording system whatsoever relating to all relevant periods preceding, during and after the accident, but in any event including periods of

no less than 6 hours preceding and after the accident; and

(d) all documents or other records which might reasonably be considered pertinent to the accident, are kept and that no alteration is made to any recordings or entries in them.

(2) In the case of an accident involving a South African ship, the persons mentioned in paragraph (3) shall also ensure that—

(a) all information from a voyage data recorder or any other recording system whatsoever relating to the circumstances of an accident is saved and preserved, in particular by taking steps, where necessary, to prevent such information from being overwritten; and

(b) any other equipment which might reasonably be considered pertinent to the investigation of the accident is so far as practicable left undisturbed.

(3) The persons referred to in paragraphs (1) and (2) are—

(a) the master or, if he has not survived, the senior surviving deck officer (as defined in the Safe Manning Regulations 1999), and

(b) the ship's owner, unless he has ascertained to his satisfaction that the master or senior surviving officer has taken the action in question.

- (4) The duty under paragraph (1) to ensure that documents, information or records are kept and not altered and to ensure under paragraph (2) that information is saved and preserved, or that equipment is left undisturbed, shall continue until—
- (a) notification is received from the Authority, proper officer or surveyor that no investigation is to take place or that the investigation has been completed;
- (b) the Authority or a proper officer or surveyor carrying out the investigation gives written notification that he no longer requires them.
- (5) Following an accident in South African waters involving a ship which is not a South African ship, the persons mentioned in paragraph (3) shall comply with the requirements of paragraphs (1) and (2) if directed to do so by or on behalf of a proper officer or surveyor in terms of sub-section (viii) of paragraph (1) of section 9.
- (6) A proper officer or surveyor may, pending investigation, prohibit persons from gaining access to, or interfering with, any ship, ship's boat or other equipment involved in an accident.
- (7) A proper officer or surveyor may take into his possession original documents referred to in paragraph (1) and retain same as long as a vessel is detained by the Authority and may make copies of and retain any document referred to in paragraph (1)

and, subject to any applicable rules of evidence, tender same in evidence at any preliminary enquiry, court of marine enquiry or maritime court which may be convened in terms of this Act.”.

Amendment of section 269 of Act 57 of 1951, as amended by section 49 of Act 40 of 1963, substituted by section 23 of Act 42 of 1969, amended by section 4 of Act 24 of 1974 and substituted by section 19 of Act 18 of 1992

3. Section 269 of the principal Act is amended by substitution for subsection (1) and (2) of the following paragraphs:

“Powers of court of marine enquiry in respect of master, member of crew or owner

269. (1) If a court of marine enquiry finds that any master or member of the crew is incompetent or has been guilty of any act of misconduct, or that loss, abandonment or stranding of or serious damage to any ship or loss of life or serious injury to any person has been caused by the wrongful act or default of any master **[or]** member of the crew or that the actions or omissions of any owner of any ship have in any way contributed directly or indirectly to such loss, abandonment or stranding of or serious damage to any ship or loss of life or serious injury to any person, it may, subject to the provisions of section 283, cancel the certificate of competency or service of the master or member of the crew or suspend it for a stated period or, whether or not the master or member of the crew

holds a certificate of competency or service, prohibit his employment in any stated capacity in a ship for a stated period or impose a fine not exceeding [R2 000]

R20 000 upon him or reprimand him or impose a fine not exceeding R1 000 000 upon the owner of the ship or reprimand the owner.

- (2) Subsection (1) shall apply in respect of masters or members of the crew or owners of all ships which are registered or licensed in the Republic or which are in terms of this Act required to be so licensed, and in respect of masters or members of the crew of ships registered in a country other than the Republic only if those ships are wholly engaged in plying between ports in the Republic or in respect of owners of ships registered in a country other than the Republic if such owners are resident or have a principal place of business within the Republic.”.

Insertion of section 269 (3), (4) and (5) in Act 57 of 1951

4. The following subsections are inserted in the principal Act after subsection (2):

“(3) Any obligation or sanction imposed by this section or section 270 upon any owner of a ship shall be imposed also upon any person (other than the owner) who is responsible for the fault of the ship; and in any case where, by virtue of any charter or lease, or for any other reason, the owner is not responsible for the navigation and management of the ship, this section and section

270 shall be construed to impose any such obligation or sanction upon the charterer or other person for the time being so responsible, and not upon the owner.

(4) For the purposes of this section and of section 270, the word "owner" in relation to a ship shall include any bareboat or other charterer, any person interested in or in possession of such ship, and a manager or operator of such ship.

(5) The powers vested in a court of marine enquiry pursuant to this section shall in no way vest that court of marine enquiry with criminal jurisdiction."

Amendment of section 270 of Act 57 of 1951

5. Section 270 of the principal Act is amended by substitution for paragraph (e) of the following paragraph:

"(e) any loss of life or any serious injury to any person has occurred on board a South African ship at or near that place[,] ; or".

Insertion of section 270 (f) in Act 57 of 1951

6. The following paragraph is inserted in the principal Act after paragraph (e):

"(f) any allegation is made to him that the actions or omissions of any owner of any ship have in any way contributed directly or indirectly to such loss, abandonment or stranding of or serious damage to any ship or loss of life or serious injury to any person,"

Amendment of section 273 (b) of Act 57 of 1951, as substituted by section 24 of Act 42 of 1969, and by section 5 of Act 24 of 1974

7. Section 273 of the principal Act is amended by substitution for paragraph (b) of the following paragraph:

“(b) if unanimous that any master or ship’s officer of a South African ship is incompetent or has been guilty of any act of misconduct, or that loss, abandonment or stranding of or serious damage to any ship or loss of life or serious injury to any person has been caused by the wrongful act or default of any master or ship’s officer or owner of a South African ship, suspend the certificate of competency or service of that master or ship’s officer for a stated period, or, whether or not the master or ship’s officer holds a certificate of competency or service, prohibit his employment in any stated capacity in a ship for a stated period or reprimand him[.] or reprimand the owner, as the case may be;”.

Amendment of section 283 of Act 57 of 1951, as substituted by section 25 (b) of Act 42 of 1969, and by section 20 of Act 18 of 1992

8. Section 283 of the principal Act is amended—

(a) by the substitution for subsection (1) of the following paragraph:

“(1) If at an investigation by a court of marine enquiry or a maritime court it is alleged or suggested that the conduct of any person has amounted to **[a punishable]** an act or omission which is punishable under any of the provisions

of this Act, that person shall be given a reasonable opportunity for making a defence.”; and

- (b) by the substitution for subsection (2) and subsection (2) (a) of the following paragraphs:

“(2) A court of marine enquiry shall not cancel or suspend a certificate or prohibit the employment of a person or impose a fine upon him or reprimand him, or impose a fine upon or reprimand the owner of a ship and a maritime court shall not suspend a certificate or prohibit the employment of a person or reprimand him or reprimand the owner of a ship—

- (a) unless the holder of the certificate or other person or owner of the ship has been present at the hearing of any evidence on which the decision of the court to cancel or suspend his certificate or to prohibit his employment or to impose a fine upon him or to reprimand him is based, or, if he has not been so present, unless a transcript of the notes of such evidence has been furnished to him at least 48 hours before he is called upon to make his defence; and”.

Short title and commencement

9. This Act is called the Merchant Shipping Amendment Act, 2009, and commences on a day fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE MERCHANT SHIPPING AMENDMENT BILL

1. This Bill amends the Merchant Shipping Act 57, 1951 (Act No. 7 of 1951). The Bill's purpose is to rectify the lacunae and to enhance the effectiveness of various procedures and processes in the Court of Marine Enquiry proceedings. The several amendments are dealt below, in the order in which they appear in the Bill.

2. *Clause 1* inserts new section 9 (viii), (ix), (x), (xi), 2 (f), (g), (h), (i) and (j) into the principal Act:

Subsection (viii) directs a person not to destroy or amend documents or items of evidence; (ix) requires foreign witnesses to sign an undertaking; (x) prevents foreign witnesses from leaving the country without providing security; (xi) prevents the ship to sail if its crew or operator failed to provide security; 2 (f) requires the holder of item/s to preserve such items; (g) prescribing forms to be signed for an undertaking; (h) requires a witness whose expenses have been paid to attend the enquiry as prescribed; (i) regulates security paid in cash; (j) regulates how security paid in cash be treated when a witness is still abroad and also on his/her first sitting.

With regard to (x), the proposed security bond of R1,000,000 amount has been determined in order to ensure that the amount is meaningful and ship owners will not be tempted to forfeit the bond. If the bond is forfeited and the witness does not appear for a hearing, this will hamper the work of the Court. In relative terms the amount is less than one day's charter hire for a Cape-sized vessel. This places the amount in context and is not so large as to be unrealistic.

3. *Clause 2* inserts new section 9A into the principal Act which regulates the preserving of evidence.

4. *Clause 3* amends section 269 of the principal Act to extend the scope of application and adjust fines.

5. *Clause 4* inserts new section 269 (3), (4) and (5).

Subsection (3) extends the obligation and sanction imposed to a person other than the ship owner; (4) defines "owner" which includes a person other than the ship owner; (5) sets out limits of the enquiry.

6. *Clause 5* amends section 270 of the principal Act to make drafting change.

7. *Clause 6* inserts section 270 (f) into the principal Act to cover omissions and actions by the ship owner.

8. *Clause 7* amends section 273 (b) of the principal Act by extending the scope of application to include the ship owner.

9. *Clause 8* amends section 283 of the principal Act as follows:

- (a) paragraph (a) makes drafting change to subsection (1); and
- (b) paragraph (b) extends the scope of application in subsection (2) to cover ship owners.

10. *Clause 9* is a standard provision dealing with the short title and commencement of the enactment.
