

Places of Refuge for Ships in Distress: The South African Approach and Challenges

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ABSTRACT: The South African Maritime Safety Authority (“SAMSA”) responds to emergency calls from distressed ships. SAMSA, as a coastal authority, operates in terms of the South African maritime regulatory framework and its approach used to be robust. For example, South Africa is the first country to recognize the need to have a tug solely for the purpose of assisting ships in distress. However, close examination of the recent maritime incidents shows that SAMSA’s approach is falling short of keeping up with the ever changing challenges of places of refuge for ships in distress. This paper seeks to critically assess SAMSA’s approach to ships in distress as informed by the South African regulatory framework. The paper will further examine the possible solutions to identified shortcomings.

1 INTRODUCTION

As far back as the 17th century, South Africa has been a well-known station for bunkering and the provision of necessities for passing ships. Since those early trading days, it has grown considerable to become a major trading and shipping hub boasting of modern ports with world class infrastructure. Durban is the busiest port in Africa, and the South African ports also service the economies of most of the countries in the Southern African Development Community (SADC) region. As a result, a number of ships calling at its ports has substantially increased in the recent times causing high volume of shipping traffic. This situation is further compounded by the fact that South Africa is located on a major international shipping route jam packed with ships passing through its coastline destined for eastern and western economies alike (Hare, 1997; Devine, 1986; Holloway, 2005).

The South African coastline is one of the most dangerous stretches of coastline in the world,

especially if one takes the weather, currents and rugged rocks into account (Reid and Heads, 2013; Hare, 1997). It is notorious for the number of ships that have met their demise in its waters.

In consequence of the above circumstances, South Africa has a heightened level of exposure to maritime casualties and risks. In recent times, 3 of the 10 largest oil spills in history took place along the South African coastline. The second largest crude oil spills to have occurred took place off Saldanha Bay when a Spanish registered tanker *MV Castillo de Bellver* broke in half and sank with 224 000 tons of light crude oil on board. More recent spills have involved the release of heavy bunker fuels from dry cargo vessels.

South Africa plays significant strategic role to the shipping world in terms of ensuring safety of life and property at sea, preventing and combating pollution of the marine environment by ships. In particular, South Africa, with its location on a major international shipping route, serves the shipping industry through response to maritime emergencies,

granting of places of refuge to distressed vessels, prevention of marine pollution, provision of necessities and bunkers to passing ships. Moreover, the oil traffic route around South Africa is one of the most important in the world (Devine, 1986). It is essential to super tankers which are unable to transit the Suez Canal, and some of which are the largest tankers and bulk carriers ever constructed (Holloway, 2005; Devine, 1986). As indicated above, the bulk of oil supplies from the Middle East to Europe and the Americas rounds the Cape (Hare, 1997). Accordingly, it is crucial for the benefit of the whole shipping world that the South African approach towards ships in distress and general safety at sea remain robust and keep up with international standards.

On the backdrop of the above introductory background, this paper seeks to consider the extent to which the South African approach to places of refuge is deficient and therefore contributes to the unsatisfactory state of affairs displayed in various marine incidents. The paper further examines the possible most pragmatic solutions to the identified deficiencies.

This paper is structured into five sections. The present section gives the introduction setting out the background and objectives of this article. In section 2, of this article sets out a brief regulatory framework on places of refuge and marine pollution. In section 3, the paper deals with the South African approach to places of refuge and marine pollution from a practical point of view. Section 4 examines the assessment of the South Africa's approach to places of refuge for ships in distress and prevention of marine pollution. Section 5, deals with recommendations. Section 6 contains concluding remarks.

2 OVERVIEW OF THE SOUTH AFRICAN REGULATORY FRAMEWORK ON PLACES OF REFUGE FOR SHIPS IN DISTRESS AND MARINE POLLUTION

In most cases, the problems relating to places of refuge have more to do with regulation and could be solved through adequate regulation. Accordingly, in this section an overview of the South African regulatory framework on places of refuge and marine pollution will be provided.

The Constitution of the Republic of South Africa ("the Constitution") sets the broad parameters for maritime safety, prevention of marine pollution, safety of life and property at sea. In particular, the constitution provides that everyone has a right to an environment that is not harmful to their health or wellbeing and to have the environment protected for the benefit of present and future generations. It empowers parliament to enact legislative and other measures in order to prevent pollution and degradation, promote conservation and secure ecologically sustainable development (Section 24 of the Constitution). The South African constitution sets out the procedure for the application of international law and customary international law, and the adoption of international conventions. (Sections 231, 232 and 233 of the Constitution)

South African legislations concerning places of refuge, safety at sea and marine pollution control are fragmented and contained in a variety of parliamentary acts, provincial ordinances, local by-laws and ministerial regulations such as Merchant Shipping Act, Marine Traffic Act 2 of 1981, Marine Pollution (Control and Civil Liability) Act 6 of 1981, Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986, Marine Pollution (Intervention) Act 64 of 1987, Maritime Zones Act 15 of 1996, and Wreck and Salvage Act 94 of 1996. In addition to domestic regulatory framework, South Africa is a member state of many international conventions relating to maritime safety, marine pollution and the related matters. All these regulatory instruments have to be consistent with the constitution which is the supreme law of the land.

The Department of Transport ("DOT") and the Department of Environmental Affairs ("DOEA") share the responsibility of administering the above mentioned pieces of legislations. In terms of Section 2(1) of the South African Maritime Safety Authority Act 5 of 1998 ('SAMSA Act'), the powers of the Ministry of Transport are transferred to the South African Maritime Safety Authority ('SAMSA') in relation to most of the statutes falling under its jurisdiction.

SAMSA is the South African coastal authority which is established in terms of the SAMSA Act with the express objective of promoting South African maritime interests, ensuring safety of life and property at sea, preventing and combating pollution of the marine environment by ships. Sections 3, 4, 5 and 6 of the SAMSA Act authorises SAMSA is authorized to deal, among the other things, with issues of access to places of refuge. Legislation and regulations aimed at preventing and limiting marine pollution, and oil pollution specifically, is the background against which the SAMSA personnel make their decisions in relation to ships in distress and determine whether or not to allow them to enter South African internal waters for the purpose of refuge (Holloway, 2005).

Moreover, the Harbour Master is also empowered by the National Ports Act 12 of 2005 and Port Rules to grant or refuse access to place of refuge for ship in distress. Sections 74(1) & (3) and 80(2) of the National Ports Authority read together with Rule 60 of the Port Rules also empowers the Harbour Master of a port from which a place of refuge is requested to either grant or refuse such request from a ship in distress. In particular, Rule 60 (1) and (2) of the Port Rules provides that if a vessel is in need of assistance and requests permission to enter into a port, the Harbour Master should consider whether to grant or refuse such a request. Rule 60(2) provides further that in considering whether to allow the vessel into a port, the Harbour Master takes into account the factors outlined under sub rule 2 (a) to (t) of the Port rules.

SAMSA, the DOEA, the DOT and other related government departments, have a comprehensive action plan and casualty response approach. (South African Incident Response Plan for Prevention and Combating of Pollution at Sea ("SA Response Plan"). This plan allows for an effective initial response as well as communication and co-operation between the

different authorities and interested parties by way of a Joint Response Committee. South Africa's National Contingency Plan for the Prevention and Combating of Pollution from Ships ("Contingency Plan") provides guidelines for the overall strategy for oil pollution prevention and management, including an action plan for SAMSA, a casualty response unit, overall response policy, priorities and so on.

3 THE SOUTH AFRICAN APPROACH TO PLACES OF REFUGE FOR SHIPS IN DISTRESS: PRACTICAL CONSIDERATIONS

The practice of coastal states in terms of which a distressed vessel is granted access to a place of refuge is an ancient one and has developed to become one of the well-established principle of international customary law of the sea (Chircop, 2002; Noyes, 2008; Van Hooydonk, 2003). In accordance with international law, the South Africa law recognises this practice of granting access to a place of refuge for ship in distress. Given the circumstances around the South African coastline, it is no rare occasion for SAMSA to receive a distress call from a ship in need of assistance and be requested to attend to maritime emergencies.

Below, SAMSA's approach when dealing with distressed vessels will be examined under the following sub-headings: initial assessments; insurance cover requirement; further assessments; setting up of a response team; factors of consideration; casualty management; and, SAMSA's priorities.

3.1 Initial Assessments

Upon receipt of notification that there is a vessel in distress, SAMSA requests essential information from the master and/or owner in order to make an initial assessment of the position. At this stage it is of utmost importance that the ship's master and owners must make a full disclosure of all the relevant facts and be co-operative in their interaction with SAMSA personnel (Holloway, 2005). SAMSA requires full disclosure in order to make a proper assessment of the situation. Failure to co-operate and provide fully disclose the required information may result into refusal to grant access to a place of refuge (SA Response Plan). For instance, in *The Bismihita*, the distressed vessel was denied access to a place of refuge simply because the owners apparently refused to cooperate at all with SAMSA and would not let SAMSA have access to the master and crew. The authorities were accordingly in no position to assess the situation because they had no information about the cause of the vessel's distress (Holloway, 2005).

Should the initial assessment be that the crew is at risk, arrangements will be made to remove the crew. In that instance, a salvage company will have to be appointed upon SAMSA insistence. As part of the initial assessment process, the limit of the owners' liability will also be calculated in terms of South African law and confirming what liability insurance is in place. The insurance cover is a pre-requisite and a guarantee to cover the cost of pollution damage and wreck removal may be requested ("SA Response

Plan"). This will certainly be the case if, subject to the approval of the National Ports Authority it is decided to bring the vessel into a port. In terms of Sections 74(1) & (3) and 80(2) of the National Ports Authority Act read together with Rule 60 of the Port Rules the National Ports Authority has the right to refuse access to a vessel.

3.2 Insurance Cover Requirement

Setting the insurance cover as a pre-requisite and demanding a guarantee to cover the cost of pollution damage and wreck removal play a very pivotal role in South Africa. That is because in terms of the South African law an owner's liability for oil pollution is limited to 133 SDRs (special drawing rights) per ton (measured by a ship's tonnage) or 14 million SDRs, whichever is the lesser. In monetary terms this equates to a maximum of approximately R240 million. In line with international practice (necessary to enable us to collect from the Clubs) we imposed strict liability on owners against which they have few defences, in return for a capping of liability to a maximum amount. That capping still stands in our law, and it removes claimants' abilities to claim in any other way: beyond that figure, you bear your own losses. On the other hands, the costs associated with maritime casualties have devastating effects on the economy and the environment, more especially the costs of dealing with oil pollution are capable of running into billions of rands (Hare, 2012; Simpson & Clark 2017). For instance, with *The Exxon Valdez* the clean-up costs and other oil pollution losses for a spill of some 40 000 tonnes hit R20 billion mark (Hare, 2012).

South Africa subscribe to the lowest cap or limit of the owner's liability. Therefore, insurance cover is essential to top-up and cover the actual costs incurred consequent to the oil spill. Since the insurance cover is set as a pre-requisite, failure to furnish the authority with the cover may result into refusal to grant access to a place of refuge. In *The Ikan Tanda*, SAMSA was prepared to allow her to be brought into a port; provided that a guarantee was put up for the estimated full potential cost which might have arisen should the vessel have sunk in a South African port. Owners were apparently only prepared to put up a guarantee to the limits of liability in terms of South African law, which are grossly inadequate (Holloway, 2005)

Though SAMSA's insistence upon the provision of insurance cover (or request guarantee, where necessary) may not be ideal, but it is somehow understandable in light of the South Africa's past experiences where ship owners would abandon the vessel leaving the South African taxpayers having to foot the bill. The abandonment of vessel by the owners happens more often where such vessel is of a relatively low value. For instance, in *The Seli 1* incident SAMSA was left facing an expensive bill after the owners of the ship and the cargo walked away from their responsibility leaving the safety authority to foot the bill for the removal of the cargo and the ship. The Russian P&I Club withdrew cover for pollution and wreck-removal expenses on the basis that the ship-owner had defaulted on an express term

of the policy. Accordingly, the ship-owner was able to avoid its obligations on the basis that, as it was not covered by its P&I Club, it could not undertake the removal. The estimated expenditure by the SAMSA in oil pollution clean-up and eventual removal of the wreck amounted to R40 million. Since the ship owners abandoned the ship, the South African taxpayers had to foot the bill.

A similar situation (abandonment) played itself out in relation to *The Phoenix* off Ballito, Durban 2011. The High Court ordered that the Phoenix could be sold to the person who submitted the highest bid and also that the recovered fuel could be sold to help defray a small percentage of the costs incurred so far by SAMSA. (Huston, 2011) The situation becomes very difficult where the vessel is of relatively low value, as it was the case with both *The Ikan Tanda* and *The Bismihita* (Holloway, 2005).

3.3 Further Assessments: Consultation, Inspection and Report Back by Surveyor

In practical terms, the vessel is requested to take up a holding position and this may be anything from 20 to 120 nautical miles offshore, depending on the scale of the threat and an immediate assessment of the prevailing wind and currents (Holloway, 2005). A surveyor is then placed on board the vessel to consult with the master and crew, carry out an inspection and report back on the overall situation. Should there be any risk to the environment, oil cargoes, and/or the bunkers would have to be trans-shipped and slop tanks sealed off (SA Response Plan).

3.4 Setting up of a Response Team

SAMSA, as a lead agency, has a responsibility of setting up a response team and to see to it that the whole operation is running smoothly. In so doing, it will consult with the DOEA, environmentalists and other experts, before deciding whether or not to offer the vessel a place of refuge, and if so, where (SA Response Plan).

3.5 Factors of Consideration

In terms of factors of consideration, there are no stone casted rules. Each case is considered on its own facts. Generally speaking, all the factors are taken into consideration, including for example, the threat to safety of people and the environment; the type of vessel and her size and draft; the prevailing wind and sea conditions at that time of the year; the ability at the location to undertake the possible trans-shipment of cargo or their pair of the vessel. The response team will also take into account the IMO Guidelines on Places of Refuge for Ships in Need of Assistance, adopted on 5 December 2003.

3.6 Casualty management

SAMSA's strategy in respect of casualty response can be described as "risk based casualty management". Ship casualties are an unfortunate and inevitable side effect

of sea based trade and as both the largest trading country in the sub-continent as well as being a strategically placed coastal trade state(geographically), the South Africa can expect more than its fair share of ship casualties. Risk based casualty management is based on a practical real-time evaluation of the benefits versus the risks, as the event unfolds, and where necessary and possible, active intervention.

3.7 SAMSA's Priorities

SAMSA's priorities in managing a casualty are: Safety of Life at Sea (saving the lives of persons aboard or otherwise threatened by the casualty); The preservation of the vessel, or removal of the vessel from the shore, with harmful substances contained and intact, in order to prevent pollution; The removal of oil and other harmful substances by the most practical means, from the vessel to prevent pollution, should the second option fail; The preservation of property (coastal properties, cargo and/or ship); and Removal of wreck

4 ASSESSMENT OF SOUTH AFRICA'S APPROACH TO PLACES OF REFUGE FOR SHIPS IN DISTRESS AND PREVENTION OF MARINE POLLUTION

In the past, the South African approach to emergency situations and requests for places of refuge used to be very robust. So much that South Africa was the first country to recognize the need to have a tug solely for the purpose of assisting ships in distress. The robust approach earned South Africa a good reputation among the other maritime state in matters of places of refuge for ships in distress (Hare, 2009). In a meeting dated 30 March 2004 the British Maritime Law Association prepared a document headed "Places of Refuge" and recorded the following positive observation about the South African approach to places of refuge: "Some States have adopted a robust and positive approach to the matter: South Africa is the vanguard" (Holloway, 2005).

However, close examination of the recent maritime incidents shows some signs of serious drawbacks. In fact, the approach of SAMSA, as a country's coastal authority, appears to be falling short of keeping up with the ever changing challenges relating to maritime casualties and access to places of refuge for ships in distress. In this regard, Simpson & Clark stated that: "in many respects, South Africa is falling behind in achieving international norms to safeguard against oil pollution and to have reserves in place besides relying on ship owners and their P&I clubs" (Simpson & Clark, 2017).

Indeed, examination of SAMSA's approach appears to be largely characterized by a number of shortcomings. Some of the shortcomings will be surveyed in more details below.

4.1 *Lack of Decisiveness (or Indecisiveness)*

Dealing with a ship in distress is an emergency situation and therefore, it is important that the coastal authorities and other stakeholders to be decisive in terms of action that should be taken when a distress call is made. All what is needed is that a decision is made and such a decision is reasonable in the circumstances. It is impossible to devise a precise step by step guide of how to act decisively in a case of emergency. Every case must be determined in the light of its own particular circumstances and facts.

The reasonableness of the decision is based on a conspectus of factors that need to be taken into consideration. Factors relevant to the decision in this regard include the following (the list is by no means exhaustive): the speed with which the decision was taken; the degree of imminence of the threatening risk or harm; etc.

In this context, it is not much about good or bad decision. The reason being that a person with call to make a decision about a ship emergency or distress situation is faced with a choice of two alternatives. That person is in a moment of crisis and as such he / she should not be judged as though he had the time and opportunity to weigh up the pros and cons. The situation has been appropriately described as "but it's a bit like 'damned if you do, damned if you don't'; in an emergency situation someone has to make decisions under pressure but without knowing how it will work out" (Huston, 2011). All what is needed is decisiveness. So an armchair's criticism can never be justified.

The excellent example of decisiveness is that of United Kingdom Secretary of the State's Representative's ("SOSREP") decision to deliberately beach the container ship *MSC Napoli*. To prevent her sinking in the English Channel, where containers would have floated off and caused great navigational danger to one of the world's busiest shipping lanes, he ordered that the ship be run ashore on a stretch of Devon coastline. Containers did break free with some floating ashore. The SOSREP faced severe criticism for his drastic action but later came into widespread praise for minimising the danger and risk.

On the other hand, the *The Treasure* incident is a good illustration of indecisiveness and its attendant consequences. As stated above, *The Treasure* managed to sail to Table View where SAMSA inspected the ship and found a 170 meters squared hole in the ship's hull. SAMSA ordered the ship to unload its fuel and cargo in Cape Town and begin repairs to override other stakeholders or leave the SA waters. After a prolonged period of indecision, the owners and insurers of the *The Treasure* eventually decided to have the ship depart from Table Bay. On the way it sank while still close to the coast, spilling about 1,300 tons of oil from its fuel tanks.

SAMSA's approach in handling *The Treasure* incident was widely criticised as being indecisive. Pointing to the indecisiveness of SAMSA, Madden & Knight stated that: The incident involving the *MV Treasure* shows what can happen when a procedure for dealing with distressed ships becomes too open-ended. The decision to either enter port or leave Table Bay should never have been left up to the owners and

insurers of the *Treasure* when there was the threat of a major environmental catastrophe if quick action was not taken. SAMSA, as the relevant coastal state authority, needed to act quickly and make its own decision on whether or not it was more desirable that, taking into account the possible danger to the environment, the *Treasure* should attempt to take refuge or steam for the open sea. The incident shows how important it is for a coastal state to have mechanisms in place that allow the problem posed by a ship in distress to be dealt with quickly and decisively." (Madden & Knight, 2003).

It is submitted that the SAMSA's criticism is fair and justifiable in the circumstances. It is not an armchair criticism. Given the fact that the situation was a clear threat to the environment, it was incumbent upon SAMSA to act decisively and with a sense of urgency demanded by the circumstances. Indeed, the decision to either enter port or leave Table Bay should never have been left up to her owners. In the end, the results proved to catastrophic in that on the way she sank while still close to the coast, spilling about 1,300 tons of oil from its fuel tanks. This oil spill had a massive impact on the immediate environment, particularly on the nearby colonies of African penguins.

4.2 *Lack of Clear Decision Making Structure and Chain of Command*

One of the challenges of dealing with maritime emergencies is that the issue involves multiple stakeholders with diverse interests (Morrison, 2011; Noyes 2008). So it is of paramount importance that the decision making structure and chain of command be very clear. In this regard, the European Parliament resolved that "each Member States must have at its disposal a clear decision making structure and chain of command for maritime emergencies, together with an independent authority that in turn has at its disposal the necessary judicial, financial and technical say in taking decisions having binding effect in emergencies within territorial waters and the exclusive economic zones" (EP Resolution 2003/2066(INI), 2003).

In the South African context, the decision making process and chain of command are not sufficiently clear. This challenge is further compounded by the South African statutory framework. For instance, Sections 3, 4, 5 and 6 of the SAMSA Act authorises to deal, among the other things, with issues of access to places of refuge. On the other hand, Sections 74(1) & (3) and 80(2) of the National Ports Authority Act 12 of 2005 read together with Rule 60 of the Port Rules also empowers the Harbour Master of a port from which a place of refuge is requested to either grant or refuse such request from a ship in distress. SAMSA does not have the powers to order a port in South Africa to accept a vessel (Holloway, 2005; Simpson & Clark, 2017). There is lack of clarity among the stakeholders as to who bears the ultimate authority to override the other when there are divergent views on matters of places of refuge.

4.3 *Lack of Guiding Principles*

This refers to essential requirements that would trigger intervention by the coastal authority. In other words, it must be clear which circumstances would warrant intervention of the authority. It must also be clear what form of intervention is warranted. Is it a control or command kind of intervention? Under which circumstances can intervention change from control to command? If the shipmaster or ship owner refuses to comply with the intervention orders, what powers can be invoked?

That would mean from the moment intervention is triggered, the coastal authority would proceed with its mission without recourse to the owners of the vessel. For instance, the UK SOSREP uses public interest principle as an overriding factor when confronted with a potential disastrous emergency situation. In taking decisions is guided by the public interest principle. SOSREP has very wide-ranging powers including the competency to beach the vessel without the owner's permission, as long as such decision is taken in the overriding public interest.

4.4 *Lack of Ultimate Powers to Override Other Stakeholders*

In performing its functions SAMSA may consult other stakeholder including the harbour master, ship master / owner, insurers, relevant government departments, environmentalists, any other relevant statutory bodies, etc. Various stakeholders have different interests and attitudes towards the decision that should be taken in the case of maritime emergency. In a situation where stakeholders hold different views on the approach that should be adopted, it would be ideal for SAMSA as a lead agency to possess powers to override the other stakeholders and implement its decision. Lack of such overriding powers, as it is the case at the moment, will lead to indecisiveness at crucial moments.

Lord Donaldson's Control and Command Review recommendation to the UK in relation to ultimate control by SOSREP, that: "ultimate control of any salvage operation where there is a threat of significant pollution of the UK environment must be exercised by the Secretary of State's representative acting in the over-riding public interest. This representative should in our view be known as "SOSREP" indicating neither more nor less than that he is the Secretary of State's representative empowered to exercise intervention powers to whatever extent is required in the public interest." (recommendation 9).

4.5 *Lack of accession to the highest limitation of liability fund*

In recent years South Africa has acceded to both the 1992 CLC and 1992 Fund Convention. The 1992 CLC raises the ceiling of limitation of a ship owner's liability and the 1992 Fund Convention acts as a top up where the 1992 CLC falls short or a ship owner is not able to meet its CLC liabilities. Both owners' P&I clubs and the Fund, administered in terms of these Conventions, will only pay out in circumstances where a ship owner is found to be legally liable in the

jurisdiction in which a claim for oil pollution arises. South African legislation has not yet been amended or promulgated to incorporate the 1992 Conventions into domestic law and the limits of liability stand as set out above.

One of the major limits to these Conventions is that they do not cover oil pollution due to the spillage or leaking of bunkers. The IMO has developed a new Convention dealing with this issue to which South Africa has not yet acceded. South Africa's present oil pollution prevention and liability legislation is housed in the Marine Pollution (Control and Civil Liability) Act and the Marine Pollution (Intervention) Act. An owner's liability for oil pollution is limited to 133 SDRs (special drawing rights) per ton (measured by a ship's tonnage) or 14 million SDRs, whichever is the lesser. In monetary terms this equates to a maximum of approximately R240 million. On the other hands, the costs associated with maritime casualties have devastating effects on the economy and the environment, more especially the costs of dealing with oil pollution are capable of reaching billions of rands. For instance, with *MV Exxon Valdez* the clean-up costs and other oil pollution losses for a spill of some 40 000 tonnes hit R20 billion.

South Africa has failed to accede to the 1992 CLC convention with the maximum cover when it comes to liability. In consequence thereof, SAMSA sets the insurance cover is a pre-requisite to grant access to place of refuge for ships in distress. It serves as a guarantee to cover the cost of pollution damage and wreck removal may be requested. This will certainly be the case if, subject to the approval of the National Ports Authority (NPA), it is decided to bring the vessel into a port. The NPA has the right to refuse access to a vessel.

This is one of the weaknesses in the South African approach to places of refuge for ships in distress. In *MV Ikan Tanda*, SAMSA was prepared to allow her to be brought into a port; provided that a guarantee was put up for the estimated full potential cost which might have arisen should the vessel have sunk in a South African port. Owners were apparently only prepared to put up a guarantee to the limits of liability in terms of South African law, which are grossly inadequate. The vessel was of a relatively low value. In the end, the vessel was denied access and ordered to leave the South African waters.

The problem with this approach is that to a large extent it leaves the decision to enter the port or sailing out of the South African waters with the ship owners and insurers. And as such it is very risky in cases of emergencies when there is the threat of a major environmental catastrophe if quick action is not taken. The delays and indecisiveness in a case of emergency have proven to be catastrophic in *MV Treasure* incident.

5 RECOMMENDATIONS

The approach of the coastal state authority when dealing with request for access to places of refuge is largely informed by the applicable regulatory framework. The coastal authorities are creature of

statutes and as such they derive their powers from the enabling statutes. Accordingly, in performing their mandate they should do so within the parameters and scheme of operation set by the empowering statute and other relevant regulatory instruments. Therefore, the shortcomings manifest in the approach of coastal authorities in South Africa and elsewhere can be resolved through adequate regulation. This is what the European Parliament when it resolved that: 'the *Prestige* disaster has clearly shown that arrangements to accommodate vessels in distress are inadequately regulated...' (EP Resolution 2003/2066(INI), 2003, 2003).

In this regard, South Africa needs to reform its legislative and policy framework so that it can adequately regulate the issues relating to places of refuge. In undertaking legislative enactments, South Africa would do well to follow the lead of the countries such as the United Kingdom. The UK through SOSREP, currently represent what perhaps may be described as one of the most effective way of addressing the modern day challenges of places of refuge. It is an approach that the other maritime states should seek to emulate.

Shipping is international in nature and its problems are also international in character. So in trying to resolve them they need an eclectic approach. South African lawyers are well not for being eclectic and their lack of fear to venture beyond their defined horizons and look to other legal systems for ideas. According to Christie "it is for that reason that the South African law has some of the characteristics of a jackdaw's nest embellished with treasures picked up here and there" (Christie, 2006).

SOSREP system carries with itself a lot of benefits. Pointing out to some of the benefits Simpson and Clark stated that: "SAMSA's role, and perhaps limited to those powers in the South African Marine Pollution Acts, are akin to those powers that would be given to a South African SOSREP. The difference is that a SOSREP would proceed without extensive consultation, bureaucracy and financial constraints. The idea of a SOSREP is to appoint a single coordinator for salvage operations able to make prevent active decisions, which would decrease the cost of an environmental catastrophe, through quicker response times and decisive action. In many respects, South Africa is falling behind in achieving international norms to safeguard against oil pollution and to have reserves in place besides relying on ship owners and their P&I clubs" (Simpson & Clark, 2017)

Regarding the South Africa's need a coastal authority agent with wide-ranging powers similar to SOSREP, Huston stated the following: "South Africa needs something along the lines of Sosrep, with its wide-ranging powers of overriding anyone preventing the ship from entering a port or place of refuge" (Huston, 2011).

However, it should be noted that there is no perfect and one-size-fits kind of approach to problems relating to places of refuge. The challenges relating to places of refuge are not static. They move with time. For instance, in as much as technological advancements and modern infrastructure presents opportunities for better and more pragmatic solution,

on the other hand it brings with it new challenges giving rise to complex problems.

So in adopting a system similar to the UK SOSREP, South Africa should avoid a wholesale importation of such a system. Instead it should adapt it to meet its own peculiar circumstances.

6 CONCLUDING REMARKS

Clearly, the South African approach to places of refuge for ships in distress falling behind in keeping up with new challenges. Among the other things, it is deficient in the following respects. To be more specific, it is indecisive; lacks clear decision making structure and chain of command; lacks guiding principle(s); SAMSA, as coastal authority, has got no ultimate authority to override other stakeholders; South Africa as maritime state has failed to reform its limitation of liability legislation so as increase its limit. The combination of all these factors is the cause of SAMSA's unsatisfactory approach to places of refuge for ships in distress.

In the main, the recommendation made is that these problems can be resolved through adequate regulation. The South African relevant regulatory framework is dated and it needs reforms.

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