JOURNAL OF OCEAN GOVERNANCE IN AFRICA

JOGA VOLUME 3 2025

juta

Journal of Ocean Governance in Africa

First Floor, Sunclare Building,
21 Dreyer Street,
Claremont 7925

www.juta.co.za

ISSN: 2710-4044

Typeset in Melior 10.5pt on 13pt
Typesetter: Wouter Reinders
Cover design: Drag and Drop

Printed and bound by

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EDITORIAL TEAM

UNDERSTANDING THE DUTY OF CARE EXPECTED OF MARITIME PILOTS DURING PILOTAGE UNDER THE SOUTH AFRICAN NATIONAL PORTS ACT OF 2005

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The South African National Ports Act 12 of 2005 imposes on pilots a duty of good faith while undertaking their pilotage duties. Without providing any clear guidelines. This is a departure from the previous position, which held pilots liable for gross negligence. An additional change in the South African position is that maritime pilots are now deemed to be employees of the relevant shipping company, while on board, for the duration of the service being rendered. Transnet and the harbour master take no responsibility for accidents within ports which are attributable to pilot error. This new approach to maritime compulsory pilot liability does not align with the English common-law and American legislative approaches. This short paper focuses on the implications of this new legislative approach, touching on the meaning of good and bad faith within the context of relevant international and domestic legislation, case law and recommendations by the International Maritime Organization (IMO).

[Keywords] Compulsory maritime pilotage, pilot liability, good faith, vicarious liability, bad faith

I INTRODUCTION

Ports play a critical role in maritime transport, with multiple vessels traversing the normally limited spaces of natural or man-made port environments. Ports are often, but not necessarily, created within natural bays or river mouths, although this is not necessarily the rule. Despite the evolution of modern ports, their role and function remain, with ports being defined as:

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https://doi.org/10.47348/JOGA/2025/a3

> [A] transit area, a gateway through which goods and people move from and to the sea. It is a place of contact between the land and maritime space, a node where ocean and inland transport systems interact, and a place of convergence for different transportation modes.[1]

Despite the traditional role of ports and harbours as places of safety,[2] ports remain places of unforeseen danger, with accidents occurring within ports every year. A report on the number of in-port accidents for the period 2002 to 2016 for the United Kingdom, Germany, the United States of America, Denmark, Australia and 2002 to 2004 for New Zealand found that 693 incidents had occurred.[3] The most common cause of accidents was identified as collision, close quarters and contact (35.8%) with the most common immediate causes for this type of accident being identified as inadequate lookout (24.6%); failure of communication (15.3%); poor judgement (14.1%); and pilot error/mishandling (12.9%). Contributory causes were identified as ineffective use of technology (24.2%); inappropriate use of technology (6.9%); failure in communication(20.6%); weather/other environmental factors (19.8%); third-party deficiency (14.1%); inadequate lookout (12.5%); inadequate risk management (11.7%); distraction (10.9%); communication problems between master and pilot (9.3%); poor judgement (8.1%); poor emergency response (6%); unsafe speed (6%); and pilot error/mishandling (5.6%).[4]

While these factors have been cited individually, they work together. A case in point is that of poor judgement in inclement weather resulting in unsafe speeds. Nearly all the countries cited have compulsory pilotage. It would therefore appear that most of the reported port-related accidents occurred under

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1 T Notterboom, P Athanasios & J-P Rodrigue *Port Economics, Management and Policy* 2 ed (Routledge 2022) available at *https://porteconomicsmanagement.org/pemp/contents/introduction/defining-seaports/*

2 *Cambridge Dictionary* 'Harbour' available at *https://dictionary.cambridge.org/dictionary/english/harbour*

3 I Acejo, H Sampson & N Turgo et al 'The causes of maritime accidents in the period 2002 to 2016' Seafarers International Research Centre, Cardiff University (UK) 1 available at *https://safety4sea.com/wp-content/uploads/2018/12/SIRC-The-causes-of-maritime-accidents-in-the-period-2002-2016-2018_12.pdf*

4 Acejo et al, op cit note 3 at 4 and 5.

https://doi.org/10.47348/JOGA/2025/a3

compulsory pilotage. While no similar statistics are available regarding the causes of accidents within South African ports, an interview[5] revealed that many accidents in South African ports are as a result of unsafe speeds. Given the financial costs of accidents and the possible damage to port infrastructure and surrounding vessels, the responsibility of the pilot and, subsequently, the master to act with utmost prudence and caution is great. This paper discusses the role and duty of the pilot during pilotage, with particular emphasis on the standard of care expected of the pilot under the South African National Ports Act 12 of 2005.[6] Of great significance is the issue of liability, and its relevance, with the terms good and bad faith being investigated in great depth.

(a) Purpose for study

Articles 76(1) and (2) of the National Ports Act[7] impose upon the pilot the duty to act in good faith in carrying out their duties. In addition, while the pilot is on board the vessels, they are deemed to be the employee of the vessel and not that of Transnet. As an employee of the shipowner or the Master, the vessel owner is held responsible for any act or omission of the pilot which results in damage to port infrastructure, other vessels or the vessel under pilotage. By transferring responsibility to the shipowner, Transnet is absolved of all liability for the wrongful acts of its pilot despite the wording of provision 76(1) from which it could be inferred that the Authority and the pilot are responsible for the actions of the pilot where the pilot is found to have acted in bad faith. Neither the National Ports Act nor the Ports Rules of 2009,[8] provide a definition of good faith

5 Data collection with relevant port officials.

6 *Government Gazette* (2005) National Ports Act 12 of 2005, *Government Gazette* No 27863 available at *https://www.gov.za/sites/default/files/gcis_document/201409/a12-051.pdf*

7 *Government Gazette*, op cit note 6 at 64: '76. (1) Neither the Authority nor the pilot is liable for loss or damage caused by anything done or omitted by the pilot in good faith whilst performing his or her functions in terms of this Act. (2) Notwithstanding any other provision of this Act, the pilot is deemed to be the servant of the owner or master of the vessel under pilotage and such owner or master is liable for the acts or omissions of the pilot.'

8 Transnet National Ports Authority, Port Rules in terms of the National Ports Act 12 of 2005, *Government Gazette* No 31986 available at *https://www.transnetnationalportsauthority.net/Legal,%20Risk%20*

or clarify this position. While the Act favours the Authority, the shipowner is not favoured. While the Master remains in command of the vessel[9] neither they nor the ship's crew may interfere with the pilot while they are fulfilling their duties, unless there is an emergency,[10] at which time the Master may intervene to protect the vessel, crew or cargo. Generally, by the time an emergency occurs, it may be too late for the Master to prevent damage altogether. In such circumstances, it may assist the Master to understand whether the pilot is acting in good faith or not, as this may assist them to be proactive, rather than reactive, in a scenario where the rules appear to allow only a reactive response.

(b) Objectives of the study

(i) To determine the meaning of good faith within South African legislation,
(ii) To define the parameters for bad faith within the pilotage context.
(iii) To analyse ship owner liability as per English law and its impact on current legislation

(c) Methodology

A qualitative approach has been adopted, with both primary and secondary data being used to determine the operational parameters of compulsory pilotage within South Africa, the United States of America and the United Kingdom. Primary data was obtained over a year through informal discussions with maritime pilots and ships' captains, government officials and legislation. Discussions were initially part of a research initiative with master's students on the Port Act of 2005 and its liability provisions. The research approach was exploratory, with participants willingly engaging in conversations, providing insights and advice on the relevant legislative provisions and explaining the role of compulsory pilots and the process of pilotage. Pilots where forthcoming about the dangers they face, their training and communication challenges during

and%20Compliance/NationalPortAct/Documents/Port%20Rules%20 GG31986%20060309.pdf

9 Article 43*(a)* Port Rules op cit note 8 at 22.

10 Article 43*(b)* Port Rules op cit note 8 at 22.

compulsory pilotage. They also clarified the relationship between themselves and the Master, while on board the vessel.

Information was obtained from willing participants who were aware of the purpose of their contributions. Informal discussions were recorded and made available to the students as part of their learning material on secure, encrypted university platforms. Secondary data was sourced through case analysis, peer reviewed articles and reports. A comparative approach was adopted to ascertain the similarities and differences between South African, British and American approaches to pilot liability under compulsory pilotage. Despite the differing approaches to pilot liability, most countries were explicit about acts by pilots which warranted intervention by the ships master. The common-law approach focused on negligence, not good or bad faith. An exploratory approach was therefore used to uncover the meaning of the terms 'good faith' and 'bad faith', beginning initially with South African employment legislation and were this was not forthcoming, banking legislation and decisions by the labour court. This approach was adopted in alignment with the approach taken by the Ports Act, in which the pilot was deemed to be an employee of the vessel. References within relevant cases were followed to discover the different nuances of the terms. Legal decisions by the labour court and the Constitutional Court were preferred, as they provided the latest and most binding meanings of these terms.

(d) Literature Review

In the absence of literature on good faith and bad faith in the context of South African pilotage, case law, foreign and domestic, has provided the most in-depth understanding of the terms. Case law has therefore been extensively investigated, to determine, initially, whether there are any direct references to good and bad faith in the context of pilot liability and secondly, in determining how the current understanding of these terms can be extended to pilot liability, as per the current South African Ports Act.

II GOOD AND BAD FAITH

While good faith is an often-used term, scholars and jurists have struggled to find an exact definition as the term is 'loose and

https://doi.org/10.47348/JOGA/2025/a3

amorphous'.[11] Powers,[12] defined good faith as 'an expectation of each party to a contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community' providing that it is 'an international doctrine that requires parties to an international transaction to act reasonably, as they would expect the other party to act.' O Connor[13] described good faith as:

> [A] fundamental principle derived from the rule *pacta sunt servanda,* and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules.

In summary, Tetley[14] has defined good faith in contract as:

> [J]ust and honest conduct, which should be expected of both parties in their dealings, one with another and even with third parties who may be implicated or subsequently involved. Good faith requires that each party be fair and honest in negotiations and, once the agreement has been reached, that the parties also perform their respective obligations and enforce their rights honestly and fairly.

This definition goes beyond the contract negotiation, extending to performance by both parties, of the contractual terms. While there has been much discussion about the exact meaning of

11 F K Juenger 'Listening to law professors talk about good faith: Some afterthoughts' (1995) 69 *Tul Law Rev* at 1253, 1254.
12 P J Powers 'Defining the indefinable: Good faith and the United Nations Convention on the contracts for the international sale of goods' (1999) 18 *Journal of Law and Commerce* at 333.
13 F O'Connor *Good Faith in English Law* (Barthmouth Publishing Company 1991) at 102.
14 W Tetley 'Good faith in contract: Particularly in the contracts of arbitration and chartering' (35/4) (October 2004) *Journal of Maritime Law and Contract* at 563 and 564.

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good faith, the understanding of the concept of bad faith has been more accepted, with Summers[15] stating that:

> Bad faith performance occurs precisely when discretion is used to recapture opportunities foregone upon contracting-when the discretion-exercising party refuses to pay the expected cost of performance. Good faith performance, in turn, occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation to capture opportunities that were preserved upon entering the contract, interpreted objectively. The good faith performance doctrine therefore directs attention to the opportunities foregone by a discretion-exercising party at formation, and to that party's reasons for exercising discretion during performance.

In Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd. (No. 3), Kelly J held that:[16]

> In most cases, bad faith can be said to occur when one party, without reasonable justification, acts in relation to the contracts in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, contrary to the original purpose and expectation of the parties.

While in *Crawford v. Agricultural Development Board (NB)*[17] the New Brunswick Court of Appeal (Bastarache J.A.) held:

> I would agree with Belobaba,[18] that community standards are imprecise and will vary from trade to trade. Bad faith is nevertheless identifiable, as stated by the trial Judge, because it requires dishonesty, ill will, improper motive or other intentional conduct equivalent to fraud.

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15 R S Summers 'The general duty of good faith: Its recognition and conceptualization' 1982 (67) *Cornell Law Review* at 810–840.

16 (1991) 106 N.S.R. (2d) 180 (N.S. S.C.T.D.); (1992) 112 N.S.R. (2d) 180 (N.S. C.A.).

17 (1997) 192 N.B.R. (2d) 68, 78; 489 A.P.R. 68, 78 (N.B. C.A.).

18 E P Belobaba *Good Faith in Canadian Contract Law in Special Lectures of the Law Society of Upper Canada* (1985) 73 at 78–80.

The Admiralty Jurisdiction Regulation Act 105 of 1983, governing maritime claims, makes provision for the Courts to revert to English common law and Roman Dutch law where South African law is silent on a matter. [19] The English common law, however, does not recognise the doctrine of good faith.[20] Rather, as discussed by Bingham L J, in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*[21]*:*

> English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus, equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach… .

Theron J, in the Constitutional Court judgement of *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19)[22] referenced the same case, stating that:

> In common law jurisdictions, courts have historically been reluctant to recognise a free-standing doctrine of good faith. In England and Wales, the courts have declined to find a general duty of good faith, preferring instead to develop specific doctrines that mitigate unfairness in particular cases. There is thus no general duty to negotiate or perform contracts in good faith in English law. English courts have developed a number of specific doctrines in response to 'problems of unfairness'. For example, the courts may require a contractual discretion to be exercised reasonably and may be prepared to imply a term of good faith where this is consistent with the intentions of the contracting parties.

19 See Article 6: Laws to be applied and rules of evidence.
20 Tetley op cit note 13 at 571.
21 [1989] Q.B. 433, 439 (C.A.).
22 [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020) 65–67.

https://doi.org/10.47348/JOGA/2025/a3

> In addition, the United Kingdom introduced a good faith principle in specific areas in accordance with European Union law.

Hong Kong and Scotland hold this same position while Australia, does not have a general doctrine of good faith, with the different states showing varied levels of openness to the concept. Froneman J, in the same case, referred to the relevance of the German approach to the discussion of a post-Constitutional approach towards good faith. He[23] referred to the Jacques du Plessis application[24] of Article 242 of the German Legal Code:

> '[G]ood faith' does not simply mean fairness or reasonableness. It bears a more specific meaning, which sometimes is explained by a closer examination of the German term, *Treu und Glauben*, of which 'good faith' is a rather vague translation. The term essentially requires that a party considers the protectable interests of another party (that is, display *Treu*) and the other party in turn must rely on this (that is, must display *Glauben)*. The protection of this reliance lies at the heart of the whole construct of good faith. When used in this sense, the concept is defined 'objectively' as a standard of behaviour, as opposed to the 'subjective' sense of having the state of mind of being 'in good faith', typically through not knowing something. German law then uses a different term, *gutter Glaube*, to describe 'subjective' good faith. [25]

From the above discussion, it becomes apparent that the principles of good faith inform the various judges' decisions, without providing one specific approach to solving the challenges posed within the specific cases. It is in the Constitutional Court judgment of *National Union of Metalworkers of South Africa obo Khanyile Nganezi and Others v Dunlop Mixing and Technical*

[23] Ibid at 192 and 193.

[24] J du Plessis (2019) 'Human Dignity in the Common Law of Contract: Making Sense of the Barkhuizen, Bredenkamp and Botha Trilogy' 2019 (9) *Constitutional Court Review* at 409; J du Plessis 'Giving Practical Effect to Good Faith in the Law of Contract' (2018) 3 *Stellenbosch Law Review* at 379.

[25] Op cit note 22 at p79.

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Services (PTY) Ltd and Others[26] *that good faith in the context of employment was discussed. At the heart of this case was the discussion of good faith and fiduciary duty. Froneman J, in his discussion referred to Hodgkinson v Simms*:[27]

> [T]he existence of a contract does not necessarily preclude the existence of fiduciary duties between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations.

Froneman J then commented that:

> There is no magic in the term 'fiduciary duty'. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship. While agency is not a necessary element of the existence of a fiduciary relationship, that agency exists will almost always provide an indication of such a relationship. The emphasis in the particulars of claim upon the representative nature of the appellant's status in dealing with Safika and the duty to account for profits acquired by him in that capacity should have been to counsel an unmistakeable beacon which marked the claim as one in which the appellant stood towards the respondents in a position of confidence and good faith which he was obliged to protect. No more was required to set up a case on a fiduciary duty.[28]

A question that arose was whether employee responsibility was the same under a duty of good faith as it is with fiduciary duty, in which case Froneman J referred to Idensohn[29] who wrote:

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26 (2019) ZACC 25.

27 As cited in *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA); 2004 *ILJ* 1005 (SCA).

28 Supra note 27 at 21.

29 K Idensohn 'The nature and scope of employee's fiduciary duties' (2012) 33 *ILJ* 1539 at 1550.

https://doi.org/10.47348/JOGA/2025/a3

> Both fiduciary duties and duties of good faith, for example, require 'loyalty'. For the purposes of fiduciary duties, 'loyalty' has the specific meaning of acting solely and exclusively in the interests of another. In relation to duties of good faith on the other hand, 'loyalty' generally has a narrower, less exacting meaning that merely requires the incumbent to have regard to or take the interests of another into account.

While there is no clear definition of good faith behaviour, the principles provided in the Code of Conduct of the Financial Markets Act 19 of 2012[30] clearly define the attributes of acting in good faith. Although the principles were designed for the financial markets, and include the weight of fiduciary duty, they may easily be translated into employee behaviour requirements in every sector. Article 75(1)*(a)* provides that the employee must:[31]

(i) Act honestly and fairly, with due skill, care and diligence, and in the interests of the client.
(ii) Uphold the integrity of the financial markets.
(iii) Have and effectively employ the resources, procedures and technological systems for the conduct of its business.

In the case of *Sappi Novoboard (Pty) Ltd v Bolleurs,*[32] *on the issue of good faith, it was held as follows:*

> It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully: … The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' … If an employee does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him … .

30 *Government Gazette* Financial Markets Act 19 of 2012, *Government Gazette* No 36121, 1 February 2013 available at *https://www.gov.za/sites/default/files/gcis_document/201409/36121a.pdf*

31 *Government Gazette* (2012) op cit note 29 at 120.

32 (1998) 19 *ILJ* 784 (LAC) at par 7.

With a basic understanding of good faith established, it is important to understand what factors the courts deem to be contrary to good faith, or bad faith. In *Ngobeni v Minister of Communications and Another,*[33] *the Court referred to factors such as '… lack of honest intention, malice, ulterior motive, a quest for revenge, reckless abandon, a quest for self or others' advancement, and attempts to divert attention from one's or others' wrongdoing and involvement in criminal or acts of misconduct …', as negating good faith. In Baxter v Minister of Justice and Correctional Services and Others,*[34] *the Courts further clarified the issue of bad faith, stating:*

> In any event, the fact that the appellant may have acted partly out of ulterior motive does not mean that he did not act in good faith (or acted in bad faith) by making the disclosure. Good faith must be assessed contextually on a case-by-case basis, taking account of various factors at play in the specific case. Acting with an ulterior motive is not necessarily the same as acting in bad faith. Acting in bad faith in a strict sense refers to a dishonest intention or a corrupt motive.

A question that arose in case law was whether bad faith had to show for an employee to be dismissed. In *Sappi Novoboard (Pty) Ltd v Bolleurs*[35] Myburgh JP provided: '"It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his empoyer honestly and faithfully.[36] The relationship between employer and employee has been described as a confidential one (*Robb v Green* at 319)." The duty which an employee owes his employer is a fiduciary one, "which involves an obligation not to work against his master's interests".[37] If an employee does "anything incompatible with the due or faithful discharge

33 (2014) 35 *ILJ* 2506 (LC) at par 54.

34 (2020) 41 *ILJ* 2553 (LAC) at par 83.

35 (1998) 19 *ILJ* 784 (LAC) 786 F to 787 D at pars 7–8.

36 *Pearce v Foster & Others* (1886) QB 356 at 359; *Robb v Green* (1895) 2 QB 1 at 10; *Robb v Green* (1895) 2 QB 315 (CA) at 317; *Gerry Bouwer Motors (Pty) Ltd v Preller* 1940 TPD 130 at 133; *Premier Medical and Industrial Equipment Ltd v Winkler & Others* 1971 (3) SA 866 (W) at 867 H.

37 *Premier Medical and Industrial Equipment Ltd v Winkler* at 867H; *Jones v East Rand Extension Gold Mining Co. Ltd* 1917 TH 325 at 334.

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of his duty to his master, the latter has a right to dismiss him" noted in *Pearce v Foster* at 359.'

In *Gerry Bouwer Motors (Pty) Ltd v Preller* it was said at 133:

> I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him.

III THE ROLE OF THE PILOT UNDER PILOTAGE AND PILOT LIABILITY

The role of the pilot was described in the American Supreme Court Case [38] where the judge stated:

> In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The pilot's job generally requires that he go outside the harbour's entrance in a small boat to meet incoming ships, board them and direct their course from open water to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and, in some measure, the competitive attractiveness of particular ports.

In the English case of *Lucey v Ingram*,[39] Baron Parke provided insights into the public utility position of marine pilots, stating:

> The object of the legislature, in establishing pilots, has been to secure, as far as possible, protection to life and property, by supplying a class of men better qualified than ordinary mariners to take charge of ships in places where, from local causes, navigation is attended with more than common

38 *Kotch v. Bd. of River Port Pilot* Comm'r, 330 U.S. 552, 557–8, 1947 AMC 535 (1947).

39 *Lucey v. Ingram* (1840) 6 M. & W. 302, 315.

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> difficulty. To affect this object, it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board, and to give up to him the navigation of the vessel. The master, however well qualified to conduct the ship himself, is bound under a penalty in a great measure to divest himself of its control, and to give up the charge to the pilot.

Taking into account the above facts, Rose[40] defined a pilot as:

> [A] person other than the master or one of the crew of a vessel who is taken on board especially for the purpose of conducting it through a river, road or channel, or from or into a port, particularly with regard to his knowledge of local conditions.

From the above definition, it is clear that the pilot cannot be a member of the crew especially in compulsory pilotage, in which the shipowner has no hand in the selection of the pilot.[41] The relationship between the Master and the compulsory pilot is of great significance, with each party having their own significant roles, responsibilities and loyalties. The relationship was captured by Justice Hill in *The Andoni*:[42]

> In my opinion ... a pilot, *prima facie* means, to use Lord Tenterden's words, 'a person taken on board at a particular place for the purpose of conducting the ship through a river, road or channel or from or into a port'. And where you find that pilotage is compulsory, that, *prima facie*, means ... that the pilot is entitled, and the master is bound to permit him, to conduct the ship, that is, to take charge of the navigation of the ship.

40 F D Rose *The Modern Law of Pilotage* 4 ed (London Sweet & Maxwell 1984).

41 K M Fokuor-Benyin 'The Law of Compulsory pilotage: An inequitable Admiralty regime or a necessary commercial realism?' (2023) 48 *Tulane Maritime Law Journal* at 73.

42 *The Andoni* [1918] 119 LT 1 154, 155 (UK).

In the *Mickleham* case,[43] the English Court of Appeal held that:

> Where a regulation having statutory force provides that a ship is to be conducted by a pilot, it does not mean that she is to be navigated under his advice; it means rather that she must be conducted by him, and that makes pilotage.[44]

Under compulsory pilotage, Lord Justice Fry continued that 'the pilot is not in charge when he does not… supersede the master, and where the pilot is only an adviser, and where the captain is free to obey the pilot or not.' This rule is not ironclad, however, as there are circumstances in which the Master may communicate and if necessary, override the authority of the pilot. In the *Argo* case,[45] the court held that 'a master has no right to interfere with the pilot, except in cases of the pilot's intoxication or manifest incapacity, or in cases of danger which the pilot does not foresee, or in cases of great necessity.' On this matter, Dr Lushington, in the *Peerless* case,[46] provided that:

> There may be occasions on which the master of a ship is justified in interfering with the pilot in charge, but they are very rare. If we encourage such interfering, we should have a double authority on board, a *divisum imperium*, the parent of all confusion, from which many accidents and much mischief would probably ensue. If the pilot is intoxicated, or is steering a course to the certain destruction of the vessel, the master no doubt may interfere and ought to interfere, but it is only in urgent cases.

Should the Captain or Master find themselves in a position where the pilot is incapable, under compulsory pilotage, he may not proceed on his own but needs to wait for another pilot.[47] Despite the position of the pilot aboard the vessels , his authority extends only to the exclusive control of navigation. At no time does his authority supersede that of the master, who has exclusive command of the vessel.[48] The master would therefore

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43 *The Mickleham* [1918] 87 Law J. Rep. 165, 168 (UK); *The Augusta* [1887] Asp. M.L.C. 161, 163, [1887] 56 LT 58, 62 (UK).

44 Fakuour-Benyin, op cit note 40 at 12 and 13.

45 *The Argo* [1859] Swab. 462, 464 (Eng.).

46 *The Peerless* [1860] 167 E.R. 16, [1860] 36 LT 25, 26 (UK).

47 C Hill *Maritime Law* 5 ed (L.L.P. 1998) at 485.

48 Fakuour-Benyin op cit note 40 at 79.

be responsible to keep a proper look-out, and inform the pilot of any significant sightings that may impact safe navigation. The pilot's duties, on the other hand, were summarised by Lord Alverstone CJ, in the *Tactician* case[49] as: 'the pilot is in sole charge of the ship, and that all directions as to speed, course, stopping and reversing and everything of that kind are for the pilot.' This principle was tested in The *Oakfield* case[50] wherein the courts found the pilot to blame for the decision to navigate in bad weather and the maneuver that caused a collision. South African legislation appears to mirror these provisions, with Article 75(3) to (5) of the National Ports Act providing clear guidelines on the roles and responsibilities of the pilot and the Master:

> (3) The pilot's function is to navigate a vessel in the port, to direct its movements and to determine and control the movements of the tugs assisting the vessel under pilotage.
> (4) The pilot must determine the number of tugs required for pilotage with the concurrence of the master of the vessel.
> (5) In the event of a disagreement between the pilot and the master of the vessel regarding the number of tugs to be used as contemplated in subsection (4), the Harbour Master takes the final decision.[51]

The International Maritime Organization (IMO) recognised the brevity of this responsibility in Resolution A.960(23) of 2003[52] which provided guidelines for the continuous education and training of pilots, with specific emphasis on areas of concern. The goal thereof was to ensure that countries provide the highest quality pilots, thus ensuring safety within during pilotage operations.[53] While the IMO did not dictate what nations should be training their pilots, it provided in-depth guidance on the

49 *The Tactician* [1907] 97 LT 1 621, 624 (UK).
50 *The Oakfield* [1886] 11 P.D. 34, 54 LT 578 (UK).
51 *Government Gazette* op cit note 6 at 63 and 64.
52 IMO *Recommendations on training and certification and on operational procedures for maritime pilots other than deep-sea pilots. Resolution A.960(23)* (2003), adopted on 5 December 2003 available at *https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.960(23).pdf*
53 Annexure 1, IMO (2003) op cit note 51 at 3–7.

communication between Master and pilots. In Annexure 2,[54] the IMO provides clear guidelines on the method, procedure and duration of communication between the Master and pilot during pilotage. While the pilot has specialised knowledge of the port environment, the Master is most knowledgeable about his vessel, and the impacts of changing cargo volumes on weight and maneuverability. The Ports Act provides that the pilot is to be undisturbed when carrying out their duties, with the Master only to impose on the pilot's autonomy if there is an emergency or the pilot is incapable. Despite this legislated position, there should be constant communication and cooperation between the Master and the pilot, for the most effective outcomes. The greater the synergy between the Master and the pilot, the better the possible outcome, even though it is clearly possible for accidents to occur due to third party error. The willingness of the pilot to actively cooperate with the Master for optimum outcomes indicates their mental state and their commitment to act in good faith.

The liability of the owner under compulsory pilotage was clearly articulated in English Law as well. Mr Joseph Story, in his Treaty on Agency,[55] provided the common-law position on the liability of shipowners under both voluntary and compulsory pilotage, stating that:

> [T]he master of a ship and the owner also, is liable for any injury, done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot, employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence. And it will make no difference in the case, that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot, or not, at his pleasure; for, in such a case, the master acts voluntarily … . On the other hand, if it is compulsive upon the master to take a pilot, and a fortiori, if he is bound to do so under penalty, then, and in such case, neither he, nor the owner, will be liable for injuries occasioned by the negligence of the

54 IMO (2003) op cit note 51 at 8–11.

55 J Story *Commentaries on the law of Agency as a branch of Commercial and Maritime Jurisprudence, with occasional illustrations from the civil and foreign law* (1839) at 593.

https://doi.org/10.47348/JOGA/2025/a3

> pilot, for in such a case, the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them; and the maxim, *qui facit per alium, facit per se*, does not apply. In short, the rule of the common law seems to be, that, wherever a man is absolutely compellable by law to employ a particular individual in a given matter, the law, which compels him to employ that individual, takes away his liability for any acts of this individual.

Lord Ellen Borough confirmed this position in the case of *Carruthers vs. Sydebotham*[56] when he stated that:

> Now to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must first be shown that there is a privity between the pilot and the master, so that the one may be considered as the representative or agent of the other. But does the master appoint the pilot? Certainly not … . But if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them.

This common-law position was held until the UK became party to the 1910 Brussels Collisions Convention, also known as the International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, 1910.[57] Articles 4 and 5 deal with the liability of the pilot and the shipowner, with Articles 5 and 6 changing the legal approach to liability.

56 [1815] 4 M. & S. 77, 85 (Eng).

57 International Convention for the Unification of Certain Rules of Law with Respect to Collision between Vessels, Brussels (23 September 1910) available at *https://droitcamerounais.info/en/files/0.732.09.10-International-Convention-of-23-September-1910-for-the-Unification-of-Certain-Rules-of-law-with-Respect-to-Collision-between-Vessels.pdf*

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> Article 4:
> If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally. The damages caused, either to the vessels or to their cargoes or to the effects or other property of the crews, passengers, or other persons on board, are borne by the vessels in fault in the above proportion, and even to third parties a vessel is not liable for more than such proportion of such damages. In respect of damages caused by death or personal injuries, the vessels in fault are jointly as well as severally liable to third parties, without prejudice however to the right of the vessel which has paid a larger part than that which, in accordance with the provisions of the first paragraph of this Article, she ought ultimately to bear, to obtain a contribution from the other vessel or vessels in fault. It is left to the law of each country to determine, as regards such right to obtain contribution, the meaning and effect of any contract or provision of law which limits the liability of the owners of a vessel towards persons on board.
>
> Article 5:
> The liability imposed by the preceding Articles attaches in cases where the collision is caused by the fault of a pilot even when the pilot is carried by compulsion of law.
>
> Article 6:
> The right of action for the recovery of damages resulting from a collision is not conditional upon the entering of a protest or the fulfilment of any other special formality. All legal presumptions of fault about liability for collision are abolished.

The purpose of the Convention was not to change the common-law position on liability under compulsory pilotage. The purpose of the Act was to abolish the 'moiety rule',[58] replacing

[58] Prior to the Act, the maritime rule was as follows: where two vessels collided, with both at fault, regardless of the blameworthiness of either, each shipowner was responsible to each other for a moiety or half of the damage to the others vessel. SKC Rares 'The 1910 Collisions Convention:

it with the more just proportionate fault approach to liability. [59]In determining fault, as per Article 4, the House of Lords held that 'the Courts must investigate and weigh each vessels blameworthiness for the collision, together with its role in the causation of the loss or damage'.[60] The shift applied to all collisions, regardless of the pilotage dynamic.

While English law was changed to reflect these provisions, the UK Pilotage Act of 1987 provides clear guidelines on the liability of pilots under compulsory pilotage. Article 21 of the Act defines pilot misconduct as:

> 21.—(1) If the pilot of a ship—
> does act which causes or is to cause the loss or destruction of:
> *(a)* any likely or serious damage to, the ship or its machinery, navigational equipment or safety equipment, or the death of, or serious injury to, a person on board the ship; or
> *(b)* omits to do anything required to preserve the ship or its machinery, navigational equipment or safety equipment from loss, destruction or serious damage or to preserve any person on board the ship from death or serious injury, and the act or omission is deliberate or amounts to a breach or neglect of duty or he is under the influence of drink or a drug at the time of the act or omission, he shall be guilty of an offence.

The change in approach under the Brussels Convention of 1910 has not insulated pilots from liability for wrongful conduct. South Africa, unlike the UK, is not party to the Brussels Convention of 1910. The common-law position, which removes liability where pilotage is compulsory, should technically still stand. Under the 2005 Ports Act, liability is however, transferred to the shipowner, through the legislative fiction that the pilot is employed by the shipowner. Under English law, through the 1910 Brussels Convention, however, shipowners were forced to bear the burden of pilot negligence, with the issue of liability

Can an old sea dog learn new tricks?' Comite Maritime International – Tokyo Conference 2025 available at *https://cmi2025tokyo.org/assets/dl/documents/pm/hon_steven_rares-KC.pdf*

59 Rares op cit note 57 at 2.

60 Ibid. See case *The Miraflores and the Abadesa* (1967) 1 (AC) 826 at 845.

becoming a moot point. The international community sought to lessen the burden on shipowners through the International Convention relating to the limitation of the liability of owners of sea-going ships (with protocol of signature) of 1957. The Convention was concluded at Brussels on 10 October 1957, with South Africa as a signatory. The relevant provision in this case is Article 1*(b)* of the Convention which provides for limitation of liability of the shipowner for:

> *(b)* Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship. Loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: Provided however that in regard to the act, neglect or default of this last class of person, the owner shall only [be] entitled to limit his liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers.

In terms of this provision, while the owner is deemed liable for the acts, neglect or default of an employee during navigation, they are still subject to the provisions of the Convention. Limitation of liability, as it pertains to damage of property and loss of life on land, arising from the collisions, ensures that the shipowner is protected from the full burden of liability to port infrastructure. Employees are also able to benefit from the limitation of liability extended to the shipowner.[61]

III COMMENTARY

From the literature, it is evident that good faith is not a single concept, but one which includes within itself, elements of

[61] Article 6(2).

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fairness, reasonableness and equality. Good faith can also have multiple facets, depending on the context in which it is used. The English law does not utilise good faith in the determination of pilot duties or liability, it is more practical. Instead, the courts have looked at the roles and responsibilities of each party to determine the issue of fault. This approach has enabled the court to by-pass the issue of motive, dealing purely with actions and the implications thereof. The South African approach is also one which is evolving, with employee duties, especially in agency relationships, going beyond good faith, to fiduciary duty in which their loyalty towards their client is greater than that of good faith.

In this case, the employee should align themselves with the interests of their employer, ensuring that their actions promote the goals of their employer and do not negatively impact them. With the English law, and subsequently the South African Courts promoting the concept of reasonable behaviours, it becomes much simpler, in the sense that we could be looking at the behaviour of the reasonable pilot. In the South African context, the pilot is wearing two hats. First, as an employee of Transnet – thus an agent of Transnet – he has a fiduciary duty towards Transnet, ensuring that he protects the interests of the port and his true employer. This will mean that, he always performs his duty with excellence, protecting the port infrastructure, other port users and the vessel that he is piloting. As a purported employee of the shipowner, regardless of compulsion, in the moment of his employment, the goal of the Master would be to safely navigate the vessels to berth, without accident and undue delay and thereafter, to safely navigate the vessel to the correct shipping lane, without colliding with other vessels or animals. It would therefore appear that, for the period of pilotage, the goals of his true employer and his imputed employer are the same, and the pilot is not forced to split his loyalties between them.

In good faith, it would be expected that the pilot would have prepared himself for his task before boarding. Checking the weather, the currents, wind shifts, other incoming vessels and familiarising himself with the vessel type and any special features attached to the vessel. On board, he would ask the Master for his inputs and ensure that there is clear communication about the number of tugs required, positioning of the tugs and vessel speed and the correct approach etc. This would be expected of a pilot acting in good faith.

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Unlike in the context of negligence, where there are degrees of negligence, each attached to intention or lack thereof, an employee is acting in good faith, or they are not. There is no grey area to navigate. Bad faith is often linked to '… lack of honest intention, malice, ulterior motive, a quest for revenge, reckless abandon, a quest for self or others' advancement, and attempts to divert attention from one's or others' wrongdoing and involvement in criminal or acts of misconduct.'[62] In determining the absence of good faith, most of the factors identified speak to motive, rather than immediate visible behaviour. Indeed, other than the issue of reckless abandonment and possibly malice, most of the identified factors will be determined after the fact. In the case of pilotage, the Master needs to be able to identify markers of bad faith or absence of good faith within a short space of time to protect his vessel, crew, cargo, port infrastructure and ship-owner from the impacts of the pilot's negligence, recklessness or bad intention.

Unfortunately, negligence or bad judgement by the pilot does not automatically indicate lack of good faith. The factor most likely to indicate bad faith in the context of the act would be reckless abandonment or attempts to divert attention from one's wrongdoing, although it may appear that the traditional grounds for the intervention of the Master, such as incapacity or being under the influence, would also provide grounds, although, under such circumstances, the master would be under a duty to intervene. Bad faith, in the case of pilotage, would possibly need to be inferred after the act, when the acts of the pilot are reviewed. What is clear, however, is that the pilot is either acting in accordance with the interests of his employers, or he is not. Where he is not, there are grounds, based on reasonableness, to assess whether his actions would constitute bad faith, although, in the case of pilotage, the shipowner is not seeking to dismiss the employee.

Unfortunately, as an imputed employee of the shipowner, regardless of whether the pilot is found to have acted in good or bad faith, they are still liable for damages. The effect of this legislation is to negate the common-law position, in which compulsory pilots are held liable for damages caused by their actions and the shipowner is absolved of such acts. This purportedly, while superficially, appears to bring the South African position in line with Articles 5 and 6 of the 1910

[62] Op cit note 33.

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Brussels Collision Convention, while providing shipowners with the option of limiting liability under the 1957 Limitation of Liability Clauses.

Even though the current South African position appears to mirror the global position of placing liability for pilot fault on the shipowner, regardless of level of fault, with limitation of liability under specific conditions, the reasoning and legal processing are different. The immediate impact of the changes is to protect Transnet from the destructive acts of its pilots and possible lack of judgement by the relevant commanding officers. Regardless of the acts of its employees, not only can Transnet sue the shipowner for damages to infrastructure, it is also insulated from claims against it that may have arisen from the actions of its employees. Whereas negligence does not require a malicious mindset, with bad faith there would be an understanding that the employee had prior ill feeling against the vessel owner, where that act is personal. It is unlikely that, such an employee would not have demonstrated this malice, through words or actions, prior to boarding the vessel. Under such circumstances, the responsibility of the ports would have to be raised. The fairness of this stance is also questionable, as it enables both the pilot and the responsible officer to avoid responsibility, and the ports to benefit from the bad faith actions of the pilot.

The limitation of liability, in the case of compulsory pilotage, appears to rest on the legislative fiction of the pilot being deemed to be an employee of the shipowner as case law is clear that compulsory pilots are not employees of the shipowner. It would appear that, South Africa, seeking to align its legislation with the 1957 Convention, (although this fact is not clear) had to create this fiction. Whether this is a workable solution, however, remains to be seen, as once again, English law has shown that an employee is one whom an employer chooses, and not one whom you are compelled to appoint. There is an additional layer which would impact on the issue of liability, this being that the shipowner has no right to choose the pilot allocated, this being a choice made by the Harbour Master. Given the significance of the service being offered and the severity of the risk being taken by the Master, one would assume that the choice of pilot would be one made with much thought. In the case of incapacity due to sickness, lack of experience, drug use or drinking on the job, the relevant ground crew would be best

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placed to know the risks and determine whether the pilot is indeed capable.

Another point of departure is the premise upon which the 1910 Brussels Convention rests. While liability has been transferred to the shipowner, at no point does the Convention assume that the pilot is an employee of the shipowner. Instead, liability is transferred because of pilot fault, even in the case of compulsory pilotage. The Convention merely abolishes all legal presumptions relating to fault. Where the pilot is not at fault, and presumably, if none of the crew are at fault, it would stand to reason that liability would not transfer.

The approach taken by the drafters raises some technical issues.

- The liability of the pilot for acting in bad faith. While the pilot deemed to be an employee of the vessel for the duration that they are on board, there is no real link between the pilot and the vessel. On the other hand, this same assumption would appear to put the pilot outside of the terms of their contractual duty to Transnet, as the act of bad faith occurred when they were deemed to be employed elsewhere. Legislation also does not specify penalties for bad faith actions. This appears to create a loophole, keeping pilots from the responsibility of their own actions.
- Under normal circumstances, a service provider is responsible for damage to the client arising from the wilful or wrongful actions of their employees. The 2005 Ports Act, through the legislative fiction, creates a situation in which the employer not only escapes liability for its lack of judgement but also holds the client accountable to damage caused to the client, itself and third parties arising from the wrongful actions of its pilots. Not only does this reasoning negate the common law, it also would appear to violate the provisions of most service agreements. Regardless of the drafters' motives, it is doubtful that this should be done by disregarding established legal rules or establishing rules which permit unreasonable, unjust outcomes.

IV CONCLUSION

Maritime pilots carry a great responsibility, with the interests of cargo owners, ship-owners and the Authority resting on their decisions and ability. Even through the Ports Rules and the National Ports Act have transferred the cost of their misconduct

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and wrongful actions to the ship-owner, the training and the administration of pilots lies with the Ports Authority. Given that the dispatch of pilots is done through the Harbour Master, they should be held more accountable for their choices, ensuring that the pilots dispatched are both physically and mentally in the best position to steer vessels to berth and sea without accidents. Training standards should also deal with the issues of mindsets and stress encountered by pilots which could trigger bad behaviour. To prevent unnecessary litigation, even if good faith is defined in employee contracts – given their extended employment role – the issue of good and bad faith should be clarified in an amendment to the Port Rules, with a Code of Conduct which outlines their exact role, responsibilities, conduct and protections when on foreign vessels. Shipowners, in addition to the limitation of liability clauses, have the option of having pilots who have trained in our ports and are therefore familiar with its waters. This would make them eligible to apply for exclusion from compulsory pilotage. This, however, is a long shot, with shipowners already struggling with the cost of labour. Given that shipowners can limit their liability under the various International Conventions, in some cases it may appear to be more trouble to contest claims caused by pilot error than not. With the many discrepancies between international law and the South African approach, legal action could, however, be beneficial, as the technical issues raised by the Act provide significant room for debate and clarification by the legal system.

https://doi.org/10.47348/JOGA/2025/a3

NOTES TO CONTRIBUTORS

I INTRODUCTION

The editors of *Journal of Ocean Governance in Africa (JOGA) – Amalwandle Ethu* ('Our Seas' in isiXhosa) under the editorship of the South African International Maritime Institute (SAIMI), welcome the submission of manuscripts in English for publication, provided that the topic under discussion relates to ocean governance, including the law of the sea and maritime law, as it applies either in the whole African continent, in a specific African region or in one or more African States.

JOGA accepts manuscripts of four types. These are:

(a) **Articles**. Articles are the feature pieces of each issue of *JOGA*. They provide a detailed analysis of the topic under discussion. Articles should not exceed 12 000 words (including references). Longer manuscripts will only be considered in exceptional circumstances. All references must be footnoted. Each article must be accompanied by an abstract of not more than 200 words. The abstract should summarise rather than introduce the article. In addition, the article should include appropriate keywords.

(b) **Notes**. Notes are shorter, more focused pieces. They may discuss any specific issue, development, event, instrument or decision of interest to ocean governance in Africa. Notes should be between 3 000 and 8 000 words long. Longer notes are not considered. Notes do not include an abstract or keywords. All references must be footnoted.

(c) **Updates and reports**. Updates are brief descriptions of legal or policy developments which have taken place at the continental, regional or domestic level. Reports are brief summaries of events that have taken place or research that has been undertaken or is in progress. Updates and reports should not exceed 3 000 words. They do not include an abstract or keywords. All references must be footnoted.

(d) **Book reviews**. Book reviews are critical discussions of scholarly books on any topic relating directly or indirectly to ocean governance as it applies either in the whole African continent, in a specific African region or in one or more African States. Reviews should be between 2 000 and 5 000 words long. Longer reviews are not considered. All references must be footnoted.

A manuscript will be considered for publication:

(a) only on the assurance that it has not, in whole, in part or in substance, been published or submitted for publication elsewhere;

(b) on the understanding that it may be submitted in confidence to at least two expert referees for evaluation; and

(c) on the understanding that the editors reserve the right to make whatever changes they consider desirable:
   - (i) to bring the manuscript into the house style of *JOGA*;
   - (ii) to eliminate errors of typing, grammar, syntax, punctuation, spelling, idiom and the like;
   - (iii) to eliminate ambiguity, illogicality, tautology, circumlocution and redundancy;
   - (iv) to produce accuracy and coherence;
   - (v) to improve the mode of expression and style of writing; and
   - (vi) to avoid possible criminal or civil liability.

Authors are required to prepare their manuscripts very carefully to avoid the need for the editors to exercise extensively their right to make changes. In particular, authors are asked to acquaint themselves with the house style of *JOGA* and to check their manuscripts carefully against the guidelines that follow.

NOTE: Regrettably, a manuscript that does not accord with the house style of *JOGA* will be returned to the author(s) immediately, with a request that the manuscript be amended to conform to the house style. The quality of the piece will normally not be assessed before this has occurred.

II HOUSE STYLE

(a) General

What follows in this document are the stylistic requirements that most commonly require the attention of the authors and editors of *JOGA*. This document is merely a general guide because it is not possible to cover every possible referencing and stylistic issue. Where this document does not provide assistance, authors are requested to either:

(i) consult previous issues of *JOGA* and to see how a similar stylistic issue has been dealt with;

(ii) consult the main *House Style for Juta Publications*, which may be found at *https://www.jutajournals.co.za/jolga-style-guide/*; or
(iii) contact the editors for advice at Joga@saimi.co.za (the email address for the editing team).

(b) Matters of presentation and layout

(i) Page layout

The page should have 2.54 cm margins all round (top, bottom, left, right). Line spacing should be 1.15. The text must be right-justified.

All paragraphs (including those that come after long quotations) should be indented except the very first paragraph of a piece and any paragraph appearing immediately after a heading, subheading or sub-subheading.

There is no space after each paragraph except when the paragraph is followed by a heading (in which case there must be two line spaces after the paragraph) or a subheading or sub-subheading (in which case there must be one line space after the paragraph).

(ii) Font and type

A Times New Roman font is used by *JOGA*. The text must be in 12 point font. An 11 point font must be used for all indented quotations, ie long quotations of more than 40 words, which are preceded and followed by a 6 point space. Footnotes must be in 10 point font, with line spacing being 1.00 and the text being right-justified.

Italics are used for emphasis, for case names, names of journals and titles of books, plays, operas and films, names of ships and the titles of paintings and other works of art as well as for web sites and other electronic references. Italics are *not* used for foreign words. All italics in direct quotations are reproduced, however.

(iii) Titles of articles, notes, updates and book reviews

Titles of articles are in italics, right-aligned and always in caps in 14 point font. A line is left between the title and the author's initial(s) and surname, which are not in italics, are right-aligned and in 12 point font. The author's degrees are given in a footnote to the symbol † (and, in the case of a second author, ††) and may be followed, in a separate sentence, by acknowledgements. The author's designation and affiliation appear immediately under his or her name, in italics, 12 point font and sentence case.

Titles of notes are in caps with, if applicable, case names in italics on a separate line. A line is left between the title and the author's initial(s) and surname, which are again in caps. The author's designation appears immediately under the name, in italics and sentence case. Degrees are not given but acknowledgements may be made in a footnote to the symbol † appearing after the author's surname.

Titles of updates are left-aligned and in bold. The first line indicates the relevant State, region or organisation in caps. The second line is in sentence case and contains the title of the update, which may be limited to the title of the relevant legal or policy instrument(s). The author's initial(s), surname, designation and affiliation are given in a footnote to the symbol †.

Titles of book reviews are left-aligned. The first line contains the title of the review in sentence case and in bold. The second line contains the reference to the book reviewed in sentence case and in the format in which the reference would appear if it were in a footnote with, in addition, the thirteen digits ISBN number. The initial(s), surname, designation and affiliation of the author of the review are given in a footnote to the symbol †.

(iv) Headings

All headings are left-aligned (other than headings of sections of *JOGA*). Main headings are in caps and bold. The headings in articles are numbered in roman numerals (e.g. 'I INTRODUCTION'). Subheadings and sub-subheadings are in sentence case. (a), (b), (c) are used for subheadings, which must be in bold. *(i), (ii), (iii)* are used for sub-subheadings, which must be in italics. Authors should avoid, wherever possible, going beyond sub-subheadings.

(v) Lists

(a), (b), (c) should be used for a list under a main heading and (i), (ii), (iii) should be used for a list under a subheading. Bullet points should only be used under sub-subheadings. Full sentences should start with a cap and end with a full stop. Phrases must start with lower case and end with a semi-colon (and a full stop right at the end of the list).

We use ‘first’ (not firstly); thereafter ‘secondly’, ‘thirdly’.

(c) Spelling, grammar and other related matters of style or convention

(i) Spelling and capital letters

JOGA uses the ‘s’ form of English spelling (e.g. recognise, emphasise, analyse, realise, organisation, but assets are ‘realized’). We say ‘in so far as’ and not ‘insofar as’; ‘moneys’ and never ‘monies’.

Capital letters are used in all proper names (e.g. South Africa, Constitutional Court). They are also used in the English official title of legislation and international instruments as well as to distinguish between two different meanings of a word (e.g. ‘Act’ (the statute) and ‘act’ (the deed); ‘Agreement’ (the treaty) and ‘agreement’ (the act of agreeing); ‘Constitution’ (the supreme statute) and ‘constitution’ (the act of constituting); ‘Convention’ (the treaty) and ‘convention’ (the general agreement); ‘Protocol’ (the treaty) and ‘protocol’ (the formalities of a procedure); ‘State’ (the country) and ‘state’ (the condition or position)). Finally, capital letters are used by tradition in a few other cases, such as ‘Parliament’ (the highest legislative body) and ‘President’ (the head of a State).

Please note: Caps are not used for court, appeal court, judge, judge of appeal, committee, board, council, municipality, province, premier, etc. (When in doubt, use lower case.)

Examples:

The appeal was upheld by the Supreme Court of Appeal in 2011.

It is likely that the appeal court will turn down the appeal.

In terms of art 3 of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, …

The Nelson Mandela Bay Municipality is facing a number of challenges. Nevertheless, the Municipality has recorded several successes. Likewise, most other municipalities have …

… within the jurisdiction of the Minister of Home Affairs. No other minister may …

> … the already-ratified Conventions could be given effect …
> … there has been a 'follow-up' agreement to the 1990 Treaty in the form of the 1998 Protocol …

(ii) Numbers, dates, percentages, currencies

Use words for all numbers between one and twenty and for all approximations ('about two hundred years', 'a thousand ways'). Numbers higher than twenty must be in figures.

All numbers in tables and graphs are in figures. So are legislative provisions ('par 4'), ages ('5 years old'), percentages (*JOGA* uses the words 'per cent' in the text ('10.4 per cent'), and only uses the figure % in footnotes, tables and when it appears in a quote) as well as measurements, quantities and amounts ('12 nm', '6 cm', '40 km', 'ZAR 5 million'). It is advisable also to use figures where a lot of numbers appear in a piece, as a consistent style looks better. A space (not a comma) is used in large numbers, as for instance in '42 567'. Where a 'rand and cents' figure is used, the cents should be connoted by a short hyphen ('ZAR 456-45'). For other currencies, use USD, GBP, €, ¥.

A sentence should never begin with figures, ie recast the sentence or use words.

Dates and centuries: 'on the 4th of July 2008' (but 'on 4 July 2008' in Internet references and 'of 4 July 2008' in references to legal instruments); 'in the 1980s' (not 1980's – there is no apostrophe); 'in the 20th century'.

JOGA uses the long dash – (known in the publishing trade as the 'em rule') where the author wishes either: (i) to tack a word, phrase or clause onto the end of a sentence for emphasis; or (ii) to mark off a 'by the way' remark in much the same way as a parenthesis, but generally to give it greater emphasis.

> **Examples:**
> His expertise and loyalty are available – at a price.
> A policy shift is necessary to protect third parties – possibly unsophisticated entrepreneurs – who enter into pre-incorporation contracts.

In other circumstances, the short hyphen [-] must be used.

Examples:
Jean-Jacques.
Seven-year-old boy.

(iv) Quotations

Quotations are reproduced exactly, including all original italics and original punctuation, notwithstanding that the original forms might not comply with the *JOGA* style.

Quotations appear in single quotation marks. Quotations within quotations appear in double quotation marks. Back to single for the rare quotation within a quotation within a quotation.

Short quotations appear as part of the text. Long quotations, ie quotations of more than 40 words, are isolated from the text by being indented from both the left margin and the right margin.

Whenever a quotation is introduced by other words, the quotation should start with lower case (using square brackets to indicate an alteration where necessary). Ellipses need not be used at the start of a quotation but must be used in the middle and at the end of a quotation to indicate missing words. We use three dots for any missing word(s). We do not include in a quotation of up to 40 words the full stop at the end of that quotation. (Thus 'right […]'. and not 'right […].')

(d) Requirements for referencing standard legal sources

(i) International instruments

A reference to an international instrument must include the year of adoption and official name of the instrument (if not mentioned in the text) as well as the reference to where the instrument has been published, including the *UNTS*, *ILM* and *LOSB* references, if applicable. (See below for referencing style in the case where the instrument is only available on the Internet.) In addition, the reference must mention: the date of adoption (date, month and year); the date when the instrument came into effect or the fact that the instrument has not come into effect ('EIF: not yet'); and the status of the instrument with regard to the State(s) concerned (e.g. 'signed in 2002' or 'ratified in 2010'). In footnotes, 'UNGA' is used instead of 'UN General Assembly' and 'UNSC' instead of 'UN Security Council'.

Examples:
1982 UN Convention on the Law of the Sea [1833 *UNTS* 3, (1982) 21 *ILM* 1245; adopted: 10 December 1982; EIF: 16 November 1994]. South Africa ratified the Convention in 1997.
2000 Constitutive Act of the African Union [2158 *UNTS* 3; adopted: 11 July 2000; EIF: 26 May 2001]. South Africa ratified the Act in 2003.

Please note: The title of a Protocol must include the title of the instrument to which the Protocol constitutes an addition (e.g. 'the 2008 Protocol to the 2000 Constitutive Act of the African Union on the Statute of the African Court of Justice and Human Rights').

Please also note: Do not abbreviate the word 'section' when it is used to refer to: (a) a division within one of the seventeen parts of the UN Convention on the Law of the Sea; or (b) any similar division within another instrument.

(ii) Cases

All case names are to appear in italics. A shortened name should be used consistently in the main text, with the full name and citation being given in a footnote the first time the case is referred to. Additional parties are referred to using 'and Another' or 'and Others').

Examples:
M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea) 1999 ITLOS Reports 10 at 23.
Broad (Pty) Ltd v Thin 2008 (4) SA 456 (SCA) 15.

Page references (with marginal letters) may be given. Paragraph references must be provided when paragraphs are numbered. If the case is not reported in a published set of law reports (either at all, or has not as yet been published in this manner due to the decision being very recent), the author should please provide some form of citation for the purposes of reference. This could be a JOL or JDR citation, or a neutral citation used by the courts and SAFLII.

With the proliferation of electronic databases and neutral citations, there is less and less call for an author to refer to a case as being unreported. However, where it is necessary to do so, the *JOGA* uses two basic styles for unreported cases, the date being the date of judgment: '*Dlamini v Jacobs* (NPD) unreported case no 98/05 of 3 August 2006' or '*Dlamini v Jacobs* (NPD) unreported case no 98/05 (3 August 2006)'. In addition, the placement of the word 'unreported' may be varied in accordance with the structure of the sentence, e.g. 'in the unreported case of *Dlamini v Jacobs* (NPD) case no 98/05 of 3 August 2006 …'.

A full set of standard case abbreviations and citations may be found in the *House Style for Juta Publications*.

(iii) Books

All the author's initials and surname must be given as they appear on the title page of the book or on the title page of the chapter / relevant page of the article. For instance, 'John D Smith' must appear as 'J D Smith' and not as 'John D Smith' or 'J Smith'.

In a reference, the co-authors of any work (book, article, chapter, whatever) take an ampersand (e.g. 'J Smith & M Dlamini'). We cite up to three authors (e.g. 'J Smith, M Dlamini & R Pillay'). Thereafter use 'et al' (e.g. 'J Smith et al'). Avoid as much as possible to refer to authors in the text (rather give whatever credit is required in a footnote).

If the named persons are the authors of the book, then no more need be said. But if these are the editors, then the abbreviation (ed) or (eds) must appear after the last surname.

Book titles take the title case and appear in italics. If it is the first edition of the book, then no edition need be referred to; it will be assumed that it is the first edition. If the book is in an edition after the first, the number of the edition must appear after the title ('2 ed', '3 ed', '4 ed', not '2nd ed', '3rd ed', '4th ed').

The year of publication must appear in brackets after the title (in the case of first editions) or edition.

The precise page number(s) where the authority was found comes next, if necessary. If the book operates by numbered paragraphs (which may be connoted either by 'par' or by '§'), then this will be a sufficient reference. If it is necessary to refer to both paragraph and page, then do so as follows: 'par 27 at 160'. This latter method should be used only where absolutely necessary. Where the reference is generally to a chapter in the book, this should be indicated by using the whole word (not 'ch').

> **Examples:**
> John D Smith & Sipho Dlamini *Hand's Law of Arbitration* 5 ed (2006) 115.
> P Q R Boberg *The Law of Delict: Aquilian Liability* (1984) chapter 3.

(iv) Chapters in books

Where an author refers to a chapter in a book written by a specific author (most commonly in a book constituted of chapters by experts on a common theme and which have been collected and edited by a general editor or editors), then both the chapter and the book must be referenced in full the first time the work is cited.

The author must be referred to exactly as he or she was in the book and the titles of chapters in collections are always in sentence case and roman. The book is to be cited as above.

> **Example:**
> M Bear & D Bear 'Too hot, too cold, just right?' in M Goldilocks (ed) *The Politics of Cookery* 3 ed (2004) 23–27.

Some works (especially encyclopaedias and loose-leaf books) can give problems. Try to follow this style:

> A J Kerr 'Lease' in W A Joubert (founding ed) *The Law of South Africa* (1999) XIV first reissue par 164.
> Joe Bloggs 'Executive government' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Service 12) 6-18.

(v) Journal articles

All the author's initials and surname must appear exactly as they appear in the journal being cited (the rules apply as for books).

The title of the article must appear in sentence case, in roman, and within single inverted commas.

The year (in brackets, except where there is no volume number), the volume (where relevant), the issue (in brackets and only where page numbers start again at page 1 in each issue) and the title of the journal must be supplied. The title of the journal must be in italics.

The names of journals should only be abbreviated in the following cases:

AGR	African Geographical Review
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
AJLS	African Journal of Legal Studies
AJMS	African Journal of Marine Science
ASR	African Security Review
AYIL	African Yearbook of International Law
CILSA	Comparative and International Law Journal of Southern Africa
EJIL	European Journal of International Law
ICLQ	International and Comparative Law Quarterly
IJMCL	International Journal of Marine and Coastal Law
ILM	International Legal Materials
JAL	Journal of African Law
JAUS	Journal of African Union Studies
JIML	Journal of International Maritime Law
JMA	World Maritime University Journal of Maritime Affairs
JMLC	Journal of Maritime Law and Commerce
JSAS	Journal of Southern African Studies
LA	Law in Africa
LMLJ	Loyola Maritime Law Journal
MLJ	Maritime Law Journal
MP	Marine Policy
OCLJ	Ocean and Coastal Law Journal
OCM	Ocean and Coastal Management
ODIL	Ocean Development and International Law
OY	Ocean Yearbook
RAAMT	Revue Africaine des Affaires Maritimes et des Transports
SAJIA	South African Journal of International Affairs
SAJMET	South African Journal of Maritime Education and Training
SAJMS	South African Journal of Marine Science
SAYIL	South African Yearbook of International Law

TMLJ	Tulane Maritime Law Journal
UNTS	United Nations Treaty Series

The numbers of the first and last pages always need to be indicated, followed, if applicable, by the number of the page(s) being referred to.

Examples:
G Abraham 'Lines upon maps: Africa and the sanctity of African boundaries' (2007) 15 *AJICL* 61–82.
E de Coning & E Witbooi 'Towards a new "fisheries crime" paradigm: South Africa as an illustrative example' (2015) 60 *MP* 208–215 at 211.

(vi) Theses

D B Hamman *River and Maritime Boundaries between South Africa and Namibia* (unpublished PhD thesis, University of Cape Town, 1991) 134.

(vii) Newspapers

Angela Jones 'Nuclear reactor in trouble' *The Star* 24 May 2005 at 2.

(viii) White papers, etc

The White Paper on Energy Policy (GN 3007 in *GG* 19606 of 17 December 1998).

(ix) Law Commission papers

South African Law Commission Issue Paper 20 (Project 123) *Protected Disclosures* (2002) par 3.

South African Law Commission Discussion Paper 107 (Project 123) *Protected Disclosures* (2004) par 56.

South African Law Commission (Project 123) *Report on Protected Disclosures* (2007).

(x) The South African Constitution

The long citation (used when referring to the Constitution for the first time) is simply 'Constitution of the Republic of South Africa, 1996'. The interim Constitution is 'the Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993)'.

(xi) Legislation

Give the short title and year in the text (e.g. 'the Maritime Zones Act, 1994' or 'the Maritime Zones Act, 1994 (MZA)' (when you are referring to the Act and/or its specific provisions more than once)) and indicate the number and year of the statute in a footnote (e.g. 'Act 15 of 1994'). Thereafter, use the acronym (e.g. 'Section 4 of the MZA', 'See s 5–6 of the MZA').

Use abbreviations for 'section', 'subsection', 'paragraph', 'subparagraph' and 'article' (but never at the start of a sentence): section = 's', subsection = 'ss', paragraph = 'par', subparagraph = 'subpar', article = 'art'. The abbreviations are the same for the plurals. Please note that the above words are not abbreviated when they are not referring to a legislative provision.

Use 'annex', 'appendix' 'chapter', 'part', 'schedule' and 'title'.

(xii) Delegated legislation

A proclamation is cited as follows: Proc R46 in *GG* 24567 of 31 January 2003.

Regulations are cited by referring to the notice in which they appear, e.g. 'the Merchant Shipping (Navigation Bridge Visibility) Regulations, 2004 (GN R1199 in *GG* 26878 of 15 October 2004)'. A regulation is abbreviated to reg, as in reg 5(1) (but not at the start of a sentence).

(xiii) Internet references

Wherever possible, a published and authoritative source should form the basis of a reference. When it is not possible, authors may refer to websites, provided that the authors consider carefully how authoritative the source of the information is before using it.

Where an Internet reference is to be used, it must appear as follows:

> **Example:**
> African Union 'Decision on maritime security in Africa' (AU Doc. EX/CL/Dec. 60 (III) 2003, available at *http://www.au.int/en/sites/default/files/ex%20CL%20DEC%2020%20-%2074%20(III)%20_E_0.pdf*, accessed on 16 September 2013).

North Atlantic Treaty Organisation *Operation Ocean Shield Fact Sheet* (2012) (available at *http://www.nato.int/nato_static/assets/pdf/pdf_topics/1889-12_Factsheet_OOS_en.pdf*, accessed on 17 December 2013).

Please note: the URL must appear in italics, in black and must NOT be underlined.

When it is not possible to ascertain the date of the document or page to which one refers, '(no date)' must be used after the title of the document or page.

Where an author has accessed a published source on the Internet (e.g. a journal article accessed through WestLaw), the original citation should be given, and there is no need to refer to the URL. The exceptions to the above rule are newspaper articles accessed from the Internet, or resources such as law commission reports etc. from other countries, which may not be obviously or easily accessible to interested readers. For convenience, authors are strongly encouraged to give a URL reference over and above the reference to the published source.

(e) The use of footnotes

Authors are encouraged to use footnotes to elaborate on points that would otherwise clutter the main text of the contribution. The other important purpose of footnotes is to provide the relevant references without cluttering the text.

In footnotes, a reference to any authoritative source (which must comply with the house style described above) is given once in full. Apply the relevant requirements for referencing standard legal sources (see (d) above).

Thereafter a book, chapter, journal article, newspaper article, law commission report, thesis will be cited by author(s) and a cross-reference (using 'op cit') to the FIRST footnote, where the full reference appeared. An abbreviated reference to the work may be used to provide further guidance where appropriate (e.g. several of an author's works are cited sporadically in an article).

Examples:
Smith & Dlamini op cit note 5 at 67.
Dugard *International Law* op cit note 13 at 234.
See Ali op cit note 14 at 33, who expresses … .

Cases are also cited using the cross-referencing method, but 'supra' is used.

Examples:
Nottebohm supra note 12 par 34.
Supra note 16 at 365G–H.

For consecutive references to the same work, 'ibid' is used with or without a page number or paragraph reference as appropriate.

Examples:
Ibid.
Ibid at 45.
Ibid par 45.

(f) Miscellaneous

A name should appear in full before any acronym is used for it. The acronym must be introduced immediately after the full name it is referring to (e.g. 'the Benguela Current Commission (BCC) governs …'). (*JOGA* uses 'LOSC' for the 1982 UN Convention on the Law of the Sea and 'UNCLOS I', 'UNCLOS II' and 'UNCLOS III' for the UN conferences on the law of the sea.) However, this does not apply, in the footnotes, to acronyms that are very well known (e.g. AU, BRICS, EAC, ECOWAS, EEZ, EU, FAO, ICJ, ILO, IMO, ITLOS, NGO, OAU, PCA, SADC, UN, UNEP and US or USA).

If at all possible, avoid starting a sentence with an acronym or any other kind of abbreviation.

Where an entire sentence appears in parentheses, the full stop is placed inside the second bracket. (Here an entire sentence is bracketed.)

When giving starting and ending page numbers and paragraph numbers, do not remove figures (e.g. '34–35' and not '34–5').