

# NOTES ON THE ANNOTATED STATUTES

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## 1. Text and format of annotated statutes

The annotated statutes have been prepared from the text in the *Government Gazettes*, *Official Gazettes* and South African *Government Gazettes*. The text in the *Gazettes* has been reproduced exactly in the annotated statutes, with apparent errors noted in the editorial comments.

Changes made to the principal laws by subsequent statutes have been made precisely as directed in the *Gazettes*, even where this results in errors of punctuation or grammar (such as a double comma or an incorrect use of “an” or “a” preceding a substituted term). While it may be a convention of legal drafting that some such errors are to be automatically corrected, drafting conventions have clearly changed over the long period covered by the annotated statutes. Thus, the annotated statutes consistently follow the precise directions in the amending *Gazettes*. (In the very few instances where a change not directed by the *Gazette* has been made to avoid confusion, this is clearly indicated in the editorial notes.)

Please note the following:

- 1.1 **Heading:** An overall heading has been added at the top of each statute, to identify it and the *Government Gazette* in which it was originally published, along with a list of the amending laws and their *Gazette* references. This heading also indicates the dates on which the principal law and the amending laws came into force.
- 1.2 **Format:** Because the statutes in force cover a long time period, a few stylistic matters have changed over time: the fonts used, the placement and style of the section headings and some other formatting issues. The annotated statutes are all presented in the formatting style which is in use in Namibian *Government Gazettes* as of 2013-2014.
  - The annotated statutes utilise a **consistent font** (Times New Roman 11pt) without regard to the font used in the *Gazette*.
  - The annotated statutes place a **single space** between each section, subsection, paragraph, or subparagraph even if the *Gazette* is inconsistent on this point.
  - The annotated statutes consistently show **section headings over the provision in question** (as opposed to in the left margin where they appear in some older statutes), with **no full stop after the section headings** (in contrast to the use of full stops in some of the older statutes).
  - **Boldface, italics and capitalisation** are reproduced as they appear in the *Government Gazette*, regardless of inconsistencies within a statute. However, in some of the older pre-independence statutes, paragraph lettering ((a), (b), (c) etc) was italicised. This style is not used in post-independence statutes. We have used the post-independence style for paragraph letters, without italics, throughout the annotated statutes.
  - **Quotation marks** in German style („example“) have been changed to English style (“example”).
  - **English texts of pre-independence statutes:** Pre-independence statutes enacted in South Africa or “South West Africa” were published in both English and Afrikaans. Only the English texts are reproduced, regardless of which language version was

signed. In some of these statutes, the text contains Roman numerals at the beginning and end of the definitions to assist the reader to correlate the definitions in the English and Afrikaans versions of the statute, since the alphabetical listing of the terms is not necessarily the same in the two different languages. (An example of such Roman numerals is shown below; in this example, the term listed as item (i) in English would have appeared as item (vi) in Afrikaans, and so forth.) These Roman numerals have been omitted in the annotated statutes.

**1. In this Ordinance, unless the context otherwise indicates -**

- (i) “cremate” means to reduce any human remains to ashes by burning or the application of heat, and “cremation” has a corresponding meaning; (vi)
- (ii) “crematorium” means any building fitted with appliances for cremation, including everything essential, incidental or ancillary thereto and includes any structure which, in any special circumstances, the Administrator may approve as a crematorium; (iii)
- (iii) “inspector” means an inspector appointed in terms of section 7 of this Ordinance; (ii)
- (iv) “local authority” means the council of any municipality or any village management board and includes the Peri-Urban Development Board established in terms of the provisions of the Peri-Urban Development Board Ordinance, 1970, (Ordinance 19 of 1970); (iv)
- (v) “proprietor” in relation to a crematorium, means any local authority or any person or any society or other association of persons, whether incorporated or not, responsible for the maintenance, management and control of a crematorium; (i)
- (vi) “regulation” means a regulation made and in force under this Ordinance. (v)

- o **Obvious errors in indentation or margins** have been corrected without comment, but only where there is no possible ambiguity of interpretation. We have taken particular care where the placement of a phrase could affect the text which it applies to, as in the following examples:

**EXAMPLE 1A – Road Fund Administration Act 18 of 1999, section 14(4) (correct in Government Gazette):**

- (4) The Administration shall -
  - (a) subject to section 22(3) of the State-owned Enterprises Governance Act, 2006, determine the remuneration and other conditions of service of its employees who are in management;
  - (b) determine the remuneration and other conditions of service of its employees who are not in management,

which may include conditions of service in respect of medical aid, housing, gratuities and pension benefits.

**EXAMPLE 1B - Road Fund Administration Act 18 of 1999, section 14(4) (example of how an incorrect placement of the final phrase could affect interpretation):**

- (4) The Administration shall -
  - (a) subject to section 22(3) of the State-owned Enterprises Governance Act, 2006, determine the remuneration and other conditions of service of its employees who are in management;
  - (b) determine the remuneration and other conditions of service of its employees who are not in management, which may include conditions of service in respect of medical aid, housing, gratuities and pension benefits.

- 1.3 Arrangement of sections:** Most statutes contain an “ARRANGEMENT OF SECTIONS”, which is occasionally given a different designation, such as “TABLE OF CONTENTS”. The

designation used in the statute has been replicated in the annotated statutes. Where the statute does not contain an ARRANGEMENT OF SECTIONS, this has been added to the annotated statute for ease of reference but indicated in green to show that it is an addition to the original text. Where a provision is inserted or deleted, or where a section heading has been changed by an amendment to the Act, this has been indicated in the ARRANGEMENT OF SECTIONS even where the amending Act makes no specific reference to the ARRANGEMENT OF SECTIONS.

**1.4 Annotations:** The annotated statutes include editorial comments which are indicated in green, in smaller typeface, to clearly show what forms part of the official text and what has been added during the annotation process. The annotated statutes utilise the following terminology, regardless of the terminology used in the amending statute:

- **Amended:** This term is used when an amending Act describes limited changes to a provision *and* whenever changes to a provision are indicated by brackets and/or underlining in the amending statute, with the result that portions of the provision in question are not changed.

Sometimes the amending Act “substitutes” the entire provision in question while also indicating the changes with amendment markings; this has been referred to as an amendment, but all changes made by the “substitution” have been incorporated even if they were not indicated with amendment markings. (Ideally, this would be referred to as a “substitution with amendment markings”, but this more accurate description would have made the annotation notes lengthy and clumsy.)

Where not all of the changes are reflected by amendment markings, this is pointed out in the annotation; failure to mark all of the changes has resulted in errors in the recording of changes to the statutes in some other sources.

- **Substituted:** This term is used when the amending statute replaces an entire provision, without any brackets and/or underlining to indicate that only specific portions of the provision have changed.
- **Inserted:** This term is used when the amending statute adds a provision that did not previously exist in the statute. Inserted provisions are often indicated with special numbering techniques – such as, for example, 13A or 13*bis* – to avoid renumbering the entire statute.
- **Deleted:** This term is used when the amending statute repeals or removes a provision. In most cases, the number or letter of the deleted provision is retained in the statute, with an annotation about the deletion, to show clearly what has been removed.

**1.5 Misspellings:** Misspellings in the text are reproduced as they appear in the *Gazettes*, but the correct spelling is placed in the editorial comments so that anyone searching for a particular word or phrase will be able to locate all of its occurrences despite the misspelling. The *Gazettes* occasionally use spellings which are more common in American English than in Namibian English (eg endeavor, willful, program); these have not been noted unless the Act in question is internally inconsistent.

**1.6 Spacing:** Corrections have been made where there is an extraneous space which was clearly unintended (eg “*Gazette* ,”), or a situation where a space has clearly been omitted (eg “paragraph(a)”). This has been done only where the extra space or the missing space is obviously in error.

**1.7 Punctuation:** Punctuation is reproduced exactly as it appears in the *Government Gazettes*, with the following exceptions:

- As noted above, full stops were used after section titles in some of the older statutes. These have been removed for consistency with the modern format adopted for the annotated statutes. Full stops have also been removed where they appear in introductory phrases (such as “*Assented to 28 February 1975.*” in some of the older statutes.
- The *Gazettes* are inconsistent in the use of “en dashes” (–) versus hyphens (-), and on whether or not there is a space before these marks. The annotated statutes consistently use a hyphen with a preceding space.

**1.8 Hyperlinks:** If the statutes are viewed online, the viewer can take advantage of hyperlinks. The *Gazettes* referred to in the headings contain hyperlinks to scans of the actual *Gazettes*. The section numbers in the table of contents at the top of each annotated statute also contain hyperlinks which take the viewer directly to the section in question when the viewer clicks the section number.

## 2. Primary sources

The annotated statutes have been prepared from three primary sources:

- **Government Gazettes issued in independent Namibia:** These are abbreviated as “GG”.
- **Official Gazettes of South West Africa:** These are abbreviated as “OG”. They were issued by the administration of South West Africa prior to Namibian independence.
- **Government Gazettes of South Africa:** These are abbreviated as “SA GG” or “RSA GG”. South African *Government Gazettes* are relevant because some South African laws were applied to “South West Africa” prior to Namibian independence.

There are two groups of South African *Government Gazettes*: those issued before 31 May 1961 by the Union of South Africa (abbreviated as “SA GG”), and those issued after 31 May 1961 by the Republic of South Africa (abbreviated as “RSA GG”). The change came about as a result of the Republic of South Africa Constitution Act 32 of 1961, which transformed South Africa into a Republic with effect from 31 May 1961 and served as South Africa’s constitution until it was replaced by the Republic of South Africa Constitution Act, 1983. The differing designations are necessary because the numbering of the South African *Gazettes* recommenced with number 1 after 31 May 1961.

Some South African *Government Gazettes* are described in their headings as “Extraordinary” *Government Gazettes*, or as “Regulation” *Government Gazettes*. The numbering of the two batches of *Gazettes* (before and after 31 May 1961) remains consecutive regardless of the special designations, and therefore those designations have not been noted in the references to the *Gazettes*.

## 3. Authoritative text of laws

Article 65 of the Namibian Constitution provides that the two “*fair copies*” of a law provided to the Registrar of the Supreme Court by the Secretary of the National Assembly will constitute “*conclusive evidence*” of the contents of the Act in question.

### **Namibian Constitution, Article 65 - Signature and Enrolment of Acts**

(1) When any bill has become an Act of Parliament as a result of its having been passed by Parliament, signed by the President and published in the Gazette, the Secretary of the National Assembly shall promptly cause two (2) fair copies of such Act in the English language to be enrolled in the office of the Registrar of the Supreme Court and such copies shall be conclusive evidence of the provisions of the Act.

(2) The public shall have the right of access to such copies subject to such regulations as may be prescribed by Parliament to protect the durability of the said copies and the convenience of the Registrar's staff.

The Assistant Registrar of the Supreme Court keeps two forms of "fair copies" at the Supreme Court Library: photocopied versions of the *Government Gazettes* as well as the texts of the laws actually signed by the President and the Speaker. The librarian of the Supreme Court Library reports that both versions are obtained from the Speaker of the National Assembly, and that both are considered to be "fair copies". Both the photocopied *Government Gazettes* and the signed statutes are accessible to the public as prescribed by the Constitution.

As of November 2013, the Supreme Court Library appeared to be in possession of all *Government Gazettes* published to date, but the signed texts dated back only to 2004. The librarian of the Supreme Court was unsure where the signed statutes prior to 2004 are stored, but suggested that they could possibly be with the Chief Justice or in the National Archives.

## **4. Date on which statute came into operation**

Many statutes contain provisions saying that they will come into force on a date set by the relevant Minister by notice in the *Gazette* – with some stating that different dates may be set for different parts of a single statute. Where a statute was brought into force by one or more separate notices, this is indicated in the heading. If the statute contains no provision on commencement dates, then statute becomes effective on the date of its publication in the *Gazette*. This applies to amending laws as well as to the principal law. The dates on which the principal statutes and the amending statutes came into force is indicated in the headings at the beginning of each statute.

## **5. Transfer proclamations**

During the years 1977 to 1980, the administration of some South African statutes was transferred from South African government departments to the Administrator-General of South West Africa. This was done by means of a series of proclamations called "transfer proclamations". Although a few of these transfers were made by Proclamations of the State President of South Africa (which were not technically "transfer proclamations"), most were effected by "transfer proclamations" promulgated by the Administrator-General. Most of these transfer proclamations applied to all South African statutes administered by a specific South African Minister or government department. In some cases, exceptions to the general transfer of powers from the department in question were listed in the transfer proclamation.

### ***The procedure for effecting transfers***

Most of the individual Transfer Proclamations refer to the "General Proclamation", which is the Executive Powers Transfer (General Provisions) Proclamation, AG 7 of 1977, as amended. This

General Proclamation sets forth the mechanics of the transfer of powers.

Section 3(1) of the General Proclamation was the core of the administrative transfer. It stated that any reference to the “Minister”, the “Minister of Finance”, the “State President”, “Parliament” or the “Government of the Republic” should be construed as a reference to the Administrator-General, while a reference to the “State” should be construed as *including* a reference to the Administrator-General. A reference to the “Republic” was to be construed as a reference to the territory of South West Africa, and a reference to the “*Government Gazette*” of the Republic was to be construed as a reference to the “*Official Gazette*” of the territory of South West Africa. If a statute was completely exempted from the operation of section 3(1) of the General Proclamation, then the administration of the statute was not transferred to South West Africa (because section 3(1) covered all possible administrative authorities).

Transfer proclamations which did not cross-reference the General Proclamation usually contained provisions which followed a similar pattern.

### ***The effect of transfer proclamations on amendments and repeals***

If the administration of a statute was transferred to South West Africa by the General Proclamation, section 3(5) of the General Proclamation (as inserted by AG 10/1978 and amended by AG 20/1982) had the effect of “freezing” the statute as it stood at the date of transfer.

Section 3(5) as amended states:

No Act of the Parliament of the Republic -

- (a) which repeals or amends any law -
  - (i) passed by Parliament and which applies in the Republic as well as in the territory; and
  - (ii) of which any or all the provisions are administered by or under the authority of the Administrator-General or the Council of Ministers in terms of a transfer proclamation or any other law; and
- (b) which is passed after the commencement of such transfer proclamation or other law

shall, notwithstanding any provision of a law referred to in paragraph (a) or any other law passed after the commencement referred to in paragraph (b) that the law referred to in paragraph (a) or any amendment thereof applies in the territory, apply in the territory, unless it is expressly declared therein or in any other law that it shall apply in the territory.

The effect was that blanket provisions predating the transfer – such as the frequently-used formula “This Act, and any amendment thereof, shall also apply in the territory of South West Africa” – no longer operated to make South African amendments to the Act automatically applicable to South West Africa. Amendments to the statute in South Africa after the date of the relevant transfer proclamation were applicable to South West Africa *only* if the amending Act, or some other law passed subsequent to the date of transfer, *expressly* made the amendments applicable to South West Africa.

The same rule applied to repeals. If a statute which had been transferred to South West Africa was repealed in South Africa, the repeal was not applicable to South West Africa unless the repealing act *expressly* stated that it also applied to South West Africa.

### ***The effect of transfer proclamations on rules and regulations***

The same principle applied to rules and regulations issued under a statute which had been transferred to South West Africa.

Section 3(4) of the General Proclamation states:

Any proclamation, regulation or rule which is issued or made after the commencement of any transfer proclamation by, or on the authority or with the approval of, the State President or the Minister under a law which at such commencement applies both in the territory and in the Republic, and which is published in the *Government Gazette* of the Republic, shall, notwithstanding the provisions of subsection (1), apply in the territory if such proclamation, regulation or rule or the notice by which it is so published, contains a statement that it was or is issued or made with the consent of the Administrator-General, and applies also in the territory: Provided that for the purposes of the application of such proclamation, regulation or rule in the territory, the provisions of subsection (1) [*the section which interpreted terminology in the relevant laws so as to effect the transfer*] shall apply.

The effect was that rules and regulations issued under South African laws applicable to South West Africa after the date of transfer did not apply to South West Africa unless this was *expressly* stated.

### ***Additional information***

Most of the transfer proclamations have never been repealed. However, they are currently relevant only where statutes which originated in South Africa are still applicable in independent Namibia, for the purpose of determining which amendments applied to South West Africa and thus remain in force in independent Namibia. They are also relevant in some cases for understanding the transfer of authority prior to independence, which can be relevant to the question of who bears authority for a particular power or function after independence – eg, for assessing whether a certain function now vests in the President or Cabinet or a Minister or Cabinet. Transfers of individual statutes are discussed in more detail in the annotation notes for each statute.

## **6. Interpretation of terms in pre-independence laws**

Because of the complexities of the issues concerning the interpretation of historical terms in pre-independence laws, the post-independence interpretation of these terms has not been annotated in individual statutes. However, exclusions from the terms of the Executive Powers Transfer (General Provisions) Proclamation, AG 7 of 1977 (the “General Proclamation”) have been noted in respect of South African statutes which were transferred to South West Africa prior to Namibian independence, in case this is relevant to post-independence interpretation.

### **6.1 Applying Art 140 of the Namibian Constitution**

#### **Namibian Constitution, Article 140 - The Law in Force at the Date of Independence**

(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

(2) Any powers vested by such laws in the Government, or in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.

(3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so

done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.

(4) Any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia and any reference to the Government Service Commission or the government service, shall be construed as a reference to the Public Service Commission referred to in Article 112 hereof or the public service of Namibia.

(5) For the purposes of this Article the Government of the Republic of South Africa shall be deemed to include the Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia, and any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, and any reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia.

**Executive Powers Transfer (General Provisions) Proclamation,  
AG 7 of 1977, as amended, sections 2 and 3(1)-(2)**

**Application of this Proclamation**

2. The provisions of this Proclamation shall, as from the commencement of a transfer proclamation and save in so far as that transfer proclamation provides otherwise, apply in respect of any law relating to a matter which in terms of that transfer proclamation is administered by the Administrator-General.

**Application of laws**

3. (1) Subject to the provisions of subsection (2), any reference in any law referred to in section 2 -

- (a) to the Minister or to the Minister of Finance or State President or Parliament (including the Senate or the House of Assembly) or Government of the Republic, shall be construed as a reference to the Administrator-General;
- (b) to the State, shall be construed as including a reference to the Administrator-General;
- (c) to the Republic, shall be construed as a reference to the territory;
- (d) to the *Government Gazette* of the Republic, shall be construed as a reference to the *Official Gazette*.

(2) The provisions of subsection (1) shall not apply with reference to -

- (a) those provisions of any law referred to in section 2 which provide for or relate to the appointment, promotion, transfer, secondment, remuneration, allowances, discipline, discharge or suspension, the retirement, leave and pension rights and privileges or any other conditions of service of any person who is, or is engaged for employment, in the service of the State or the Government of the Republic or any of its departments in terms of that law or any other law;
- (b) those provisions of any law so referred to which provide for or relate to the institution, constitution or control of any juristic person or any board or other body of persons that may exercise powers or perform other functions in or in respect of both the territory and the Republic;
- (c) such provisions of any law so referred to as the Administrator-General may determine, to



such extent or with reference to such matter and with effect from such date (which may be a date earlier than the date of the determination) as he may determine, and made known by notice in the *Official Gazette*.

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In the case of *Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another* 2012 (2) NR 566 (SC), which dealt with the interpretation of the Medicines and Related Substances Control Act 101 of 1965 (RSA), the Supreme Court made a ruling on the impact of Article 140 of the Namibian Constitution on the interpretation of South African statutes.

Article 140 of the Constitution is the provision whereby government power was transferred from the South African government to the new government of Namibia... A reading of art 140 shows that it is a comprehensive provision to achieve a complete and full transfer of the powers vested in the South African government to the new government of the Republic of Namibia. To that extent the governmental hierarchy of South Africa with a State President and ministers and/or other officials was basically the same as that of the new government of Namibia with a President, ministers and other officials, so that such transfer could be easily achieved without the possibility that somewhere or somehow powers vested in some or other obscure person or institution were going to be left out. However, there was in the hierarchy of South Africa or in the independent Republic of Namibia no such designation as an Administrator-General.

Article 140(2), (3) and (4) clearly set out when reference to the President or a minister or other official of the Republic of South Africa shall be a reference to the President, a minister or an official of the Republic of Namibia. No mention is made of the Administrator-General. This, in my opinion, was deliberately done because subart (5) deals exclusively with the Administrator-General and his administration of Namibia and it sets out when, in terms of enactments by such administration, references to the Administrator-General or a minister or other official must be deemed to be a reference to the President, a minister or other official of the Republic of Namibia. This was limited to enactments by the administration of the Administrator-General and there is, in my opinion, no reason why these words should not bear their ordinary grammatical meaning. The effect of this is that **only where there are in enactments of the administration of the Administrator-General reference to the Administrator-General, will such reference be a reference to the President of the Republic of Namibia.** To read into subart (4) reference to 'other official' as a reference to the Administrator-General is clearly contextually wrong and would be in conflict with the provisions of subart (5).

As I have previously pointed out, the fact that there was no reference to the Administrator-General in subarts (2), (3) and (4) was deliberate and not done by mistake or *per incuriam*. After all, the administration of the Administrator-General forms an important part in the political history of this country and during his term of 11 years, various enactments were promulgated by his administration. If it was the intention of the founding fathers to deal differently with this administration, it is my opinion that subarts (4) and (5) would have been differently worded. If it were the intention to have all references in any Act to the Administrator-General to be a reference to the President of the Republic of Namibia, the Constitution would have stated so. This could easily have been achieved by including into subart (4) also reference to the Administrator-General or to state in subart (5) that any reference in any law to the Administrator-General would be a reference to the President of the Republic of Namibia, rather than to leave it to extensive interpretation to read into the words 'other official', in subart (4) of art 140 the word 'Administrator-General', just because in regard to enactments by him, he is equated with the President of the Republic of Namibia.

**Because reference to the Administrator-General is to be regarded as a reference to the President of the Republic of Namibia only in regard to enactments by such administration, it follows, as a matter of necessary implication, that references in enactments by the South African Parliament to the Administrator-General, as a result of s 3(1) of AG Proc 7 of 1977, were done away with. This achieved the further purpose that references to the President, a minister or other official of the Republic of South Africa were, in terms of the Constitution, now a reference to the President or a corresponding minister or official of the government of the Republic of Namibia, without reference to the words Administrator-General.** [at paragraphs 55-60, emphasis added]

In this case, the Supreme Court considered and analysed the previous Supreme Court cases of *Müller and Another v President of the Republic of Namibia and Another* 1999 NR 190 (SC) and *S v Tcoeb* 1999 NR 24 (SC).

In *Tcoeb*, the statute at issue was the Prisons Act 8 of 1959 (RSA), an Act by the South African Parliament, which was extensively amended by Act 13 of 1981 (SWA), an Act by the administration of the Administrator-General. The sections which the Court was called upon to interpret were all amendments made by the 1981 Act. The Court read these sections of the Act as applied in light of article 140(5) of the Namibian Constitution, which was straightforward: the provisions in question were all amended provisions which were fundamentally legislation of the administration of the Administrator-General, and Article 140(5) states that “any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, and any reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia”.

In *Müller*, the Court dealt with s 9(1) of the Aliens Act 1 of 1937 (SA) – which had initially made reference to the State President, but was amended in South Africa by the Aliens Amendment Act of 1981 to read “Minister” *after* the transfer of Act 1 of 1937 to South West Africa by Proclamation AG 9 of 1978, meaning that this amendment was therefore not applicable to Namibia. Thus, the law to be interpreted was Act 1 of 1937, a South African law as it applied in “South West Africa” prior to Namibian independence. The Supreme Court held in 2012, in the *Minister of Health and Social Services* case, that the *Müller* case was correct in finding that the reference to Administrator-General in that section should be construed after independence as a reference to the President of Namibia, but this conclusion should have been based on Art 140(4) instead of Art 140(5). The 2012 Supreme Court case reasoned that “the clear meaning of art 140(5) is that only where reference was made to the Administrator-General in enactments by his administration, was that meant as a reference to the President of Namibia”. Therefore, the relevant provision of the Constitution was Article 140(4) – which, read together with Art 140(3), applies to “laws prior to the date of Independence” which are not covered by Art 140(5).

The import of this judgment would appear to be as follows:

**a) South West African legislation**

These laws are to be interpreted with regard to **Art 140(5)** of the Namibian Constitution, with the result that -

- a reference to the Administrator-General shall be deemed to be a reference to the President of Namibia;
- a reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia.

**b) South African legislation**

These laws are to be interpreted with regard to with regard to **Art 140(1)-(4)** of the Namibian Constitution, *except* where the source of the provision in question is an amendment which constitutes legislation enacted by the “Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia”, in which case **Art 140(5)** applies.

Where portions of a transferred South African law have *not* been amended by South West African legislation, then **Art 140(4)** is applied with reference to the wording of the provision as it stands *without regard to section 3(1)(a) of the General Proclamation which was applied through the mechanism of the various transfer proclamations*.

This means that -

- a reference to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia;
- a reference to the Government Service Commission or the government service, shall be construed as a reference to the Public Service Commission or the public service of Namibia.

Where portions of a transferred South African law *have* been amended by “legislation enacted by” the “Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia”, then **Art 140(5)** applies to the amended provisions, taking into account the interpretation of terms in section 3(1)(a) of the General Proclamation, with the result that in the usual case -

- a reference to the Administrator-General shall be deemed to be a reference to the President of Namibia;
- a reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia.

One question not dealt with in the 2012 case is *whether section 3(1) of the General Proclamation continues to apply to terms not addressed in Art 140 of the Namibian Constitution* – namely, in respect of references to the State, the Republic and the Government Gazette of the Republic. This question is probably only academic in nature, as any such references – whether or not section 3(1) of the General Proclamation applies – could only refer in the post-independence period to Namibia, the Republic of Namibia and the *Government Gazette* of Namibia.

Another question which might arise is *whether, or how, to apply the portion of section 3(1) of the General Proclamation which requires that references to the State “shall be construed as including a reference to the Administrator-General”*. There could be some argument as to whether a reference to the State in such cases constitutes a reference to Namibia generally, or is to be construed as including a reference to the President of Namibia.

## 6.2 The transitional provisions of the Public Service Act 13 of 1995

It is also relevant to take note of the transitional provisions of the **Public Service Act 13 of 1995**, which replaced the Public Service Act 2 of 1980 (SWA). Section 38 of Act 13 of 1995 provides the following rules of construction:

### Construction of certain references in other laws

- 38.** Any reference in any other law -
- (a) to a department shall be construed as a reference to the corresponding office, ministry or agency, as the case may be;
  - (b) to the head of a department or to a secretary of a department shall be construed as a reference to the permanent secretary of the corresponding office, ministry or agency, as the case may be; and
  - (c) to the government service shall be construed as a reference to the Public Service. (emphasis added)

Note that there is arguably some overlap between this provision and Art 140(4) of the Namibian Constitution which states that “any reference to... the government service, shall be construed as a reference to... the public service of Namibia” – keeping in mind that the Public Service Act 2 of 1980 continued in force until 1 November 1995.

### 6.3 Pre-independence references to courts

A separate set of rules of construction applies to references to various courts in pre-independence laws. In 1981 the South-West Africa Division of the Supreme Court of South Africa was converted into the Supreme Court of South-West Africa by the **Supreme Court of South West Africa Proclamation 222 of 1981** (RSA GG 7909), which was brought into force by RSA Proc. 260/1981 (RSA GG 7973). Section 2 of that Proclamation stated:

The South-West Africa Division of the Supreme Court of South Africa as it existed immediately prior to the commencement of this Proclamation, shall cease to be such a division, but shall continue to exist as a superior court for the territory under the name of the Supreme Court of South West Africa, consisting of a judge president and as many other judges as the Administrator-General may from time to time determine. (emphasis added)

In terms of the transitional provisions contained in section 38(2) of RSA Proc. 222 of 1981:

- (2) Unless it would in any particular case be obviously inappropriate -
- (a) any reference in any law other than the Supreme Court Act, 1959 (Act 59 of 1959), or in any document; or
    - (i) to the South-West Africa division of the Supreme Court of South Africa; or
    - (ii) to any division of the said Supreme Court, which immediately prior to the commencement of this Proclamation included a reference to the said South-West Africa division;
    - (iii) to the High Court of South-West Africa,shall be construed as a reference or as including a reference, as the case may be, to the Supreme Court;
  - (b) any reference to the said Supreme Court Act or any provision thereof, in any law which applies in or in respect of the territory shall, in so far as it so applies, be construed as a reference or including a reference, as the case may be, to this Proclamation or any provision thereof corresponding to such first-mentioned provision.

(emphasis added)

The **Supreme Court Act 15 of 1990** repealed the Supreme Court Act 59 of 1959 and all amendments to that Act insofar as they apply in Namibia, as well as RSA Proclamation 222 of 1981. Act 15 of 1990 provides the following transitional provisions in section 39:

#### Application of other laws

**39.** Unless it would in any particular case obviously be inappropriate, any reference in any other law, or in any document or register -

- (a) to the appellate division of the Supreme Court of South Africa (hereinafter referred to as the Appellate Division), shall be construed as a reference to the Supreme Court;
- (b) to any division of the said Supreme Court of South Africa, which immediately prior to the commencement of this Act included a reference to the said Appellate Division, shall be construed as a reference or as including a reference, as the case may be, to the Supreme Court;
- (c) to the Chief Justice of South Africa or any other judge of the Appellate Division, shall be construed as a reference to the Chief Justice or any other judge of the Supreme Court;

- (d) to the registrar or any other officer of the Appellate Division, shall be construed as a reference to the registrar or such other officer of the Supreme Court, as the case may be;
- (e) to the Supreme Court Act, 1959, or any provision thereof, shall, in so far as it applies in relation to the Appellate Division, be construed as a reference or including a reference, as the case may be, to this Act or any provision thereof corresponding to such first-mentioned provision.

(emphasis added)

Section 40(2) of the **High Court Act 16 of 1990** provides the following transitional provisions.

#### **Saving and transitional provisions**

**40.** (1) \*\*\*

(2) Unless it would in any particular case obviously be inappropriate, any reference in any other law, or in any document or register-

- (a) to the Supreme Court of South West Africa, including a reference to that court as construed in accordance with the provisions of section 38(2) of the Supreme Court of South West Africa Proclamation, 1981, shall be construed as a reference to the High Court.
- (b) to the registrar or any other officer of the Supreme Court of South West Africa, shall be construed as a reference to the registrar or such other officer of the High Court, as the case may be;
- (c) to the Supreme Court Act, 1959, or any provision thereof, in so far as it applies in relation to the Supreme Court of South West Africa, or to the Supreme Court of South West Africa Proclamation, 1981, or any provision thereof shall be construed as a reference or including a reference, as the case may be, to this Act or any provision thereof corresponding to any of such first-mentioned provisions.

(emphasis added)

## **7. Fines in South African statutes expressed in pounds**

References to fines in pounds in statutes enacted prior to 1961 should be multiplied by 2 to obtain their South African rand/Namibian dollar value.

The pound was the currency of the Union of South Africa from the time the country became a British Dominion in 1910 until it was replaced by the rand shortly before South Africa became a Republic in 1961. The South African pound was replaced by the rand on 14 February 1961 in terms of the Decimal Coinage Act 61 of 1959 (SA), at a rate of 2 rand = 1 pound. (See also the South African Reserve Bank Act 90 of 1989 (RSA), section 15(2), and its predecessor, the South Africa Reserve Bank Act 29 of 1944 (SA), section 10A.)

This explains why the High Court in the case of *S v George* (CR 25/2010) [2010] NAHC 149 (12 October 2010) noted at para 8 that the legal conversion of a fine of 200 pounds in section 18(5) of the Children's Act 33 of 1960 produced a value of N\$400.

## **8. Apartheid terminology**

There were some general laws which amended terminology or provided rules of construction for certain terminology. Many of the terms in question are offensive in independent Namibia, but it is necessary to be aware of the chain of terms in order to understand how the amendments to some pre-independence laws fit together. The annotations have attempted to incorporate the effect of these

amendments and rules of construction – at least where apartheid terminology survives in the laws in force. However, the annotations do not in every case trace the effect of these general amendments and rules of construction on provisions which have since been amended or repealed to exclude the terminology in question.

### In South Africa:

**Bantu Laws Amendment Act 46 of 1962 (RSA GG 240)**  
came into force on date of publication: 11 May 1962;  
section 16(1)(a), (b) and (c) made expressly applicable to South West Africa  
(re-named the Native Laws Amendment Act 46 of 1962  
as a result of Act 42 of 1964, reproduced in relevant part below)

#### **Change of name or official title of certain institutions and holders of offices**

- 16.** (1) Any reference in any law or document to –
- (a) the Department of Native Affairs **shall be construed** as a reference to the Department of Bantu Administration and Development;
  - (b) the Minister of Native Affairs **shall be construed** as a reference to the Minister of Bantu Administration and Development;
  - (c) the Secretary for Native Affairs **shall be construed** as a reference to the Secretary for Bantu Administration and Development;
  - (d) the Native Affairs Commission **shall be construed** as a reference to the Bantu Affairs Commission;
  - (e) a chief native commissioner or an assistant chief native commissioner **shall be construed** as a reference to a Chief Bantu Affairs Commissioner or an Assistant Chief Bantu Affairs Commissioner, respectively;
  - (f) the director of native labour, the assistant director of native labour or an additional director of native labour, **shall be construed** as a reference to the Director of Bantu Labour, the Assistant Director of Bantu Labour or an Additional Director of Bantu Labour, respectively;
  - (g) the Director of the Native Affairs Central Reference Bureau **shall be construed** as a reference to the Director of the Bantu Reference Bureau;
  - (h) a native commissioner, an additional native commissioner or an assistant native commissioner **shall be construed** as a reference to a Bantu Affairs Commissioner, an Additional Bantu Affairs Commissioner or an Assistant Bantu Affairs Commissioner, respectively;
  - (i) the Native Affairs Central Reference Bureau **shall be construed** as a reference to the Bantu Reference Bureau;
  - (j) a native appeal court **shall be construed** as a reference to a Bantu Appeal Court;
  - (k) a native divorce court **shall be construed** as a reference to a Bantu Divorce Court; and
  - (l) a court of a native commissioner **shall be construed** as a reference to a court of a Bantu Affairs Commissioner; and any word or expression in any law or document connected with an institution or the holder of an office referred to in any of the preceding paragraphs shall be construed accordingly.
- (2) The provisions of **paragraphs (a), (b) and (c) of sub-section (1) shall apply also** in connection with **any law in force in the territory of South-West Africa**, including that portion thereof known as the Eastern Caprivi Zipfel, referred to in section three of the South-West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951).

(emphasis added)

**Bantu Laws Amendment 42 of 1964 (RSA GG 801)**  
read together with section 16(1) of the Native Laws Amendment Act 46 of 1962 (RSA) (RSA GG 240);  
brought into force on 1 January 1965 by RSA Proc. 339/1964 (RSA GG 967);  
no explicit mention of South West Africa, but incorporated by reference to section 16 of Act 46 of 1962

#### **Substitution of “native” and derivatives in all laws**

- 100.** (1) Subject to the provisions of this Act, there is hereby substituted for the words “native”, “Native”, “natives” and “Natives” and their derivatives wherever they occur in any law, “Bantu”, “Bantu” and “Bantu” respectively.

(2) Where any reference in any law to any expression referred to in section *sixteen* of the **Native Laws Amendment Act, 1962 (Act No. 46 of 1962)**, must in terms of the said section be construed as a reference to another expression referred to in the said section, the last-mentioned expression wherever it occurs in any such law, is **hereby substituted** for the firstmentioned expression.

(3) Subject to the provisions of sub-section (2), there is hereby substituted for any compound word, or any expression, of which the word “native” or any derivative thereof forms a part, wherever such compound word or expression occurs in any law, the corresponding compound word, or the corresponding expression, of which the word “Bantu” or the corresponding derivative thereof forms a part.

(emphasis added)

**Second Bantu Laws Amendment Act 102 of 1978 (RSA) (RSA GG 6095)**  
**section 17 brought into force on 1 August 1978 by RSA Proc R.198/1978 (RSA GG 6120)**  
**(not made expressly applicable to South West Africa, so applicable only to South African laws which had not been transferred to South West Africa by that date)**

**Change of name or official title holders of certain institutions and holders of offices, and of “Bantu” and derivatives thereof**

**17.** (1) In any law or document there are **hereby substituted** for-

- (a) the words “Department of Bantu Administration and Development” the words “Department of Plural Relations and Development”;
- (b) the words “Minister of Bantu Administration and Development” the words “Minister of Plural Relations and Development”;
- (c) the words “Secretary for Bantu Administration and Development” the words “Secretary for Plural Relations and Development”;
- (d) the words “Bantu Affairs Commission” the words “Commission for Plural Affairs”;
- (e) the words “Chief Bantu Affairs Commissioner” and “Assistant Chief Bantu Affairs Commissioner” the words “Chief Commissioner” and “Assistant Chief Commissioner”, respectively;
- (f) the words “Director of Bantu Labour”, “Assistant Director of Bantu Labour” and “Additional Director of Bantu Labour” the words “Director of Labour”, “Assistant Director of Labour” and “Additional Director of Labour”, respectively;
- (g) the words “Director of the Bantu Reference Bureau” the words “Director of the Reference Bureau”;
- (h) the words “Bantu Reference Bureau” the words “Reference Bureau”;
- (i) the words “Bantu Affairs Commissioner”, “Additional Bantu Affairs Commissioner” and “Assistant Bantu Affairs Commissioner” the words “Commissioner”, “Additional Commissioner” and “Assistant Commissioner”, respectively;
- (j) the words “Bantu Appeal Court” the words “Appeal Court for Commissioners’ Courts”;
- (k) the words “Bantu Divorce Court” the words “Divorce Court”;
- (l) the words “court of a Bantu Affairs Commissioner” the words “Commissioner’s Court”;
- (m) the words “South African Bantu Trust” and “Bantu Trust” the words “South African Development Trust” and “Development Trust”, respectively;
- (n) the words “Bantu Homelands” the words “Black states”;
- (o) the words “Bantu beer” the words “sorghum beer”;
- (p) the words “Bantu Affairs Administration Board” the words “Administration Board”;
- (q) the words “Bantu Trust and Land Act” the words “Development Trust and Land Act”.

(2) Subject to the provisions of this section there is **hereby substituted** for the word “Bantu” wherever it occurs in any law as a reference to a person or persons, the word “Black” or “Blacks” as the context in question may require.

(3) Subject to the provisions of this section there is **hereby substituted** for any compound word, or any expression, of which the word “Bantu” or any derivative thereof forms a part, wherever such compound word or expression occurs in any law, the corresponding compound word, or the corresponding expression, of which the word “Black” or the corresponding derivative thereof forms a part: Provided that in all such compound words or expressions in the Afrikaans text of any law the word “Swart” shall be written separately from the other words of the compound word or expression.

(emphasis added)

**Laws on Plural Relations and Development Second  
Amendment Act 98 of 1979 (RSA) (RSA GG 6547)**  
came into force on 1 July 1979 (section 17(2) of Act 98 of 1979)  
(not made expressly applicable to South West Africa, so applicable only to  
South African laws which had not been transferred to South West Africa by that date)

**Change of name or official title of certain institutions and holders of offices**

17. (1) A reference in any law or document to the Department of Plural Relations and Development, the Commission for Plural Affairs, the Minister of Plural Relations and Development and the Secretary for Plural Relations and Development **shall be construed** as a reference to the Department of Co-operation and Development, the Commission for Co-operation and Development, the Minister of Co-operation and Development and the Secretary for Co-operation and Development, respectively.

(2) Subsection (1) shall come into operation on 1 July 1979.

(emphasis added)

**In South West Africa:**

**Native Laws Amendment Proclamation, AG 3 of 1979 (OG 3898)**  
came into force on 1 August 1978 EXCEPT FOR section 1(1)(a), (b) and (c)  
which were deemed to have come into operation on 17 May 1978 (section 5)

**Change of names or official titles of certain institutions and holders of offices, and of “Bantu” and derivatives thereof**

1. (1) In any law or document there is **hereby substituted** –

- (a) for the expression “Department of Bantu Education”, the expression “Department of Education and Training”;
- (b) for the expression “Minister of Bantu Education”, the expression “Minister of Education and Training”;
- (c) for the expression “Secretary for Bantu Education”, the expression “Secretary for Education and Training”;
- (d) for the expression “Department of Bantu Administration and Development”, the expression “Department of Plural Relations and Development”;
- (e) for the expression “Minister of Bantu Administration and Development”, the expression “Minister of Plural Relations and Development”;
- (f) for the expression “Secretary for Bantu Administration and Development”, the expression “Secretary for Plural Relations and Development”;
- (g) for the expressions “chief native commissioner” and “Chief Bantu Affairs Commissioner”, the expression “Chief Commissioner”;
- (h) for the expressions “assistant chief native commissioner” and “Assistant Chief Bantu Affairs Commissioner”, the expression “Assistant Chief Commissioner”;
- (i) for the expressions “native commissioner” and “Bantu Affairs Commissioner”, the expression “Commissioner”;
- (j) for the expressions “additional native commissioner” and “Additional Bantu Affairs Commissioner”, the expression “Additional Commissioner”;
- (k) for the expressions “assistant native commissioner” and “Assistant Bantu Affairs Commissioner”, the expression “Assistant Commissioner”;
- (l) for the expressions “native commissioner’s court” and “court of a Bantu Affairs Commissioner”, the expression “Commissioner’s Court”;
- (m) for the expressions “Bantu Trust and Land Act”, “South African Bantu Trust” and “Bantu Trust”, the expressions “Development Trust and Land Act”, “South African Development Trust” and “Development Trust”, respectively;
- (n) for the expressions “Bantu beer” and “kaffir beer”, the expressions “sorghum beer”;
- (o) for the expression “kaffir beer account”, the expression “sorghum beer account”.

(2) Subject to the provisions of this section, there is **hereby substituted** for the word “Bantu” wherever it occurs in any law as a reference to a person or persons, the word “Black” or “Blacks”, as the context in question may require.



(3) Subject to the provisions of this section, there is **hereby substituted** for any compound word, or any expression, of which the word “Bantu” or any derivative thereof forms a part, wherever such compound word or expression occurs in any law, the corresponding compound word, or the corresponding expression, of which the word “Black” or the corresponding derivative thereof forms [sic] a part: Provided that in every such compound word or such expression in the Afrikaans text of any law the word “Swart” shall be written separately from the other words of that compound word or expression.

(emphasis added)

#### **Substitution of section 3A of Act 56 of 1954, as inserted by section 4 of Act 23 of 1972**

2. The following section is hereby substituted for section 3A of the South West Africa Native Affairs Administration Act, 1954:

##### **“Construction of the word “Black”.**

3A. (1) Any reference in **any law in force in the territory**, including the Eastern Caprivi Zipfel, or in any document, relating to any matter in such territory, to a Black, being a reference to a person, **shall be construed** as a reference to a native, and any word or expression in any such law or document connected with a Black **shall be construed** accordingly.

(2) Unless a contrary intention appears from [sic] the provisions of any law or document, the word ‘native’, for the purpose of the application of subsection (1), **shall have the meaning** assigned to it in section 25 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928), of the territory.”

(emphasis added)

**AG 3 of 1979 also repeals section 16 of the Bantu Laws Amendment Act 46 of 1962, and section 100 of the Bantu Laws Amendment Act 42 of 1964, in so far as the provisions thereof are applicable in the territory of South West Africa. It explicitly states that it does not affect the operation of section 17 of the Second Bantu Laws Amendment Act 102 of 1978) in respect of South African laws which had not been transferred to South West Africa. It would similarly not affect the operation of or section 17 of the Laws on Plural Relations and Development Second Amendment Act 98 of 1979 (which post-dates it) in respect of South African laws which had not been transferred to South West Africa.**

#### **References to Plural Relations and Development Act 10 of 1979 (OG 4023) came into operation on 1 July 1979 (section 2)**

##### **Interpretation of references to Department of Plural Relations and Development and certain official titles**

1. **Any reference in any law** or document to the Department of Plural Relations and Development, the Minister of Plural Relations and Development and the Secretary for Plural Relations and Development, **shall be construed as** a reference to the Department of Co-operation and Development, the Minister of Co-operation and Development and the Secretary for Plural Relations and Development, respectively.

(emphasis added)

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