



Republic of Namibia
Annotated Statutes

Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 (RSA)

(RSA GG 1171)

brought into force in South Africa and South West Africa
on 1 October 1965 by RSA Proc. R.234/1965 (RSA GG 1243)
(see section 10 of Act)

APPLICABILITY TO SOUTH WEST AFRICA: Section 10 states “This Act and any amendment thereof shall apply also in the territory of South West Africa, including that portion of the said territory known as the Eastern Caprivi Zipfel and referred to in sub-section 3 of section *three* of the South West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951), and also in relation to all immovable property in that portion of the said territory known as the ‘Rehoboth Gebiet’ and defined in the First Schedule to Proclamation No. 28 of 1923 of the Administration of the said territory.” **Although amendments to the Act in South Africa would have been automatically applicable to South West Africa, there were no amendments to the Act in South Africa prior to Namibian independence.**

TRANSFER TO SOUTH WEST AFRICA: Since the Act does not indicate what Minister administered the Act, it is not clear which transfer proclamation, if any, was applicable. However, the issue of transfer is not relevant to the content of the Act since there were no amendments to the law in South Africa prior to Namibian independence.

ACT

To consolidate and amend the laws relating to the removal or modification of restrictions on immovable property imposed by will or other instrument; to impose a limit on the duration of fideicommissa created by will or other instrument in respect of immovable property; to impose a limit on the duration of restrictions on the alienation of immovable property imposed by will or other instrument otherwise than by way of a fideicommissum; and to provide for incidental matters.

(English text signed by the State President)
(Assented to 18th June, 1965)

ARRANGEMENT OF SECTIONS

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BE IT ENACTED by the State President, the Senate and the House of Assembly of the Republic of South Africa, as follows:-

Interpretation of terms

1. In this Act, unless the context otherwise indicates -

“beneficiary” means any person entitled to a beneficial interest in immovable property under a will or other instrument or for whose benefit any immovable property is held in terms of a will or other instrument by a trustee, administrator or fiduciary without a beneficial interest;

“court” means a court of a provincial or local division of the Supreme Court of South Africa having jurisdiction;

“fideicommissum” does not include a trust.

Application to the court for the removal or modification of restrictions on immovable property

2. (1) If any beneficiary interested in immovable property which is subject to any restriction imposed by will or other instrument before or after the commencement of this Act, desires to have such restrictions removed or modified on the ground that such removal or modification will be to the advantage of the persons, born or unborn, certain or uncertain, who are or will be entitled to such property or the income thereof under such will or instrument, such beneficiary may apply to the court for the removal or modification of such restriction.

(2) An application to the court under this Act shall be on notice of motion supported by affidavits, and notice of such application shall be given to all other beneficiaries under the will or instrument: Provided that if all the beneficiaries join in such application, it may be made by way of petition.

Powers of court as to removal or modification of restrictions on immovable property and as to disposal of proceeds of such property

3. (1) If the court to which application is made under this Act, is satisfied -

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- (a) that the shares which any of the beneficiaries in being at the time of the making of such application individually hold in the immovable property concerned are so small that they cannot be beneficially occupied or enjoyed; or
- (b) that no beneficial use can be made of the immovable property concerned by the beneficiaries in being owing to there being a prohibition in the will or other instrument against the subdivision of the property; or
- (c) that since the taking effect of the will or other instrument imposing any restriction upon the immovable property concerned circumstances materially affecting the value of the property have arisen which in the opinion of the court were not contemplated or foreseen by the person who made and executed the will or instrument; or
- (d) that it will be in the public interest or in the interests of the persons referred to in sub-section (1) of section *two*, to do so,

it may remove or modify any restriction such as is referred to in sub-section (1) of section *two* and order the property to be sold in whole or in part or may make such further or other order as to it may seem just.

(2) If the court orders the property or any portion thereof to be sold, it may further order that the proceeds derived from such sale -

- (a) be paid over to some person specially appointed by the court who shall, for the benefit of the persons referred to in sub-section (1) of section *two*, invest the same in securities or immovable property which shall *mutatis mutandis* be subject to all the terms, conditions and trusts contained in the will or other instrument relating to the property sold; or
- (b) be distributed among the beneficiaries in being to be enjoyed by them absolutely; or
- (c) be dealt with in such further or other manner as to it may seem just in order to give effect to any order it may make under sub-section (1) of this section.

Powers of court relating to evidence

4. The court may, if it thinks fit -
- (a) order oral evidence to be produced before it upon any point arising out of the application and affecting the rights of any person, whether such person is a party to the application or not;
 - (b) order any magistrate or other person specially appointed by the court as commissioner to take and record such oral evidence or to cause the same to be recorded and transmit the record thereof to the court;
 - (c) refer the application to the Master of the Supreme Court or to some other person specially appointed by the court for a report thereon or upon some matter arising therefrom.

Appeal

5. An appeal from a judgment or order of the court under this Act shall lie direct to the Appellate Division of the Supreme Court of South Africa without leave first obtained.

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Limit on duration of any fideicommissum created after the commencement of this Act in respect of immovable property in favour of more than two successive fideicommissaries

6. (1) Any fideicommissum created after the commencement of this Act by any will or other instrument in respect of immovable property in favour of more than two successive fideicommissaries shall, notwithstanding the terms of such will or instrument, be limited to two successive fideicommissaries.

(2) If in terms of any disposition made by will or other instrument after the commencement of this Act any immovable property or any undivided share in immovable property becomes vested in any fiduciary (other than a fiduciary without a beneficial interest) subject to a fideicommissum purporting to be in favour of more than two successive fideicommissaries, such immovable property or undivided share, or any undivided share therein, shall, notwithstanding the terms of such will or instrument, when it vests in the second successive fideicommissary, vest in, and be transferred to, such fideicommissary free of the fideicommissum.

Limit on duration of any fideicommissum created before the commencement of this Act in respect of immovable property

7. (1) Any fideicommissum created before the commencement of this Act by any will or other instrument in respect of immovable property in favour of more than two successive fideicommissaries, shall, notwithstanding the terms of such will or instrument -

- (a) if at such commencement no fideicommissary substitution has taken place in terms of such will or instrument, be limited to two successive fideicommissaries;
- (b) if at such commencement one fideicommissary substitution has already taken place in terms of such will or instrument, be limited to one further fideicommissary;
- (c) if at such commencement two or more fideicommissary substitutions have already taken place in terms of such will or other instrument, be terminated at such commencement.

(2) If in terms of any disposition made by will or other instrument before the commencement of this Act any immovable property or any undivided share in immovable property -

- (a) is vested at such commencement for the first time or becomes vested after such commencement for the first time, in terms of such will or instrument, in a fiduciary (other than a fiduciary without a beneficial interest) subject to a fideicommissum purporting to be in favour of more than two successive fideicommissaries, such immovable property or undivided share, or any undivided share therein, shall, notwithstanding the terms of such will or instrument, when it vests in the second successive fideicommissary, vest in such fideicommissary free of the fideicommissum and such immovable property or undivided share or the undivided share therein, as the case may be, shall be transferred to such fideicommissary free of the fideicommissum;
- (b) is already vested at such commencement in terms of such will or instrument in the first fideicommissary subject to a fideicommissum purporting to be in favour of more than one further fideicommissary, such immovable property or undivided share, or any undivided share therein, shall, notwithstanding the terms of such will or instrument, when it vests after such commencement in the second successive fideicommissary, vest in such fideicommissary free of the fideicommissum and such

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immovable property or undivided share or the undivided share therein, as the case may be, shall be transferred to such fideicommissary free of the fideicommissum;

- (c) is already vested at such commencement in terms of such will or instrument in the second or a later successive fideicommissary subject to a fideicommissum purporting to be in favour of further fideicommissaries, such immovable property or undivided share, shall, notwithstanding the terms of such will or instrument, at such commencement be released from such fideicommissum and such immovable property or undivided share, as the case may be, shall vest in such second or later fideicommissary free of the fideicommissum and such immovable property or undivided share shall, if it is not already registered in the name of such second or later fideicommissary, be transferred to such fideicommissary free of the fideicommissum.

Limit on duration of restrictions on alienation of immovable property imposed by will or other instrument otherwise than by way of a fideicommissum

8. (1) No restriction against the alienation of any immovable property imposed before or after the commencement of this Act, otherwise than by way of a fideicommissum, by any will or other instrument which provides for benefits for successive beneficiaries named, described or designated therein, shall be effectual to prohibit or restrict the alienation of such immovable property after a right to enjoy any benefit in connection with or derived from such immovable property or any fund of which such immovable property forms a part, has in terms of the will or other instrument vested in the third successive beneficiary.

(2) After any restriction against alienation has ceased to be effectual in respect of any immovable property in terms of sub-section (1), such immovable property shall thereafter in all other respects continue to be, or if it is sold, the proceeds or any investment of the proceeds thereof, shall thereafter in all other respects *mutatis mutandis* be, subject to the terms, conditions and trusts contained in the will or other instrument relating to such immovable property.

Endorsement of title deed

9. (1) Where any immovable property or any undivided share in immovable property which has vested in any fideicommissary free of any fideicommissum in terms of section *six* or *seven*, is registered in the name of such fideicommissary subject to such fideicommissum, the registrar of deeds shall, on application by or on behalf of the fideicommissary, accompanied by the title deed under which such immovable property or undivided share is so registered and in which such fideicommissum is embodied, together with an order of court, or such other proof as the registrar may consider necessary, to the effect that the said immovable property or undivided share has vested in the fideicommissary free of the said fideicommissum, endorse the said title deed to that effect.

(2) After any restriction against alienation has ceased to be effectual in respect of any immovable property in terms of section *eight*, the registrar shall, on the application by or on behalf of the person in whose name such immovable property is registered, accompanied by the title deed under which such immovable property is so registered and in which such restriction is embodied, together with an order of court, or such other proof as the registrar may consider necessary, to the effect that the said restriction has so ceased to be effectual in respect of the said immovable property, endorse the said title deed to that effect.

Application of this Act in South-West Africa

10. This Act and any amendment thereof shall apply also in the territory of South-West Africa, including that portion of the said territory known as the Eastern Caprivi Zipfel and

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referred to in sub-section (3) of section *three* of the South-West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951), and also in relation to all immovable property in that portion of the said territory known as the “Rehoboth Gebiet” and defined in the First Schedule to Proclamation No. 28 of 1923 of the Administrator of the said territory.

Repeal of laws

11. (1) The laws specified in the Schedule are hereby repealed to the extent set out in the fourth column thereof.

(2) Any application made and any other thing done under any provision of any law repealed by this Act shall be deemed to have been made or done under the corresponding provision of this Act.

Short title and date of commencement

12. This Act shall be called the Immovable Property (Removal or Modification of Restrictions) Act, 1965, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

Schedule

Republic or Province.	No. and year of Law.	Title.	Extent of Repeal.
Republic	Act No. 2 of 1916.	The Removal or Modification of Restrictions on Immovable Property Act, 1916.	The whole.
”	Act No. 20 of 1924.	The Removal or Modification of Restrictions on Immovable Property Act, 1916, Amendment Act, 1924.	The whole.
”	Act No. 32 of 1952.	The General Law Amendment Act, 1952.	Section <i>six</i> .
South-West Africa.	Proclamation No. 43 of 1948.	The Removal or Modification of Restrictions on Immovable Property Proclamation, 1948.	The whole.
”	Ordinance No. 12 of 1956.	The General Law Amendment Ordinance, 1956.	Section <i>five</i> .