

ARBITRATION

Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977

Summary: This Act ([RSA GG 5504](#)) provides for the recognition and enforcement of foreign arbitral awards. It came into force in South Africa and South West Africa on its date of publication (13 April 1977); see the definition of “court” in section 1.

Applicability to SWA: Although the Act does not contain a specific provision making it applicable to SWA, “court” was defined in section 1 of the original Act as “...a court of a provincial division or local division of the Supreme Court of South Africa”. At the relevant time, the South African *Supreme Court Act 59 of 1959* defined “provincial division” to include “the Eastern Cape division and the Southwest Africa division”. Furthermore, the First Schedule to the *Supreme Court Act 59 of 1959* contained a description of the various provincial and local divisions of the Supreme Court of South Africa and their areas of jurisdiction which, at the time, included a description of the “South-West Africa Division of the Supreme Court of South Africa”.

Transfer of administration to SWA: Although this Act makes no reference to any minister, because of its subject matter it probably fell under the Executive Powers (Justice) Transfer Proclamation, AG 33 of 1979, dated **12 November 1979**. In any event, there were no amendments to the Act in South Africa prior to Namibian independence.

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 *RSA Supreme Court of South West Africa Proclamation 222 of 1981* ([RSA GG 7909](#)), brought into force by RSA Proc. 260/1981 ([RSA GG 7973](#)). In terms of the transitional provisions contained in section 38(2) of the *RSA Supreme Court of South West Africa Proclamation 222 of 1981*, the reference to the “provincial or local division of the Supreme Court of South Africa” in the definition of “court” in section 1 of the Act would be construed as a reference to the Supreme Court of South West Africa:

- (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.

The Supreme Court Act 15 of 1990 ([GG 84](#)) repealed the *RSA South West Africa Proclamation 222 of 1981* in so far as it applied to Namibia. In terms of the transitional provisions contained in section 40 of the High Court Act 16 of 1990 ([GG 85](#)) any reference in any other law 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 *RSA Supreme Court of South West Africa Proclamation 222 of 1981*, is required to be construed as a reference to the High Court of Namibia. Thus, the definition of “court” in the Act should now be construed as a reference to the High Court of Namibia.

Regulations: The Act makes no provision for regulations.

Commentary: Steven Finizio, Danielle Morris & Katherine Drage, “Enforcing arbitral awards in Sub-Saharan Africa-Part 1”, Wilmer Cutler Pickering Hale and Dorr LLP, 7 July 2015, available [here](#). (See also Part 2 of this discussion, available [here](#).)

Related international agreement: The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York Convention), 1958*, which entered into force internationally on 7 June 1959, is relevant. However, Namibia is *not* a party to this Convention.

Arbitration Act 42 of 1965, as amended in South Africa prior to Namibian independence 

Summary: This Act ([RSA GG 1084](#)) provides for the settlement of disputes by arbitration tribunals.

Repeals: The Act repeals the Arbitration Proclamation 3 of 1926 in respect of SWA.

Applicability to SWA: Section 41 states “This Act and any amendment thereof shall apply also in the territory.” Section 1 defines “the territory” as “the territory of South West Africa including that portion of the territory known as the ‘Rehoboth Gebiet’, and the Eastern Caprivi Zipfel referred to in subsection (3) of section three of the South West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951)”.

Transfer of administration to SWA: There is no reference to any minister in the Act, so it is not clear from the face of the Act what transfer proclamation, if any, was applicable. In any event, there were no amendments to the Act in South Africa prior to Namibian independence.

Regulations: The Act makes no provision for regulations.

Cases:

Erongo Mining and Exploration Co Ltd t/a Navachab Gold Mine v Mineworkers Union of Namibia 1993 NR 270 (LC) (section 30)

Nel v Kalahari Holdings (Pty) Ltd 1995 NR 244 (HC) (sections 3(1) and (6))

RL Civil Engineering v Ministry of Regional and Local Government and Housing & Another 1998 NR 61 (HC) (sections 4(2) and 21(f))

Kasuto v Joubert & Another 2011(2) NR 399 (HC) (section 1, definition of “arbitration agreement”)

Da Cunha Do Rego v Beerwinkel t/a JC Builders 2012 (2) NR 769 (SC) (application of sections 15(2) and 31)

Westcoast Fishing Properties v Gendev Fish Processors & Another 2016 (4) NR 1191 (SC) (nature of private arbitration; fairness and prejudice)

Merit Investment Eleven (Pty) Ltd v Namsoy Fishing Enterprises (Pty) Ltd 2017 (2) NR 393 (SC) (section 31)

Expedite Aviation CC v Tsumeb Municipal Council & Another 2020 (4) NR 1126 (SC)

Namibia Power Corporation (Pty) Ltd v Congo Namibia (Pty) Ltd 2021 (2) NR 483 (HC) (section 6 discussed *obiter* as an option that was not utilised in the case at hand)

Van Biljon v Coleman No & Another 2021 (3) NR 699 (HC) (arbitration finding of absolution from the instance does not constitute a final award; section 33(1)(b) interpreted; section 33(4) applied).

See also **LABOUR**.