

NAMLEX
INDEX TO THE LAWS OF NAMIBIA

LEGAL ASSISTANCE CENTRE
2010 update

INFORMATION CURRENT TO 30 June 2010

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UPDATES

The current issue of NAMLEX includes the following:

- laws and regulations through **Government Gazette 4513 (30 June 2010)**
- cases in the Namibian Law Reports through **2009**
- multilateral treaties signed or ratified as of **31 May 2010**.

The Legal Assistance Centre will endeavour to update NAMLEX from time to time. While every effort has been made to ensure the accuracy of the information in NAMLEX, there are undoubtedly some errors. We appeal to those who use NAMLEX to alert us to mistakes which should be corrected or to additional information which should be included in future updates.

TERMINOLOGY

There are laws which are termed "Acts", "Ordinances", "Proclamations" and "AG Proclamations" because legislative authority over South West Africa vested in various different offices and bodies at different points in the country's history. The differences in terminology do not give the laws in question any greater or lesser legal force.

This index refers to "South West Africa" to mirror the use of that term in the laws which are being discussed, and to differentiate between the period before and after independence.

FORMAT

INDEX

The categories used in NAMLEX are listed in the index in boldface type. All other headings have cross-references to NAMLEX categories.

LIST OF STATUTES

This is an alphabetical list of all the statutes in force in Namibia. The category in which each statute has been placed is indicated in brackets. South African statutes inherited by Namibia at independence are indicated in italics. Laws which have not yet come into force are shaded. Appropriations, transfer proclamations and repeals of discriminatory legislation which do have any independent force are excluded from this list.

INDIVIDUAL ENTRIES

The individual statutes in each index category are listed chronologically, starting with the oldest statute.

Title of statute: South West African and Namibian legislation appear in ordinary typeface. South African legislation is indicated in italics. The title also indicates which South African amendments to South African legislation are applicable to Namibia.

Summary: This is a brief summary of the topics covered by the statute. For post-independence statutes, the date on which the statute came into force is given if this is a date other than the date the statute was published in the *Government Gazette*.

Applicability to SWA: For South African statutes, there is an explanation of how the statute became applicable to Namibia.

Transfer of administration to SWA: Various laws called “transfer proclamations” transferred the administration of certain South African statutes to South West Africa, primarily during the period 1977-1979. This information is important for determining which South African amendments to the statute are applicable to Namibia. The transfer proclamations are discussed in more detail below.

Amendments: Amendments to each statute are listed. The name of the amending act is omitted where it is simply a reference to the primary legislation (eg where the Namibian Citizenship Act is amended by the Namibian Citizenship Amendment Act). The name of the amending act is included in some cases where it provides information about the context of the amendment, particularly for amendments made since independence (eg where the Agricultural Bank Act is amended by the Posts and Telecommunications Companies Establishment Act).

Regulations: This part of the entry lists regulations and other subsidiary rules and notices. *These listings are not comprehensive.* However, for the period since independence, all regulations and most other subsidiary rules and notices have been included.

Appointments: For most statutes, recent appointments made in terms of the statute are listed. However, this information is not comprehensively listed.

Cases: Judicial decisions which relate to the statute are also included. *These listings are not comprehensive.* However, they include all Namibian cases published since independence in the Namibian Law Reports (published by the Legal Assistance Centre and Juta), as well as a few significant cases dating from before independence. The cases listed also include all District Labour Court and Labour Court judgments reported in the Namibia Law Reports or in the Namibian Labour Law Publication (available at www.namibia-law.com by subscription).

Generally *not* included are unreported cases available only in hard copy or via www.saflii.org or www.superiorcourts.org.na and Namibian cases reported only in Butterworths Constitutional Law Reports (BCLR) or in the South African Law Reports. This update was also done without reference to www.namlii.org.

Articles: This includes selected books and articles which discuss the legislation, as well as public educational materials on the statute in question. This feature is new with the 2010 update, and feedback on its usefulness or suggestions for inclusion would be welcomed.

Other information: Additional information which may be useful has been included with some entries.

Government Notices and General Notices NOT catalogued: Although key notices are logged under the relevant statutes, NAMLEX does not include notices pertaining to the following-

- advertisements
- announcements of vacancies
- bulk water supply tariffs
- changes of surnames
- closures of roads or erfs
- communications licences
- town planning schemes
- township establishment and boundaries
- farming units offered for allotment
- hunting seasons
- invitations for tenders
- prohibition and proposed prohibition of use of certain merchandise marks
- proclamation of district roads
- registration or de-registrations of close corporations
- registration or de-registrations of companies
- registration of air services
- registration of trademarks
- road carrier permits
- total allowable catches (fish).

ABBREVIATIONS

- AG** Administrator General
This refers to the Administrator-General of South West Africa. Where the term AG appears on its own in a citation, this refers to an AG Proclamation.
- GG** *Government Gazette*
Prior to Namibian independence, laws and regulations which were applicable to South West Africa were published in the *Government Gazette* of South Africa, in the *Official Gazette* of South West Africa and sometimes in both. At independence, Namibia began publication of the *Government Gazette* of the Republic of Namibia. Thus the term “Government Gazette” refers to two different publications, depending on the relevant date. The context should indicate whether the term refers to the Namibian *Government Gazette* or to the South African one.
- GN** Government Notice
“Government Notices” should not be confused with “General Notices”. The abbreviation GN is used only for “Government Notice” in this index. The term “General Notice” is spelled out.
- OG** *Official Gazette of SWA*
- Ord.** Ordinance
- Proc.** Proclamation
- RSA** Republic of South Africa
South Africa became the Republic of South Africa in 1961.
- SA** South Africa
- SWA** South West Africa or South West Africa/Namibia

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.

Although a few of these transfers were made by Proclamations of the State President of South Africa, most were effected by “Transfer Proclamations” promulgated by the Administrator-General. Each of these Transfer Proclamations applied to all South African statutes administered by a specific South African government department. Exceptions to the general transfer of powers from the department in question were listed in the Transfer Proclamation.

All of the Transfer Proclamations are listed for convenience in the index, in a category entitled “Transfer Proclamations”.

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, 1977 (AG 7/1977, 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.

Transfer proclamations which did not actually refer to the General Proclamation 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 subsequent to 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 explicitly stated. If subsequent rules and regulations were made applicable to South West Africa through this procedure, then their administration was transferred to South West Africa in the same way as that of the enabling act.

Additional information

Transfers are currently relevant only where statutes which originated in South Africa are still applicable in independent Namibia. Transfers of individual statutes are discussed in more detail under the NAMLEX entry for each such statute.

A BRIEF LEGAL HISTORY OF NAMIBIA

Prior to the colonial presence in Namibia, the laws in force were the customary laws of the various communities.

Germany first annexed portions of Namibia as a colony in 1884. The boundaries of the territory, which became known as German South West Africa, were set forth in agreements concluded in 1886 with Portugal and in 1890 with Great Britain. The territory was administered by German colonial officials, who initially issued only a small number of regulations. A Governor's Council representing the colonial settlers was established in 1908. This body was supplemented by a *Landesrat* comprising both elected and appointed members of the colonial community, in terms of the **Verordnung of 28 January 1909**. This Territorial Council was primarily an advisory body, with the power to change or modify the Governor's decisions.

German laws and administration were applied mainly in the central and southern parts of the country known as the "Police Zone". The northern areas of Namibia -- including the Kaokoveld, Ovambo, Okavango and Caprivi areas -- were not directly affected by German settlement.

German rule in Namibia effectively ended with the surrender of the German armed forces on 9 July 1915. Martial law was declared during the period of military occupation by South African forces in the **Proclamation of Martial Law 15 of 1915** (13 August 1915), which was repealed by Proclamation 76/1920. The legal measures taken during the period of martial law were ratified by **Proclamation 1 of 1921** (Union Gazette Extraordinary of 2 January 1921). During the period of martial law, German laws remained in force, with the exception of those which were specifically repealed. Administration was initially in the hands of a military governor, who was replaced by a South African administrator on 28 October 1915.

"South West Africa" became a Protectorate of South Africa in terms of the Peace Treaty of Versailles which was signed on 28 June 1919. The Mandate for South West Africa established pursuant to this treaty was reprinted in Government Notice 72 of 6 June 1921. The **Treaty of Peace and South West Africa Mandate Act 49 of 1919** gave effect to the Mandate for South West Africa. In general, this Act delegated administration of the territory of South West Africa to the Governor-General of South Africa, who was given both legislative and executive powers. The Governor-General subsequently delegated administrative powers over the Territory to the Administrator of South West Africa, in **SA Proclamation 1 of 2 January 1921**. The Administrator was advised by an Advisory Council established in terms of **SWA Proclamation 1 of 3 January 1921** (which was amended by Proclamation 51 of 1921). At the same time, the **Administration of Justice Proclamation 21 of 1919** introduced Roman-Dutch law to South West Africa.

In 1921 a Commission on South West Africa established by the South African government recommended that the Territory be administered as a "fifth province" of South Africa. However, for both political and economic reasons, the South African government did not act fully upon these recommendations. The **South West Africa Constitution Act 42 of 1925** provided for the appointment of an Administrator and the election of an all-white Legislative Assembly and Executive Committee. The Legislative Assembly had the power to make laws and ordinances, except on certain matters which were "reserved" and remained under the legislative power of the South African government. These reserved matters included defence; railways and harbours; posts and telegraphs; matters pertaining to the courts; immigration; customs and excise; banking and currency; and "native affairs". The Administrator had whatever administrative powers were delegated to him by the Governor-General in respect of these reserved matters.

In 1946, South Africa began moving towards the incorporation of South West Africa into the Union of South Africa. Consequently, the *South West Africa Constitution Act 42 of 1925* was substantially amended by the ***South West Africa Affairs Amendment Act 23 of 1949***. This Act gave South West Africa direct representation in the South African Parliament. The South West African Legislative Assembly (which was now constituted somewhat differently) continued to have legislative power over anything which was not a reserved matter. The South African Parliament was competent to legislate on matters reserved from the South West African Legislative Assembly, but the Governor-General no longer had law-making powers for the territory. The Administrator of South West Africa remained empowered to administer reserved matters, subject to the direction and control of the Governor-General of South Africa.

The ***South West Africa Affairs Amendment Act 55 of 1951*** returned legislative power to the Governor-General, empowering him to make laws in respect of reserved matters by Proclamation in the *Government Gazette*, subject to the approval of the South African Parliament.

In a continued impetus towards centralisation, the *South West Africa Constitution Act 42 of 1925* was further amended by the ***South West Africa Native Affairs Administration Act 56 of 1954***, which transferred administration of “native affairs” to the South African Minister of Native Affairs (later called the Minister of Bantu Administration and Development), who was competent to transfer certain powers to the Administrator of South West Africa in his capacity as a member of the Native Affairs Commission. To further complicate matters, at this stage the responsibility for matters affecting the “Basters” and “Coloureds” remained with the Administration of South West Africa. Later the South African Department of Coloured, Rehoboth and Nama Relations took over the administration of affairs relating to these groups.

The *South West Africa Constitution Act 42 of 1925* was replaced by the ***South West Africa Constitution Act 39 of 1968***, which gave the South African government power to make laws in respect of an expanded list of reserved matters, including “Bantu affairs”; civil aviation; railways and harbours; employment in the public service; courts; postal and telephone services; police and the military; immigration control; customs and excise; and banking and currency. The SWA Administrator continued to have administrative power in respect of most of these matters, subject to the direction and control of the State President of South Africa, who had full powers to administer the territory “as an integral portion of the Republic”.

This legal regime was soon followed by the ***Development of Self-Government for Native Nations in South West Africa Act 54 of 1968***, which was designed to assist “native nations in the territory of South West Africa” to “develop in an orderly manner to self-governing nations and independence”. The “native nations” were identified as Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi, Ovamboland and any other land subsequently set aside for the use of native nations by the State President of South Africa. The Legislative Councils in the different “native nations” were to have legislative power over certain listed topics -- including education; welfare; clinics; business, trade and industry; roads, sanitation and water supply; the administration of justice; and labour bureaux” -- while Executive Councils in each “native nation” would have administrative power over these matters.

Soon afterwards, the ***South West Africa Affairs Act 25 of 1969*** gave South Africa even tighter legal and administrative control over South West Africa. Many items were added to the existing list of reserved matters, including arms and ammunition; explosives; “riotous assemblies”; prisons; immorality; publications control; water affairs; mining and minerals; forestry; agriculture; fishing; income tax; deeds; trademarks; the registration of companies; labour matters; marriage; the registration of births, deaths and marriages; various welfare issues; and matters relating to “Coloureds, Namas and Basters”. The South West African

authorities could not enact legislation on any reserved matters without the permission of the State President of South Africa.

However, in the wake of the 1971 Advisory Opinion of the International Court of Justice and the subsequent political developments, there was a movement in the opposite direction, towards the eventual independence of South West Africa/Namibia. Reflecting this change in orientation, the *South West Africa Constitution Amendment Act 95 of 1977* empowered the State President of South Africa to make laws for the territory of South West Africa “with a view to the eventual attainment of independence”.

RSA Proclamation R249 of 28 September 1977 abolished the SWA seats in the South African Parliament. The office of Administrator-General for SWA/Namibia was established by *RSA Proclamation 180 of 19 August 1977*, and *RSA Proclamation 181 of 19 August 1977* empowered the Administrator-General to make laws for SWA/Namibia by Proclamation in the *Official Gazette*, as well as to repeal or amend laws passed by the South African Parliament insofar as they related to SWA/Namibia. At this stage, the administration of a number of laws was transferred from South Africa back to South West Africa in terms of a series of transfer proclamations promulgated between 1977 and 1980.

In the meantime, external pressure on South Africa to allow the people of SWA/Namibia to determine their own future led to the Turnhalle Constitutional Conference in 1975. This initiative, which was organised along ethnic lines, was boycotted by SWAPO and some other parties on the grounds that the process was irretrievably tainted by the prevailing climate of political repression.

The Turnhalle forum made recommendations for an “interim government”. Ignoring international opposition, in 1978 South Africa proceeded unilaterally with “internal” elections for a Constituent Assembly to draw up a constitution for an independent Namibia, pursuant to the **Constituent Assembly and Election Proclamation, 1978** (AG 63/1978). SWAPO and other parties boycotted these elections, which were marred by intimidation and propaganda and strongly criticised at an international level. In 1979, the **National Assembly Proclamation, 1979** (AG 21/1979) transformed this Constituent Assembly into a National Assembly with law-making powers. In addition, a Council of Ministers established in terms of the **Council of Ministers Proclamation, 1980** (AG 19/1980) was empowered to issue administrative directives to the Administrator.

In 1980, the **Representative Authorities Proclamation, 1980** (AG 8/1980) made provision for second-tier governmental authorities based on an ethnic division of the country into eleven “population groups”. The various second-tier authorities established pursuant to AG 8/1980 then assumed control over a number of issues, including communal land rights, education, health services and social welfare.

National legislative and executive authority reverted to the Administrator-General in 1983 after the DTA (which was the “ruling party” in accordance with the results of the “internal elections”) resigned from the National Assembly and the Council of Ministers.

In 1985, there was another attempt at internal negotiations at a Multi-Party Conference which led to the formation of the so-called “Transitional Government of National Unity”. This new transitional arrangement, which was rejected by SWAPO as well as many other groupings, was composed of a Legislative and Executive Authority established by *RSA Proclamation R.101 of 1985*, complemented by a Constitutional Council established by the **Constitutional Council Act 8 of 1985**. This governing system incorporated a “Bill of Fundamental Rights and Objectives” annexed to *RSA Proclamation R.101 of 1985*.

In the meantime, international negotiations had resulted in the passage of UN Security Council **Resolution 435 of 29 September 1976**, which set forth a framework for free and fair elections to be held under international supervision. Faced with increasing criticism at an international level combined with pressure from the armed struggle led by SWAPO from exile and the growing internal resistance, South Africa finally acceded to the United Nations plan for a transition to independence. Implementation of Resolution 435 began on 1 April 1989. It left the administration of the electoral process in the hands of the South West African Administrator-General, subject to the “supervision and control” of the United Nations represented by the UN Special Representative and the United National Transitional Assistance Group (UNTAG).

During the implementation period, the Administrator-General took over the functions of the Transitional Government of National Unity, as well as the functions of the second-tier ethnic authorities in terms of the **Repeal of the Laws on the National Assembly, the Cabinet and the Constitutional Council Proclamation, 1989** (AG 16/1989), and the **Representative Authorities Powers Transfer Proclamation, 1989** (AG 8/1989).

Resolution 435 called for the “repeal of all remaining discriminatory or restrictive laws, regulations or administrative measures which might abridge or inhibit” the objective of a free and fair election. This objective was addressed by the **First Law Amendment (Abolition of Discriminatory or Restrictive Laws for purposes of Free and Fair Election) Proclamation** (AG 14/1989) and the **Second Law Amendment (Abolition of Discriminatory or Restrictive Laws for purposes of Free and Fair Election) Proclamation** (AG 25/1989).

Elections were held in November 1989, pursuant to the **Registration of Voters (Constituent Assembly) Proclamation, 1989** (AG 19/1989), the **Registration of Political Organisations (Constituent Assembly) Proclamation, 1989** (AG 43/1989), and the **Election (Constituent Assembly) Proclamation, 1989** (AG 49/1989), as amended by AG 59/1989.

The role of the Constituent Assembly was determined primarily by the terms of UN Resolution 435, supplemented by the **Constituent Assembly Proclamation, 1989** (AG 62/1989). A Constitution was speedily adopted, and Namibia became an independent nation on 21 March 1990 with the **Constitution of the Republic of Namibia** as the Supreme Law.

Further details about the legal history of Namibia and the relevant political context can be found in A du Pisani, *SWA/Namibia: The Politics of Continuity and Change* (1986).

LEGAL BACKGROUND OF SPECIFIC AREAS

South African laws which were made applicable to South West Africa sometimes contained particular references to certain portions of Namibia: the Eastern Caprivi Zipfel, Walvis Bay or the Rehoboth Gebiet. There are also a few specific references to these areas in South West African and Namibian legislation. The reason for this is the peculiar legal history of these three areas, which is briefly outlined here.

Eastern Caprivi Zipfel

This area became a part of German South West Africa as a result of an agreement between Great Britain and Germany dated 1 July 1890, with the understanding that it would provide a corridor to the Zambezi River and thus to other areas in Africa which were under German control. It was subsequently named the Caprivi Zipfel (Strip) after the German Chancellor, Count von Caprivi.

The Eastern Caprivi Zipfel is defined in the *SA Eastern Caprivi Zipfel Administration Proclamation 147 of 1939* as “that part of the Mandated Territory of South West Africa which lies to the East of longitude 21° East”.

The Eastern Caprivi Zipfel has had an unusual administrative history in comparison to other parts of Namibia. From 1922 to 1929, it was administered by the British High Commissioner of South Africa as if it were part of the Bechuanaland Protectorate (now Botswana). (See *SA Proclamations 12 of 1922 and 23 of 1922*.) From 1929 until 1939, it was administered by the Administrator of South West Africa, in terms of *SA Proclamation 196 of 1929*, which authorised the Administrator to repeal or amend any laws in force in the Caprivi, and to make new laws applicable to the area. The *Caprivi Zipfel Administration Proclamation 26 of 1929* made provision for the laws of the Territory to apply to the “Eastern Caprivi Zipfel”.

Then, in 1939, administrative responsibility passed to the South African Minister of Native Affairs (later the Minister of Bantu Administration and Development), in terms of the *SA Eastern Caprivi Zipfel Administration Proclamation 147 of 1939*.

The *South West Africa Affairs Amendment Act 55 of 1951* gave the Governor-General of South Africa the power to make laws by Proclamation for the Eastern Caprivi, and to repeal or amend any other laws made applicable to the area, *except* for Acts of the South Africa Parliament made applicable to the Eastern Caprivi Zipfel after the date of the Governor-General’s empowerment. The 1951 Act also specified that no future Acts of Parliament and no Ordinances of the Legislative Assembly of South West Africa would be applicable to the Eastern Caprivi Zipfel unless “expressly declared to be so applicable”. (For the rest of the Territory of South West Africa, the Governor-General was empowered at this stage to make laws by Proclamation only in respect of matters for which the Legislative Assembly of South West Africa was not empowered to legislate.)

The *South West Africa Constitution Act 39 of 1968* made a similar distinction between the power of the State President of South Africa to make laws for the Territory of South West Africa in general, and his power to make laws for the Eastern Caprivi Zipfel. This Act also reiterated the requirement that legislation of the South African Parliament and the Legislative Assembly of South West Africa would be applicable to the Eastern Caprivi Zipfel only if this was expressly stated.

Thus, from 1939, administrative responsibility for the Eastern Caprivi Zipfel rested entirely with South Africa, with no authority over the area being delegated to the South West African administration.

Then, in 1977, when the *South West Africa Constitution Amendment Act 95 of 1977* transferred general administrative responsibility for the Territory from South Africa to the South West African administration, the Eastern Caprivi Zipfel was included without distinction.

The history of the Eastern Caprivi Zipfel is discussed in *Moraliswani v Mamili* (unreported judgement, Supreme Court of SWA, 1985/06/12).

Walvis Bay

Britain annexed Walvis Bay in 1878, an act which was formalised by the Cape Colonial Parliament's *Walfish Bay and St. John's River Annexation Act 35 of 1884* and the accompanying *Proclamation of Annexation 184 of 1884*.

From 7 August 1884, the port and settlement of Walvis Bay was administered as part of the Colony of the Cape of Good Hope. At this stage, the Cape Governor was authorised to legislate for Walvis Bay by proclamation.

From 31 May 1910 to 1915, Walvis Bay was treated as part of the Province of the Cape of Good Hope of South Africa, and was considered part of the Union of South Africa for legislative and administrative purposes. During the occupation of South West Africa by Union forces in the course of World War II, the **Proclamation of Martial Law 15 of 1915** provided that all proclamations and martial law regulations issued in the Protectorate of German South West Africa would apply to Walvis Bay "on account of its contiguity to the Protectorate".

After the Mandate for South West Africa was established pursuant to the Peace Treaty of Versailles, the *South West Africa Affairs Act 24 of 1922* gave the Governor-General of South Africa the power to set a date after which Walvis Bay would be administered "as if it were part of the mandated territory and as if inhabitants of the said port and settlement were inhabitants of the mandated territory". The Governor-General was also empowered to delegate his legislative powers for Walvis Bay to the Administrator of South West Africa for the purpose of bringing the laws of Walvis Bay into conformity with the rest of the territory. The act further provided that no future act passed by the Parliament of the Union of South Africa would apply to Walvis Bay *unless* this was specifically stated in the law, or the law was declared to be applicable to Walvis Bay by a Proclamation of the Governor-General.

The relevant date was set as 1 October 1922 by *SA Proclamation 145 of 1922*. This Proclamation also delegated all of the Governor-General's powers to make laws for Walvis Bay to the Administrator of South West Africa. The Administrator immediately enacted the **Walvis Bay Administration Proclamation 3 of 1922**, which repealed the South African laws in force in Walvis Bay and substituted the relevant South West African legislation. This Proclamation also provided that all future laws enacted by the Administrator for the territory would be automatically applicable to Walvis Bay, unless Walvis Bay was specifically *excluded*. Thus, from this date, Walvis Bay was treated as if it were part of the Territory of South West Africa.

The only legal distinction between Walvis Bay and the Territory of South West Africa was the requirement that laws made applicable to South West Africa by the South African Parliament applied to Walvis Bay only if this was expressly stated. This caused so much confusion that the *South West African Affairs Amendments Act 28 of 1944* removed this special requirement, providing that all laws made applicable to South West Africa by the South African Parliament would automatically apply to Walvis Bay. Nevertheless, specific references to Walvis Bay continued to be included in some of the South African laws which were applied to South West Africa, even though they were no longer necessary.

The legal effect of treating Walvis Bay as a part of South West Africa during this period is discussed in *Rex v Offen* 1935 SA 4 (AD), affirming 1934 SWA 73, and *R v Akkermann* 1954(1) SA 195 (SWA).

As pressure for an independent Namibia increased, South Africa took steps to tighten its hold on Walvis Bay, which was a strategic location in economic as well as military terms. Walvis Bay legally reverted to being administered as part the Cape Province of South Africa on 1 September 1977 in terms of the ***Walvis Bay Administration Proclamation, RSA Proclamation No. R.202 of 1977***. This Proclamation provided that all laws in force in Walvis Bay prior to this date would remain in force, but that any future laws which became operative in the Cape Province would also apply to Walvis Bay. The State President of South Africa already had broad powers to legislate for South West Africa and Walvis Bay in terms of the *South West Africa Constitution Act 39 of 1968*, and he exercised these powers in a series of proclamations to bring Walvis Bay back in line with South Africa on key matters such as labour law, mining and minerals, race relations, pass laws, the judiciary, parliamentary and provincial representation and various economic issues.

This situation predictably caused a great deal of legal confusion and inspired international protest. The United Nations Security Council passed **Resolution 432 of 27 July 1978** declaring that the territorial integrity of Namibia must be assured through the “reintegration” of Walvis Bay.

Although the **Namibian Constitution** explicitly stated that the national territory of Namibia includes the enclave, harbour and port of Walvis Bay, the resolution of the status of Walvis Bay was postponed as part of the negotiations around the independence process. According to the Supreme Court in *S v Redondo* 1992 NR 133 (SC), the Namibian legislature and courts were bound in terms of the Namibian Constitution to exercise jurisdiction over Walvis Bay from the date of Namibian independence “whatever difficulties there may be in the execution of such duties”. However, this case also held that the transitional provisions of the Constitution were intended to provide legal continuity in Walvis Bay as well as in the rest of Namibia. In other words, the laws in force in Walvis Bay at the date of independence remained in force until amended, repealed or declared unconstitutional, even if these were different from the laws in force in the rest of Namibia.

The full reincorporation of Walvis Bay into independent Namibia was achieved in 1994 in terms of the **Walvis Bay and Off-Shore Islands Act 1 of 1994**. This act provided that as from the effective date of reintegration, 1 March 1994, the laws immediately in force in Walvis Bay would cease to be applied, except insofar as specifically continued in terms of the present act, and that otherwise only the law of Namibia would henceforth apply. Specific provisions of the act then dealt with specific transitional matters. This had the effect of harmonising the laws in Walvis Bay with the laws in force in the rest of Namibia, while ensuring that no one was unfairly prejudiced by the change in legal regimes.

The legal history of Walvis Bay is discussed extensively in *S v Redondo* 1992 NR 133 (SC) at 143 and in L Berat, *Walvis Bay: Decolonization & International Law* (1990).

Rehoboth Gebiet

The Rehoboth Basters established a republic in 1870, prior to the formal colonisation of South West Africa by Germany. A constitution which came to be known as the **Paternal Laws** was adopted as a Constitution for the Baster people in 1872. The Paternal Laws provided for a supreme ruler known as a *Kaptein*, for a Council (*Kapteinsraad*) of two citizens to assist the *Kaptein*, and for a Parliament (*Volksraad*) consisting of a further two citizens.

In 1885, the first *Kaptein* of the Rehoboth Gebiet signed a treaty with the German colonial authorities which guaranteed the political autonomy of the Rehoboth Basters. Despite the

existence of this treaty, the German Imperial Government made several laws which were applicable in Rehoboth and involved itself in administration of the area to some degree. Nevertheless, the governing structures set forth in the Paternal Laws continued to operate.

After South Africa acquired the Mandate for South West Africa in terms of the Peace Treaty of Versailles, an agreement was reached in 1923 giving a limited form of self-government to the Rehoboth community. This Agreement described the boundaries of the “Rehoboth Gebiet” (subsequently altered by the Rehoboth Gebiet Affairs Proclamation 9 of 1928, the Rehoboth Gebiet Boundaries Amendment Proclamation 22 of 1941, and the Rehoboth Gebiet Boundaries Amendment Proclamation 36 of 1954); acknowledged the right and title of the Rehoboth community to the land which they then occupied; and gave the *Volksraad* law-making powers for the area, provided that the assent of the Administrator of South West Africa was obtained for all laws enacted. Laws passed for South West Africa as a whole were henceforth to be applicable to the Rehoboth Gebiet only if specifically extended to the area. This agreement was ratified and confirmed in **Proclamation 28 of 1923**.

The 1923 Agreement was rejected by a majority of the Basters, who demanded complete independence. As a result of this dissension, two *Volksraads* were elected and the opposing sections of the community recognised different persons as *Provisional Kapteins*. As a consequence of this dispute, all the powers which had vested in the Kaptein and the Volksraad under the 1923 Agreement were transferred by the Administrator to the Magistrate of the Rehoboth District in terms of the **Rehoboth Affairs Proclamation 31 of 1924**. This move was disregarded by a section of the community, which proceeded to hold new elections for another *Volksraad* and a *Kaptein*. A direct confrontation ensued, which was suppressed by the police and the defence force without bloodshed.

At this stage, the South African government appointed a Commission of Inquiry to make recommendations on the status of the Rehoboth Gebiet. Reporting in 1928, this Commission advised that the Magistrate of Rehoboth should retain the powers transferred to him in 1924, acting on the advice of an Advisory Council consisting of members of the Rehoboth Baster Community. An Advisory Board was established by the **Rehoboth Gebiet Affairs Proclamation 9 of 1928**.

However, from this point forward there was a gradual transfer of powers back to the Rehoboth Community, who continued to insist on their right to self-government. The basic 1924 assignment of authority to the local Magistrate remained in place until 1961, when the powers and duties set forth in the 1923 Agreement were transferred from the Magistrate and the Advisory Council back to the *Kaptein*, the *Kapteinsraad* and the *Volksraad* in terms of the **Rehoboth Gebiet Affairs Ordinance 20 of 1961**.

The restoration of powers culminated in the **Rehoboth Self-Government Act 56 of 1976**, which granted self-government to the citizens of the “Rehoboth Gebiet”. This Act made new provision for the election of a *Kaptein* and a Legislative Council, and the appointment of a Kaptein’s Council by the *Kaptein*. The Kaptein’s Council and the Legislative Council together constituted a Legislative Authority which was empowered to make laws on a wide range of specified matters, but the assent of the State President of South Africa was required for all laws passed by the Legislative Authority. The Act also provided that no laws made applicable to South West Africa after the commencement of the Act (including laws enacted by the South African Parliament as well as laws enacted by the Legislative Assembly of South West Africa) would be applicable to the Rehoboth Gebiet if they related to the specified matters over which the Rehoboth Legislative Authority had been given control.

During the implementation of Resolution 435, all the powers, duties and functions of the Kaptein's Council were transferred to the Administrator-General of South West Africa in terms of the **Government of Rehoboth Powers Transfer Proclamation, 1989** (AG 32/1989).

The **Namibian Constitution** repealed the *Rehoboth Self-Government Act 56 of 1976* in its entirety, making the Rehoboth Gebiet an integral part of Namibia.

As a legacy of the various manifestations of the "self-government" of Rehoboth, there are several matters in respect of which the laws that apply to the Rehoboth Gebiet are not the same as those that apply to the rest of Namibia. For example, as of 1997, the ***Registration of Deeds in Rehoboth Act 93 of 1976*** establishes a separate registry for deeds in the Rehoboth Gebiet, while the registration of deeds for the rest of Namibia falls under the ***Deeds Registries Act 47 of 1937***. Another example is the **Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941**, which applies to the administration of estates of persons who are members of the Rehoboth Baster Community, while the estates of other persons in Namibia are governed by the ***Administration of Estates Act 66 of 1965***.

From time to time, laws applicable to other parts of the territory of South West Africa have been made explicitly applicable to the Rehoboth Gebiet. (See, for example, Proclamation 12/1930.)

The history of the Rehoboth Gebiet is discussed in *Rehoboth Bastergemeente v Government of the Republic of Namibia & Others* 1996 NR 238 (SC).

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