

# MAINTENANCE

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## Reciprocal Enforcement of Maintenance Orders Act 3 of 1995

**Summary:** This Act ([GG 1035](#)) provides for the reciprocal enforcement of maintenance orders between Namibia and other countries designated by the Minister of Justice. It repeals the South African *Reciprocal Enforcement of Maintenance Orders Act 80 of 1963*.

**Amendments:** Sections 1, 5, 6, 7, 8, and 9 are amended by the Maintenance Act 9 of 2003 ([GG 3043](#)), which was brought into force on 17 November 2003 (GN 232/2003, [GG 3093](#)).

**Savings:** Section 13(2) states that anything done-  
under any provision of the Reciprocal Enforcement of Maintenance Orders Act, 1963, or deemed to have been so registered or confirmed or done, shall be deemed to have been registered or confirmed or done under the corresponding provision of this Act.

**Regulations:** This Act makes no provision for regulations, which means that the savings clause does not apply with respect to regulations.

**Rules:** Rules issued under the previous Act are contained in RSA GN R.98/1965 (22 January 1965).

**Designations:** Section 13 of the Act provides that any country designated under the *Reciprocal Enforcement of Maintenance Orders Act 80 of 1963* will be deemed to be a designated country for the purposes of the Act. South Africa was named as a designated country in GN 124/1993 ([GG 727](#)), effective 10 September 1993.

Although South Africa is the only country that was designated under the 1963 Act by an independent Namibian government, some of the designations made prior to Namibian independence by the State President of South Africa were applicable to “South West Africa” and thus survive in independent Namibia.

The *Reciprocal Enforcement of Maintenance Orders Act 80 of 1963* was an Act of the South African Parliament that was made applicable to the “territory of South West Africa” by the Reciprocal Enforcement of Maintenance Orders Amendment Act 40 of 1970, with effect from 1 March 1971.

The 1963 Act was administered by the Minister of Justice of South Africa, thus, its administration was transferred to South West Africa by the Executive Powers (Justice) Transfer Proclamation (AG 33/1979), dated 12 November 1979. Section 3(1)(k) of this Proclamation explicitly excluded the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 from the provisions of section 3(1) of the General Proclamation – meaning that the functions of the Minister were not transferred. Nevertheless, as of 1979, section 2 of the 1963 Act empowered the State President to issue Proclamations designating countries to which the Act was applicable. This power was not affected by the exclusion from section 3(1) of the General Proclamation, but was governed by section 3(4) of the General Proclamation which states that any proclamation issued by the State President after the commencement of any transfer proclamation under a law which at the time of such commencement applied to both South Africa and the territory of South West Africa and which is published in the *Government Gazette* of the Republic “shall, notwithstanding the provisions of (1), apply in the territory if such proclamation ... 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 ...”. None of the Proclamations issued by the State President under the 1963 Act after the date of transfer, or the notices publishing them, make any explicit reference to the territory or the Administrator-General, and thus were not applicable to the “territory of South West Africa”.

The South African Transfer of Powers and Duties of the State President Act 97 of 1986 amended section 2 of the 1963 Act so that the power to designate countries under the Act was in future to be exercised by means of a notice issued by the Minister of Justice rather than by a Proclamation of the State President. The effect of this change would have been that any subsequent notices issued by the Minister of Justice in this regard would have been applicable to the Territory of South West Africa by virtue of the exclusion of the 1963 Act from section 3(1) of the General Proclamation. However, we have not located any such notices between 1986 and Namibian independence on 21 March 1990.

The result is that the only designations applicable to “South West Africa” were those which were made prior to the date of transfer in 1979.

The countries in question are as follows (excluding the South African “homelands” which existed as semi-autonomous political units under apartheid but are now part of a unitary South Africa, as declarations in respect of these “homelands” are of no ongoing relevance):

- North-West Territories, Canada (Proclamation No. R. 160 of 1970 of 19 June 1970)
- State of California, USA (Proclamation No. R. 1 of 1971 of 8 January 1971)
- Province of Alberta, Canada (Proclamation No. R. 175 of 1971 of 13 August 1971)
- United Kingdom (Proclamation No. R. 9 of 1976).

Several secondary sources list RSA Government Notice 68 of 1968 as designating Germany under the Act. However, it has not been possible to locate this Government Notice, and it seems impossible that it could have been a valid designation under the Act because in 1968 such a designation could only have been made by means of a Proclamation of the State President. Therefore, Germany is not included in the list of designated countries.

Upon Namibia’s independence, the powers given to the South African Minister of Justice under the 1963 Act were vested in the Minister of Justice of Namibia by virtue of the transitional provisions contained in Article 140 of the Namibia Constitution. However, as noted above, the only country designated under the 1963 Act since independence is South Africa.

## **Maintenance Act 9 of 2003**

**Summary:** This Act ([GG 3043](#)) concerns the payment of maintenance, the holding of maintenance enquiries, and enforcement of maintenance orders. It repeals the South African *Support of Dependants (Natives) Proclamation of 1936* and the South African *Maintenance Act 23 of 1963*. It was brought into force on 17 November 2003 by GN 232/2003 ([GG 3093](#)).

**Savings:** Section 50(5) states: “Notwithstanding the repeal of the Maintenance Act, 1963 (Act No. 23 of 1963) by subsection (1) the rules which were made under that Act and were in force immediately before the commencement of this Act and which are not inconsistent with this Act, continue in force until repealed, withdrawn or amended by regulations made under section 49.” Pre-independence rules and regulations have not been researched.

**Savings:** The savings clause appears to apply to rules but not regulations made in terms of the repealed Maintenance Act 23 of 1963. Section 50(5) states:

Notwithstanding the repeal of the Maintenance Act, 1963 (Act No. 23 of 1963) by subsection (1) the rules which were made under that Act and were in force immediately before the commencement of this Act and which are not inconsistent with this Act, continue in force until repealed, withdrawn or amended by regulations made under section 49.

**Regulations and rules:** Regulations made under this Act are contained in GN 233/2003 ([GG 3093](#)).

Rules which may have survived pursuant to the savings clause have not yet been researched.

**Notices:** Maintenance investigators are designated as *ex officio* Commissioners of Oath in the area in which they are appointed, with effect from 1 June 2020, in terms of the *Justices of the Peace and Commissioners of Oaths Act 16 of 1963* by GN 146/2020 ([GG 7258](#)).

**Cases:** Cases decided under the present Act –

See *Main NO v Van Tonder NO & Another* 2006 (1) NR 389 (HC), which discusses the Act in dicta at 397E-G.

*S v Gawaseb* 2007 (2) NR 600 (HC) (sentence under section 39(1); section 33(1))

*S v Kalundu* 2013 (2) NR 387 (HC) (section 33; order of court in respect of voluntary payments towards arrears while criminal case pending)

*S v EZ* 2014 (1) NR 18 (HC) (sentence for failure to pay maintenance not to be treated lightly, and correct approach to periodical imprisonment for this offence)

*S v Kapitango & Others* 2016 (4) NR 976 (NLD) (appeal procedure under section 47)

*S v Guibeb* 2017 (4) NR 1210 (HC) (unemployment which does not result from unwillingness to work is a defence to charge of failure to pay maintenance under section 39(1); informal substitution of order instead of substitution pursuant to section 17(1)(b)(i) is not competent; suspension of maintenance order until arrears are paid in full as a condition of sentence, without section 17 enquiry, is not competent)

*S v Aukongo* 2018 (2) NR 398 (NLD) (section 39(2)).

Cases decided under the repealed *Maintenance Act 23 of 1963* –

*S v Koyoko* 1991 NR 369 (HC) (section 5(4))

*S v Shivute & Several Other Cases* 1991 NR 433 (HC) (sections 11(1) and (2))

*S v Afrikaner* 1991 NR 109 (HC) (section 11(1))

*S v Exabuja* 1992 NR 196 (HC) (section 11(3))

*S v De Koe* 1993 NR 359 (HC) (section 11(3))

*S v Geiseb* 1994 NR 175 (HC) (section 11(3))

*Tsaoseb v Geingos* 1995 NR 107 (HC)

*Van Zyl v Fourie* 1997 NR 85 (HC) (section 4(1)(b))

*Jantjies v Jantjies & Another* 2001 NR 26 (HC) (principle of set-off not applicable to maintenance order).

## **SELECTED CASES**

*Main NO v Van Tonder NO & Another* 2006 (1) NR 389 (HC) (dealing with maintenance from a deceased estate and extending common law to provide for support from estate of parent to major child in need)

*S v Gawaseb* 2007 (2) NR 600 (HC) (quotes with approval at 602I-603B the following statement from a South African case: “Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those dependent on the law. It is a function of the State not only to provide a good legal framework but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by s 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.”)

## **COMMENTARY**

Legal Assistance Centre, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, 1995, available [here](#)

Law Reform and Development Commission, *Report on Maintenance*, LRDC 5, 1997, available [here](#)

Legal Assistance Centre, *Guide to the Maintenance Act 9 of 2003*, 2005, available [here](#) (languages: English, Afrikaans, Oshiwambo, Otjiherero, Khoekhoegowab, Rukwangali)  
Legal Assistance Centre, *Maintenance Matters: An Assessment of the Operation of Namibia's Maintenance Act 9 of 2003*, 2013, available [here](#).

See also Child Care and Protection Act 3 of 2015 (state maintenance grants) (**CHILDREN**).