

MAINTENANCE

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.

Repeals: The Act repeals the *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 -

Any order registered or confirmed or any other thing 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.

Rules: This Act makes provision for rules rather than regulations, as did the repealed *Reciprocal Enforcement of Maintenance Orders Act 80 of 1963*.

Rules issued under the previous Act were initially contained in RSA GN R.98/1965 ([RSA GG 1011](#)), but these rules were replaced by rules in RSA GN R.299/1971 ([RSA GG 3002](#)).

No rules have been issued under this Act since independence, so the 1971 rules appear to be the ones which are currently operative.

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. However, 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, section 2 of the 1963 Act empowered the State President to issue Proclamations designating countries to which the Act was applicable.²⁴⁶ This power was not affected by the exclusion

²⁴⁶ Section 1 of the original *Reciprocal Enforcement of Maintenance Orders Act 80 of 1963* (RSA GG 550) stated:
2. (1) The State President may by proclamation in the *Gazette* declare that this Act shall apply in respect of any country or territory in which there is in his opinion a law providing for the enforcement therein of maintenance orders made by courts of the Republic.

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 the relevant transfer proclamation 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 R.160 of 19 June 1970)
- State of California, USA (Proclamation R.1 of 8 January 1971)
- Province of Alberta, Canada (Proclamation R.175 of 13 August 1971)
- United Kingdom (Proclamation 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 prior to 1986 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 the enforcement of maintenance orders. It was brought into force on 17 November 2003 by GN 232/2003 ([GG 3093](#)).

(2) The State President may by like proclamation withdraw any such proclamation.

Section 2(1) of the Act was substituted by the *General Law Amendment Act 70 of 1968* (RSA GG 2106) to read as follows:

(1) This Act shall apply in respect of any country or territory designated by the State President by proclamation in the *Gazette*.

Section 2 of the Act was amended again by the *South African Transfer of Powers and Duties of the State President Act 97 of 1986* (RSA GG 10438) to substitute “Minister” for “State President”, and to substitute “notice” for “proclamation”.

Repeals: The Act repeals the *Support of Dependants (Natives) Proclamation of 1936* and the *Maintenance Act 23 of 1963*.

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.

The *Maintenance Act 23 of 1963* has no savings clause in respect of any of the enactments that it repeals.

Regulations: Regulations relating to Maintenance made in terms of this Act are contained in GN 233/2003 ([GG 3093](#)).

Section 15 of the repealed *Maintenance Act 23 of 1963* authorises the Minister to make “rules” rather than regulations. which is presumably why the savings clause in section 50(5) of the current Act refers to “rules”.²⁴⁷ “Rules for Maintenance Courts in respect of Bantu Persons” were contained in RSA GN R.97/1965 ([RSA GG 1011](#)); they were amended and renamed “Rules for Maintenance Courts in respect of Bantu and Native Persons” by RSA GN R.2332/1970 ([RSA GG 2958](#)). “Rules made in terms of Section 15 of the Maintenance Act, 1963” were contained in RSA GN R.99/1965 ([RSA GG 1011](#)); these rules were withdrawn and replaced by another set of rules with the same name in RSA GN R.2331/1970 ([RSA GG 2958](#)). However, these race-based rules which would otherwise have survived pursuant to the savings clause were all repealed by the regulations contained in GN 233/2003 ([GG 3093](#)) at the time when this Act came into force.²⁴⁸

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

²⁴⁷ To provide the context for possible savings, section 1 of the *Maintenance Act 23 of 1963* defines “Republic” to include “the territory”, which is defined as “the territory of South West Africa”. Section 16A states “This Act and any amendment thereof shall apply also in the territory, including the Eastern Caprivi Zipfel.” In 1977, the Act was administered in part by the Minister of Justice and in part by the Minister of Bantu Administration and Development. Therefore, the administration of the Act was transferred to SWA by both the Executive Powers Transfer Proclamation (AG 3/1977, as amended), dated 28 September 1977, and the Executive Powers (Justice) Transfer Proclamation (AG 33/1979, as amended), dated 12 November 1979.

²⁴⁸ GN 233/2003 ([GG 3093](#)) repeals RSA GN R.97/1965, RSA GN R.99/1965, RSA GN R.2331/1970 and RSA GN R.2332/1970 – even though the repeal of RSA GN R.99/1965 is redundant.

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**).