

# MARRIAGE AND DIVORCE

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## Divorce Laws Amendment Ordinance 18 of 1935

**Summary:** This Ordinance ([OG 643](#)) amends the common law by setting forth additional grounds for divorce.

**Regulations:** The Act makes no provision for regulations.

**Cases:** *WWB v Aipanda NO 2018 (2) NR 446 (HC)* (sections 1(1)(a) and 2(b)).

## *Matrimonial Causes Jurisdiction Act 22 of 1939*, as amended in South Africa to November 1979

**Summary:** This Act ([SA GG 2635](#)) concerns jurisdiction over divorce proceedings.

**Applicability to SWA:** Section *7bis* of the Act defines “Republic” to include the territory of South West Africa. Section *7ter*, as inserted by *Act 17 of 1943*, originally stated: “This Act shall apply to the Mandated Territory of South-West Africa and the port and settlement of Walvis Bay, and for the purpose of such application the High Court of South-West Africa shall be deemed to be a provincial division of the Supreme Court of South Africa.” As substituted by *Act 70 of 1968* with retroactive effect from 18 October 1953, section *7ter* states “This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel referred to in section 38(5) of the South West Africa Constitution Act, 1968 (Act No. 39 of 1968).” Section *7ter* (as amended) states “This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel referred to in section 38(5) of the South West Africa Constitution Act, 1968 (Act No. 39 of 1968).”

**Transfer of administration to SWA:** The administration of this Act was transferred to SWA by the Executive Powers (Justice) Transfer Proclamation (AG 33/1979), dated **12 November 1979**, as amended.

The Act was repealed in South Africa with effect from 1 July 1979 by the *Divorce Act 70 of 1979* ([RSA GG 6505](#)), shortly *before* it was transferred to SWA in November 1979. The repealing Act was not made expressly applicable to SWA, but should have repealed the Act in respect of SWA by virtue of section *7ter* of Act 22 of 1939. However, the principal Act was specifically mentioned in the subsequent SWA transfer proclamation. Therefore, it apparently remained in force in SWA – and it has been amended in independent Namibia, and applied in practice by the High Court in several post-Independence cases.

Note that the *Matrimonial Causes Jurisdiction Act 35 of 1945*, which once applied to SWA by virtue of the references in the text of the Act to the Supreme Court of South Africa (“including the High Court of South West Africa”) and to certain decrees and orders “to be recognised in the Union and in South West Africa”, was also repealed by the *Divorce Act 70 of 1979*, shortly *before* the relevant SWA transfer proclamation was issued in November 1979. There have been no further references to this Act in SWA or in independent Namibia, meaning that there is no reason to think that the repeal in question was not effective for both SWA and SA.

Section 3(1)(c) of the transfer proclamation excluded the reference to the “Republic” in the Act from the operation of section 3(1) of the General Proclamation, meaning that “Republic” retained the meaning given to it in section *7bis* of the Act (South Africa and SWA).

**Amendments:** The following pre-independence South African amendments were applicable to SWA –

- *Matrimonial Causes Jurisdiction Amendment Act 17 of 1943* ([SA GG 3180](#))
- *Matrimonial Affairs Act 37 of 1953* ([SA GG 5170](#))
- *General Law Amendment Act 70 of 1968* ([RSA GG 2106](#)).

Section 1 on jurisdiction is amended by the Married Persons Equality Act 1 of 1996 ([GG 1316](#)).

**Regulations:** The Act makes no provision for regulations.

**Cases:** *SS v YS* 2013 (1) NR 32 (HC) (jurisdiction under sections 1 and 5); *ZS v ES* 2014 (3) NR 713 (HC).

## **Matrimonial Affairs Ordinance 25 of 1955**

**Summary:** Only sections 4-6 remain in force. The surviving portions of this Ordinance ([OG 1927](#)) deal with the Court's power to make an order of sole guardianship for a minor child in cases of divorce or separation of married parents and that guardian's power to name a guardian in a will, and with spousal maintenance in divorce cases.

**Amendments:** The Ordinance is amended by Ord. 9/1967 ([OG 2777](#)) and by the Married Persons Equality Act 1 of 1996 ([GG 1316](#)), which repeals sections 1, 2 and 3 and amends section 4.

**Regulations:** The Act makes no provision for regulations.

**Cases:**

*NS v PS* 2010 (2) NR 418 (HC) (issues to be considered in respect of maintenance)

*DK v DK* 2010 (2) NR 761 (HC) (section 5, which authorises the court to order a guilty spouse to maintain an innocent spouse, does not prevent a court from ordering an innocent spouse to pay maintenance to a guilty spouse who is in need of it)

*S v S* 2011 (1) NR 212 (HC) (the issue of guilt still remains an issue to be determined in respect of maintenance for the innocent spouse, with guilt already having been determined in the case at hand; in absence of proof of maintenance needs, a nominal amount of maintenance awarded to reserve innocent party's right of entitlement to maintenance should circumstances change)

*AP v PP* 2014 (3) NR 671 (no spousal maintenance justified for defendant where plaintiff has agreed to pay more than a fair share of child maintenance costs).

## ***Marriage Act 25 of 1961***, as amended in South Africa to March 1978

**Summary:** This Act ([SA GG 6670](#)) governs the solemnisation of civil marriages.

**Applicability to SWA:** Section 39A states "This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel."

**Transfer of administration to SWA:** The administration of this Act was transferred to SWA by the Executive Powers (Interior) Transfer Proclamation (AG 17/1978), dated **30 March 1978**.

Section 3(2) of the transfer proclamation excluded references to the "Republic" in the Act from the operation of section 3(1)(c) of the General Proclamation.

None of the amendments to the Act in South Africa after the date of transfer were made expressly applicable to SWA.

**Amendments:** The following pre-independence South African amendments were applicable to SWA:

- *Marriage Amendment Act 11 of 1964* ([RSA GG 734](#))
- *Bantu Laws Amendment 42 of 1964* ([RSA GG 801](#))
- *Marriage Amendment Act 19 of 1968* ([RSA GG 2023](#))
- *Marriage Amendment Act 51 of 1970* ([RSA GG 2822](#))
- *Marriage Amendment Act 26 of 1972* ([RSA GG 3464](#))
- *Marriage Amendment Act 12 of 1973* ([RSA GG 3831](#)).

In South West Africa –

- the Marriage Amendment Proclamation, AG 8 of 1977 ([OG 3666](#)) amends sections 2 and 3 of the Act and inserts section 5bis;
- the Native Laws Amendment Proclamation, AG 3 of 1979 ([OG 3898](#)), deemed to have come into force in relevant part on 1 August 1978 (section 5 of AG 3 of 1979), substitutes certain expressions; and
- the Marriages, Births and Deaths Amendment Act 5 of 1987 ([OG 5356](#)) makes substantial amendments to the Act.

The Married Persons Equality Act 1 of 1996 ([GG 1316](#)) amends sections 1 and 26 and substitutes “Minister” for “Cabinet”.

The Child Care and Protection Act 3 of 2015 ([GG 5744](#)), which was brought into force by GN 4/2019 ([GG 6829](#)), substitutes section 24.

**Regulations:** Pre-independence regulations have yet not been comprehensively researched. However, some pre-independence regulations on marriage officers are contained in GN 213/1987 ([OG 5480](#)).

**Cases:** *Ex parte Groebler & Another* 2004 NR 105 (HC) (procedure regarding consent to marriage of child under age 18); *Gurirab v Minister of Home Affairs and Immigration & Another* 2016 (1) NR 37 (HC) (review of decision to revoke licence of marriage officer in terms of section 9 of the Act; review cannot be undertaken until potential remedies under section 9(2) have been exhausted).

## Recognition of Certain Marriages Act 18 of 1991

**Summary:** This Act ([GG 315](#)) provides for the recognition of marriages contracted in terms of the SWAPO Family Act, 1977, and for the adoption of children in terms of this Act.

**Regulations:** The Act makes no provision for regulations.

**Cases:** *Amadhila v Amadhila* (I.77/96) [1996] NAHC 34 (8 November 1996): “With the exception of the rights and obligations of the spouses in relation to the matrimonial property (both during the subsistence of the marriage and on dissolution thereof), the status of all marriages contracted outside Namibia prior to the date of independence in accordance with the provisions of the Family Act, is in all respects the same as those marriages contracted in terms of the Marriages Act, 1961. It follows that, notwithstanding the wide ranging grounds for dissolution of a marriage provided for in articles 55 to 63 of the Family Act (some of them rather progressive but alien to our common law), the grounds on which one or both partners in such a marital relationship can sue for divorce are the same as those applicable to common law marriages.”

## Dissolution of Marriages on Presumption of Death Act 31 of 1993

**Summary:** This Act ([GG 768](#)) provides for the dissolution of marriages of persons presumed to be dead.

**Regulations:** The Act makes no provision for regulations.

## Married Persons Equality Act 1 of 1996

**Summary:** This Act ([GG 1316](#)) abolishes the marital power which previously applied to civil marriages and amends the law on matrimonial property in civil marriages in community of property. It also amends the common law on the domicile of married women and minor children, and on the guardianship of minor children. The Act was brought into force on 15 July 1996 by GN 154/1996 ([GG 1340](#)).

**Amendments:** The Banking Institutions Act 2 of 1998 ([GG 1808](#)), brought into force on 1 April 1998 (GN 63/1998, [GG 1827](#)), repeals section 26. The Defence Act 1 of 2002 ([GG 2749](#)), which was brought into force on 15 July 2002 by GN 109/2002 ([GG 2765](#)), repeals section 22. The Companies Act 28 of 2004 ([GG 3362](#)), brought into force on 1 November 2010 by GN 172/2010 ([GG 4536](#)), repeals sections 31 and 32.

**Regulations:** The Act makes no provision for regulations.

**Application of law:** Act 2/1996 ([GG 1323](#)) contains amendments to the *Deeds Registries Act 47 of 1937* which are consequential to the Married Persons Equality Act. See also Act 8/1996 ([GG 1352](#)), which makes similar consequential amendments to *Registration of Deeds in Rehoboth Act 93 of 1976*.

### Cases:

*Myburgh v Commercial Bank of Namibia* 1999 NR 287 (HC); 2000 NR 255 (SC) (abolition of marital power prior to promulgation of Married Persons Equality Act)

*S v Gariseb* 2001 NR 62 (HC) (abolition of marital power makes it possible for husband to be charged with theft of wife's property in marriage in community of property)

*Stipp & Another v Shade Centre & Others* 2007 (2) NR 627 (SC) (necessary allegations for application in respect of section 7(1)(j) read together with section 7(6))

*Intamba v Tjapaka* [2015] NAHCMD 218 (16 September 2015) (what constitutes evidence of consent / lack of spousal consent to enter into a sales agreement)

### Commentary:

Law Reform and Development Commission, *Aspects of Family Law: The Abolition of Marital Power and Equalization of Rights between Spouses*, LRDC 1, 1994, available [here](#)

Legal Assistance Centre, *Guide to the Married Persons Equality Act*, 2001, available [here](#) in English and Afrikaans.

## SELECTED CASES

*Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC) (marital power)

*Vahekeni v Vahekeni* 2008 (1) NR 125 (SC) (role of court in restitution of conjugal rights, with particular reference to protecting best interests of children)

*S v S* 2011 (1) NR 144 (HC) (questions the continued relevance of the concept of putative marriage since statutory reforms have put children born out of wedlock on the same legal footing as the children born in wedlock)

*Mpasi NO & Another v Master of the High Court & Others* 2018 (4) NR 909 (SC) (presumption in favour of marriage; common law approach to proof of marriage).

### Cases on grounds for divorce:

*Valindi v Valindi & Another* 2009 (2) NR 504 (HC) (divorce case which addresses condonation of adultery by plaintiff and adultery and malicious desertion as grounds for divorce)

*NS v RH* 2011 (2) NR 486 (HC) (defences to adultery; condonation of adultery)

*HV v SV* (2) 2014 (3) NR 842 (HC) (condonation of adultery in context of domestic violence; criticism

of fault-based grounds for divorce and call for urgent law reform)  
*S v S* (I 61/2015) [2015] NAHCNLD 30 (8 July 2015) (no order for restitution of conjugal rights granted because of past domestic violence)  
*ZS v ES* 2014 (3) NR 713 (HC) (constructive desertion can be present even where the plaintiff has not left the common home).

### **Cases on marital property / forfeiture of benefits**

*Mofuka v Mofuka* 2001 NR 318 (HC); 2003 NR 1(SC) (marital property regime)  
*Hamutenya v Hamutenya* 2005 NR 76 (HC) (application for amendment of divorce order not allowed while applicant in contempt of existing order)  
*Nakashololo v Nakashololo* 2007 (1) NR 27 (HC) (marital property regime)  
*Valindi v Valindi & Another* 2009 (2) NR 504 (HC) (divorce case which addresses section 17(6) of Native Administration Proclamation 15 of 1928)  
*NS v RH* 2011 (2) NR 486 (HC) (effective date for division of joint estate, dissipation of joint assets and appointment of liquidator to calculate value of estate, taking into account dissipated assets, and to effect division of estate; advantages of mediation in family matters)  
*C v C; L v L* 2012 (1) NR 37 (HC) (general principles to be applied regarding forfeiture of benefits upon divorce from marriage in community of property, discussing general, quantified and specific forfeiture orders)  
*S v S* 2013 (1) NR 114 (SC) (no basis for argument that forfeiture of benefits implicates Art 16 of Constitution)  
*Mieze v Mieze* [2013] NAHCMD 181 (28 June 2013) (a lease for a resettlement farm is part of the joint estate of a couple married in community of property, even if the lease is in the name of one spouse only)  
*HP v FP* 2014 (3) NR 701 (HC) (parties are entitled to amend or vary the terms of a settlement agreement which has been made an order of court, without a formal application to court to have further terms of their agreement recorded in a court order)  
*ZS v ES* 2014 (3) NR 713 (HC) (choice of law rules on marital property; even where there is an antenuptial contract, depending on its terms, the domiciliary law of the husband at the time of the marriage may or may not apply; where such domiciliary law applies, a court must have regard to changes in the law of the husband's matrimonial domicile, subject to public policy; whether the redistribution rules of section 7(3) of South Africa's Divorce Act 70 of 1979 can be characterised as relating to the patrimonial consequences of the marriage is a question of fact which must be proved by expert evidence or agreed between the parties; existence of universal partnership between married couple).  
*AP v EP & Others* 2017 (1) NR 109 (HC), read together with *AP v EP* [2013] NAHCMD 355 (I 799/2010; 26 November 2013) (parties married out of community of property may establish a universal partnership in respect of commercial ventures (*societas universorum quae ex quaestu veniunt*) but not a universal partnership in respect of all their property (*societas universorum bonorum*))  
*WWB v Aipanda NO* 2018 (2) NR 446 (HC) (applying principles set out in *C v C; L v L* 2012 (1) NR 37 (HC), finding of exceptional circumstances that justified the forfeiture of a specific property).

### **Cases on custody:**

*DM v SM* 2008 (2) NR 704 (HC) (custody dispute resolved in favour of father) (see also *DM v SM* 2014 (4) NR 1074 (HC))  
*NS v PS* 2010 (2) NR 418 (HC) (custody of 7-year-old and 10-year-old boys awarded to father, after discussion of gender-neutral role of parenting).  
*A v A* 2011 (1) NR 70 (HC) (joint custody of minor children upon divorce should be awarded only in exceptional circumstances)  
*NS v RH* 2011 (2) NR 486 (HC) (factors to consider in determining best interest of minor child for purposes of awarding custody in situation involving relocation of parents to different countries, including discussions of gender dimensions of this issue; advantages of mediation in family matters)  
*T v T* [2013] NAHCMD 377 (13 December 2013) (notes that joint custody is sometimes awarded in Namibia; disagrees with statement in *A v A* 2011 (1) NR 70 (HC) that joint custody is appropriate

only when children are mature enough to decide this issue for themselves; “It often happens that parents divorce on amicable terms. They might be ideal candidates for joint custody even if the children are still too young to indicate any preferences.”)

*SK v SK* 2018 (1) NR 268 (HC) (custody of minor children is never *res judicata* but always subject to variation on good cause shown and subject to best interests of child).

#### **Civil actions for adultery:**

*Matthews v Ipinge* 2007 (1) NR 110 (HC)

*Burger v Burger & Another* [2012] NAHCMD 15 (10 October 2012)

*Jaspert v Siepker* [2013] NAHCMD 267

*Van Wyk v Van Wyk & Another* [2013] NAHCMD 125

*Useb v Gawaseb* [2014] NAHCMD 283 (1 October 2014)

*JS v LC & Another* 2016 (4) NR 939 (SC) (delict of adultery no longer sustainable in Namibian law)

*Van Straten v Bekker* (I 6056-2014) [2016] NAHCMD 243 (25 August 2016) (delict of adultery no longer sustainable in Namibian law)

For a discussion of the two cases ruling that the delict of adultery is no longer sustainable in Namibian law, see Dianne Hubbard, “Infusions of the Constitution into the Common Law” in Nico Horn & Manfred O Hinz, eds, *Beyond a Quarter Century of Constitutional Democracy: Process and Progress in Namibia*, Windhoek: Konrad Adenauer Stiftung, 2017, available [here](#).

#### **Restitution:**

*HV v SV (1)* 2014 (3) NR 808 (HC) (order for the restitution of conjugal rights: it is the deserter spouse and not the deserted spouse who bears the onus of showing that an offer to return is genuine; change of heart by the deserter and a commitment to reform are crucial elements of *bona fides*).

#### **Judicial statements on Namibia’s antiquated divorce law:**

*HV v SV (2)* 2014 (3) NR 842 (HC) at para 8: “There is, to the best of my knowledge, not a single modern constitutional democracy where the fault-based principle of divorce has not been abandoned in favour of ‘irretrievable breakdown’ or some other more flexible criteria such as the parties having lived apart for a certain period of time. The state of our law is such that even if a court is satisfied that a marriage between two people has no hope of ever being salvaged, the court must keep them together as long as one spouse wants to remain married.... under our law, love is an irrelevant consideration when it comes to whether or not a deserted spouse who does not want to continue with a marriage, should be granted her wish. A more fertile ground for violence in the family is hardly imaginable!”

*ZS v ES* 2014 (3) NR 713 (HC) at para 44: “Although it is already the second decade of the twenty-first century, Namibia is, in this area of the law [divorce and matrimonial property], still hobbling along in antiquity. It has remained stuck in the distant past instead of joining ‘the worldwide shift to irretrievable marriage breakdown as the main or only ground of divorce’ (Hahlo supra 5 ed at 331) or some similar approach which more accurately reflects the reality of the modern marriage. I agree with the learned author’s view that ‘the guilt principle has long been little more than a polite fiction’ in many, if not most, of the divorce cases that serve before this court. In spite of many calls for reform, the current state of affairs continues, forcing this court to continue to apply laws which, I am convinced, do not reflect the values and aspirations of the Namibian people who have embraced a progressive Constitution based on modern democratic principles.”

## **COMMENTARY**

H Becker and M Hinz, *Marriage and Customary Law in Namibia, Namibia Papers Working Document No. 30*, Windhoek: Centre for Applied Social Sciences, 1995

H Becker, *‘In our tradition we are very Christian’: Gender, marriage and customary law in northern Namibia*, Windhoek: Centre for Applied Social Sciences, 1997

Legal Assistance Centre, *Proposals for Law Reform on the Recognition of Customary Marriages*, 1999, available [here](#)



Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia*, 2000, available [here](#)

Dianne Hubbard, *Law for All, Volume 3: Family Law*, Windhoek: Namibia Institute for Democracy / Out of Africa Publishers, 2001

Law Reform and Development Commission, *Report on Uniform Consequences of Common Law Marriages (Repeal of Section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)*, LRDC 11, 2003, available [here](#)

D LeBeau, et al, *Women's Property and Inheritance Rights in Namibia*, Windhoek: Gender Training and Research Programme and University of Namibia, 2004

Law Reform and Development Commission, *Report on Customary Law Marriages*, LRDC 12, 2004, available [here](#)

Law Reform and Development Commission, *Report on Divorce*, LRDC 13, 2004, available [here](#)

Legal Assistance Centre, *Marital Property in Civil and Customary Marriages: Proposals for Law Reform*, 2005, available [here](#)

Law Reform and Development Commission, *Report on Marital Property*, LRDC 15, 2010, available [here](#)

Legal Assistance Centre, *A Family Affair: The Status of Cohabitation in Namibia and Recommendations for Law Reform*, 2011, available in detailed and summary versions [here](#)

Law Reform and Development Commission, *Working Paper on Issues related to Family Law Workshop: Swakopmund Family Law Workshop*, LRDC 23, 2012, available [here](#).

## **INTERNATIONAL LAW**

***Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979***

*Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, 1999*

***African Charter on Human and Peoples' Rights (Banjul Charter), 1981***

*Protocol to the African Charter for Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), 2003*

***SADC Protocol on Gender and Development, 2008.***

See also Native Administration Proclamation 15 of 1928 (marriages between blacks) ('**BLACKS**').

See also *Aliens Act 1 of 1937* (name changes upon marriage); *Births, Marriages and Deaths Registration Act 81 of 1963* (registration of marriages); and *Identification Act 21 of 1996* (population register which includes record of marriages and divorces) (**CIVIL REGISTRATION**).

See also Combating of Domestic Violence Act 4 of 2003 (**DOMESTIC VIOLENCE**).

See also Communal Land Reform Act 5 of 2002 (rights of spouses in respect of communal land) (**LAND AND HOUSING**).