

MARRIAGE AND DIVORCE

Divorce Laws Amendment Ordinance 18 of 1935.

Summary: This Ordinance amends the common law by setting forth additional grounds for divorce.

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

Summary: This Act 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* 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, as amended), dated 12 November 1979.

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 the definition section of the Act (South Africa and SWA).

The Act was repealed in South Africa in July 1979 by the *Divorce Act 70 of 1979*, shortly *before* it was transferred to SWA in November 1979. The repealing Act was not made expressly applicable to SWA, but should have repealed the Act in respect of SWA. However, the principal Act was specifically mentioned in the subsequent transfer proclamation. Therefore, it apparently remained in force in SWA.

Amendments: Section 1 on jurisdiction is amended by the Married Persons Equality Act 1 of 1996.

Matrimonial Causes Jurisdiction Act 35 of 1945, as amended in South Africa to November 1979.

Summary: This Act extends court jurisdiction in divorce matters.

Applicability to SWA: The text of the Act refers 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”.

Transfer of administration to SWA: The administration of this Act was transferred to SWA by the Executive Powers (Justice) Transfer Proclamation (AG 33/1979, as amended), dated 12 November 1979. There were no amendments to the Act in South Africa prior to Namibian independence.

Matrimonial Affairs Ordinance 25 of 1955.

Summary: This Ordinance places certain limitations on the marital power of the husband in a civil marriage, in a manner similar to the RSA *Matrimonial Affairs Act 7 of 1953*.

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

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

Summary: This Act 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: AG 8/1977 amends sections 2 and 3 of the Act and inserts section 5*bis*. The Marriages, Births and Deaths Amendment Act 5 of 1987 makes substantial amendments to the Act. The Married Persons Equality Act 1 of 1996 amends sections 1 and 26 and substitutes certain expressions.

Cases: *Ex parte Groebler & Another* 2004 NR 105 (HC) (procedure regarding consent to marriage of child under age 18).

Recognition of Certain Marriages Act 18 of 1991.

Summary: This Act 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.

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

Summary: This Act provides for the dissolution of marriages of persons presumed to be dead.

Married Persons Equality Act 1 of 1996.

Summary: This Act 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 came into force on 15 July 1996 (GN 154/1996, GG 1340).

Amendments: The Banking Institutions Act 2 of 1998 repeals section 26. The Companies Act 28 of 2004 repeals sections 31 and 32.

Application of Act: Act 2/1996 contains amendments to the *Deeds Registries Act 47 of 1937* which are consequential to the Married Persons Equality Act. See also Act 8/1996, 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)).

Articles: Law Reform and Development Commission, Aspects of Family Law: The Abolition of Marital Power and Equalization of Rights between Spouses (LRDC 1), 1994; Legal Assistance Centre, *Guide to the Married Persons Equality Act*, 2001 (languages: English, Afrikaans, Oshindonga, Otjiherero, Khoekhoegowab, Silozi, Rukwangali).

SELECTED CASES

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

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)

Matthews v Ipinge 2007 (1) NR 110 (HC) (civil action for adultery)

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)

DM v SM 2008 (2) NR 704 (HC) (custody dispute resolved in favour of father)

Valindi v Valindi & Another 2009 (2) NR 504 (HC) (divorce case which addresses section 17(6) of Native Administration Proclamation 15 of 1928, condonation of adultery by plaintiff and adultery and malicious desertion as grounds for divorce).

SELECTED ARTICLES

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 at www.lac.org.na/projects/grap/Pdf/customary.pdf

Legal Assistance Centre, *Proposals for Divorce Law Reform in Namibia*, 2000, available at www.lac.org.na/projects/grap/Pdf/divlawref.pdf

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

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

Law Reform and Development Commission, *Report on Divorce* (LRDC 13), 2004

Legal Assistance Centre, *Marital Property in Civil and Customary Marriages: Proposals for Law Reform*, 2005, available at www.lac.org.na/projects/grap/Pdf/marriageprop.pdf

Law Reform and Development Commission, *Review of the Marriage Act (Act No 25 of 1961), Discussion Paper No 1, Project No 18*, 2009.

INTERNATIONAL LAW

Convention on the Elimination of All Forms of Discrimination against Women, 1979
accession: 23 November 1992

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

effective date: 22 December 2000 (This is the date on which the Optional Protocol came into force internationally after being ratified by the first 10 countries, one of which is Namibia. The Namibian Parliament approved the Optional Protocol on 17 May 2000.)

Namibia has NOT agreed to the following amendment, which is not yet in force internationally:

* *Amendment to article 20, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1995.*

Cases: *Müller v President of the Republic of Namibia & Another* 1999 NR 190 (SC) at 205E-F.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

(entered into force within the AU on 25 November 2005)

signature: 9 December 2003 (source: www.africa-union.org)

ratification approved by Parliament: 8 July 2004 (source: Parliament)

deposit: 26 August 2004 (source: www.africa-union.org)

Reservation: Namibia will not be bound by Article 6(d) until it has enacted legislation regarding the recording and registration of customary marriages. (source: Ministry of Foreign Affairs)

SADC Protocol on Gender and Development, 2008

(not yet in force within SADC as of 23 June 2010) (source: SADC)

signature: 17 August 2008 (source: SADC)

ratification approved by Parliament: 7 October 2009 (source: Parliament)

SADC list of ratifications dated 23 June 2010 does not show ratification by Namibia

See also *Births, Marriages and Deaths Registration Act 81 of 1963 (BIRTHS, MARRIAGES AND DEATHS)*.

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

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

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