‘BLACKS’

Native Administration Proclamation 15 of 1928, sections 17-18 and 23-27

Summary: This Proclamation (originally published in OG 284) was the South West African version of the South African Bantu Administration Act 38 of 1927.

The surviving portions of this Proclamation (sections 17, 18, 23, 24, 25, 26 and 27 and any regulations made in terms of those sections) deal primarily with marriage and succession in respect of “natives”.

The Proclamation, with the exception of Chapter IV on Marriage and Succession, came into force in all of South West Africa on 1 January 1930 (GN 165/1929) (OG 350). Selected portions of Chapter IV – section 17(6) and sections 18(3) and (9) – were subsequently applied to the area north of the Police Zone with retroactive effect from 1 August 1950 (GN 67/1954) (OG 1818).

The whole of section 18 and its accompanying regulations were made applicable to the whole of South West Africa *with the exception of* Owambo, Kavango and Caprivi by RSA Proclamation R.192/1974 (RSA GG 4164).

Thus, only sections 17(6) on marriage and sections 18(3) and 18(9) on succession apply in Owambo, Kavango and Caprivi (with effect from 1950). None of section 17 on marriage applies elsewhere, but the whole of section 18 on succession applies to the remainder of Namibia (with effect from 1974).

The overall result is as follows, regarding the provisions that remain in force:

- section 17(6) applies north of the Police Zone with effect from 1 August 1950, but section 17 is not otherwise applicable anywhere in Namibia;
- section 18(3) and (9) apply north of the Police Zone with effect from 1 August 1950, and the whole of section 18 applies everywhere in Namibia *other than* Kavango, Eastern Kavango and Caprivi with effect from 15 February 1974;
- sections 23-27 apply everywhere in Namibia with effect from 1 January 1930.

Amendments: The Proclamation is amended by Proc. 25/1937 (OG 722), Proc. 24/1941 (OG 915), Proc. 35/1943 (OG 1080), General Laws Amendment Ordinance 11 of 1954 (OG 1846), South West Africa Native Affairs Administration Ordinance 4 of 1955 (OG 1899), RSA Proc. 360/1968 (RSA GG 2227), RSA Proc. 41/1973 (RSA GG 3782), AG 46/1978 (OG 3779), Act 27/1985 (OG 5147), Damara Community and Regional Authorities and Paramount Chief and Headman Ordinance 2 of 1986 of the Damara Legislative Assembly (published in OG 5355), First Law Amendment (Abolition of Discriminatory or Restrictive Laws for purposes of Free and Fair Election) Proclamation, AG 14/1989 (OG 5726) and Act 23/1992 (GG 470).

The Native Administration Proclamation Amendment Act 27 of 1985 (OG 5147) repealed sections 7-16 and sections 19-22 of this Proclamation, as well as section 18(3)-(8) and (9)(c), with no savings provision for anything done pursuant to those sections.

The Traditional Authorities Act 17 of 1995 (GG 1158), which was brought into force on 31 August 1992 by GN 118/1992 (GG 472), repeals the remaining sections of the Proclamation *with the exception of* sections 17, 18, 23, 24, 25, 26 and 27; the repeal extends to any regulations made in terms of the repealed sections.

The Estates and Succession Amendment Act 15 of 2005 (GG 3566) repeals portions of section 18, but provides that “the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed”.

The Repeal of Obsolete Laws Act 21 of 2018 (GG 6812), which was brought into force by GN 32/2019 (GG 6851), repeals the provisions in the Schedule referred to in section 26 of the Proclamation in so far as those provisions amend the Native Reserves Trust Funds Administration Proclamation No. 9 of 1924.

Regulations: The Traditional Authorities Act 17 of 1995 (GG 1158) repeals all of the provisions of the Native Administration Proclamation 15 of 1928 not previously repealed by the Native Administration Proclamation Amendment Act 27 of 1985 (OG 5147), *except for* sections 17, 18, 23, 24, 25, 26 and 27 "and any regulations made under any of those sections".

Regulations relating to the "administration and distribution of native estates" in the area north of the Police Zone were issued pursuant to section 18(9) in GN 70/1954 (OG 1818). These regulations were subsequently extended to the whole of South West Africa *with the exception of* Owambo, Kavango and Caprivi by RSA Proc. R.192/1974 (RSA GG 4164).

Application of law: The Police Zone is defined in the First Schedule to the Prohibited Areas Proclamation 26 of 1928 (OG 296), as amended by GN 105/1933 (OG 522), GN 83/1938 (OG 752), GN 126/1938 (OG 760), GN 375/1947 (OG 1331), GN 216/1950 (OG 1542), GN 255/1950 (OG 1554), GN 2/1953 (OG 1736), GN 198/1954 (OG 1854), GN 38/1959 (OG 2182) and GN 3/1961 (OG 2289), substituted by GN 222/1961 (OG 2334) and amended by GN 165/1962 (OG 2425).

The Proclamation was affected by RSA Proc. 2/1973 (RSA GG 3757) (criminal jurisdiction of native commissioners).

Comment: Proclamation 15 of 1928 was once supplemented by the Native Administration Proclamation 11 of 1922 (OG 82), which was repealed in its entirety by the Local Authorities Act 23 of 1992 (GG 470), effective 31 August 1992.

Cases:

Mofuka v Mofuka 2001 NR 318 (HC), 2003 NR 1 (SC)

Berendt & Another v Stuurman & Others 2003 NR 81 (HC) (declares sections 18(1), (2) and (9) unconstitutional with effect as of 30 June 2005; time period extended to 30 December 2005 by *Government of the Republic of Namibia v The Master of the High Court & 3 Others*, case no 105/2003; see Estates and Succession Amendment Act 15 of 2005)

Kavendjaa v Kaunozondungo NO & Others 2005 NR 450 (HC) (section 18 and related regulations)

Nakashololo v Nakashololo 2007 (1) NR 27 (HC) (factual enquiry finds joint oral declaration to marriage officer before solemnisation of marriage, attested to by marriage officer, sufficient to make marriage in community of property in terms of section 17(6))

Valindi v Valindi & Another 2009 (2) NR 504 (HC) (factual enquiry concerning section 17(6))

EN v SN 2014 (4) NR 1193 (HC) (section 17(6))

Meroro v Minister of Lands, Resettlement and Rehabilitation & Others 2015 (2) NR 526 (SC)(discusses section 18(9) and related regulations)

Shipanga v Shipanga (I 259-2012) *Shipanga v Kautwima* (I 3962-2012) [2014] NAHCMD 318 (30 October 2014) (although section 17(6) is arguably unconstitutional, which is not decided in this case, a declaration of unconstitutionality would not operate retrospectively)

MN v LI & Another 2022 (1) NR 135 (SC) (application of section 17(6))

Dengeinge v Uugwanga 2023 (2) NR 348 (HC) (remark on this Proclamation in *dicta* at para 33:

> [33] … one cannot be oblivious of the proprietary consequences of the marriages concluded north of the police zone which, according to the provisions of the Native Administration Proclamation 15 of 1928, the default position of such marriages is that they automatically produce a proprietary regime of property being out of community of property, unless the parties had made a declaration prior to marrying that they want their property regime to be in community of property. It raises a legitimate question why such a system should continue to be maintained in modern Namibia?)

Hamupolo v Simon NO & Others 2024 (2) NR 462 (SC) (section 17(6): "at any time within one month previous to the celebration of such marriage" interpreted to mean that the relevant declaration must be made "at any time one month before the month that the solemnisation of the marriage takes place"; the purpose is

to provide black spouses with an opportunity to reflect on their intention to marry in community of property; court finds that the marriage is out of community of property since no declaration was filed under 17(6), but in community of property as between the spouses to reflect their intention).

Commentary:

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

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

Legal Assistance Centre, *Customary Laws on Inheritance in Namibia: Issues and questions for consideration in developing new legislation,* 2005, available here.

Additional information: The history of the application of this Proclamation to persons in various parts of Namibia is complex; as one judicial opinion recently stated, "any discussion of the wider aspects of the Proclamation and the regulations made thereunder has always created more heat than light" (*Nakashololo v Nakashololo* 2007 (1) NR 27 (HC) at 28I). For this reason, some excerpts on the Proclamation's history and purpose have been included below.

The Native Administration Proclamation 15 of 1928 is modelled on South Africa's Black Administration Act 38 of 1927. The Administrator of South West Africa gave the following explanation of the Proclamation's purpose to the League of Nations:

> It may be stated that to meet the position legislation is being introduced which a) will simplify procedure in native cases generally; b) will give Native Commissioners power to deal with all matrimonial cases and so cheapen and expedite proceedings. There will, of course, be a right of appeal to the High Court; c) will secure the inheritances under native law of the offspring of a marriage or alliance contracted under native custom in the event of a marriage in accordance with civil law being entered into subsequently; d) will simplify marriage procedure." (UG 31/1928: para 41)

The Native Administration Proclamation 15 of 1928, with the exception of Chapter IV on Marriage and Succession, generally came into force in all of South West Africa on 1 January 1930 (GN 165 of 11 December 1929).

Selected portions of Chapter IV – section 17(6) and sections 18(3) and (9) – were subsequently applied to the area north of the Police Zone with retroactive effect from 1 August 1950 (GN 67 of 1 April 1954).

On 1 April 1954, regulations concerning inheritance were promulgated, in terms of section 18(9) of the Proclamation, in GN 70 of 1 April 1954 (hereinafter referred to as 'Regulation GN 70'). These regulations were by their own terms applicable only "to native estates in that portion of the territory north of the Police Zone".

> The Police Zone is the area south of ('within') an imaginary line drawn through Namibia. It is defined in the First Schedule to Proclamation 26 of 1928. The area north of ('outside') the Police Zone was primarily viewed as labour reserves during the early colonial period. During German colonization, there was no direct colonial rule of this area. When South Africa assumed administration of Namibia, it had no clear policy on how to deal with this area.

The whole of section 18 of the Proclamation and Regulation GN 70 was made applicable to the whole of South West Africa *with the exception of* Owambo, Kavango and Caprivi by RSA Proclamation R.192 of 15 February 1974.

> Technically, RSA Proclamation R.192 of 15 February 1974 excludes the areas "referred to paragraphs (d), (e) and (f) of section 2(1) of the Development of Self-Government for Native Nations in South West Africa Act, 1968 (Act 54 of 1968)".

The result was as follows:
(1) In Owambo, Kavango and Caprivi, sections 17(6) on marriage applied to marriages between Africans, and sections 18(3) and 18(9) on succession and Regulation GN 70 applied (with effect from 1950).

(2) In all of Namibia north of the old Police Zone, section 17(6) on marriage applied to marriages between Africans (with effect from 1950).
(3) Inside the old Police Zone, none of section 17 on marriage applied.
(4) In all of Namibia *other than* Owambo, Kavango and Caprivi, the whole of section 18 on succession, including Regulation GN 70, applied (with effect from 1974).

The Native Administration Proclamation Amendment Act 27 of 1985 repealed sections 18(3), 18(4), 18(5), 18(7), 18(8) and 18(9)(c).

In *Berendt & Another v Stuurman & Others*, 2003 NR 81 (HC), the High Court declared sections 18(1), 18(2) and 18(9) and Regulation GN 70 to be in conflict with the Constitution.

The Estates and Succession Amendment Act 15 of 2005 (GG 3566) repeals subsections 18(1), 18(2), 18(9) and 18(10), but states:

> Despite the repeal of the provisions referred to in subsection (1), the rules of intestate succession that applied by virtue of those provisions before the date of their repeal continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said provisions not been repealed.

This would appear to leave the subsections in question, along with Regulation GN 70, applicable to the same persons in the same parts of Namibia as before the *Berendt* case. However, the constitutionality of the approach taken by the Estates and Succession Amendment Act 15 of 2005 is an open question.

Legal Assistance Centre, 2010

The Western concept of a civil marriage and the legal consequences thereof were foreign to the indigenous peoples of Southern Africa during the pre-colonial era. Theirs was one of (potentially) polygynous customary unions concluded without formal officiation according to the tradition of each tribe and cemented by bridewealth agreements between the families of the partners in such unions. The arrival of European colonial powers in Southern Africa and their 'mission to ''civilize'' their colonies' (T W Bennett *Application of Customary Law in Southern Africa* (1985) at 138) had a far-reaching impact upon African customary legal systems. A choice was given to members of those indigenous groups to conclude civil marriages. The personal and proprietary consequences of those marriages were, however, not only foreign to the indigenous people but, if so contracted, had the potential to cause serious prejudice to other parties in existing customary unions.

Hence, uncoordinated attempts were made prior to 1928 to address those concerns by legislation (see J M T F Labuschagne 'Spanningsveld tussen die Psigo-Kulturele en die Juridiese: Opmerkinge oor die Vermonsregtelike gevolge van gemeenregtelike Huwelike tussen Swartes' *THRHR* (1995) 302 at 303-304). From 1 January 1929 the position was comprehensively regulated in South Africa by s 22 of the Native Administration Act, 1927. Being a mandated territory of the Republic of South Africa at the time, the legislative authorities in the then South West Africa soon followed suit with the promulgation of the Native Administration Proclamation, 1928. Section 17 dealt with 'Marriage' in almost identical terms as s 22 of Act 38 of 1927 (RSA).

However, whereas s 22 became of force and effect in South Africa from the beginning of 1929, s 17 of Proc 15 of 1928 did not. In terms of s 27 of the Proclamation, the Administrator had to fix the date on which it would commence by notice in the Gazette and he could exclude from application in such notice any specified part or provision of the Proclamation 'which shall thereupon not apply until brought into operation by a further notice'. When the Administrator brought the Proclamation into operation with effect from 1 January 1930 by Government Notice 165 of 11 December 1929, he expressly excluded Chap IV (which contains s 17). That chapter, with all the legislative intentions to protect customary unions, was never applied in Namibia. That is, except for ss 17(6) and 18(3) and (9), which were applied with effect from 1 August 1950 only to the area north of the 'Police Zone' as defined in the first schedule to the Proclamation. That area includes Ovamboland.

Section 17(6) of the Proclamation (as amended by s 6 of Act 27 of 1985) provides as follows:

> 'A marriage between Blacks, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time

within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.'

… the plaintiff did not challenge the constitutionality of s 17(6)… and did not attack the validity of GN 67 of 1954 or the retroactive effect thereof on the pleadings or in argument. Hence, those questions do not arise for decision and I shall refrain from expressing any view thereon….

The legislative intention behind the promulgation of the subsection, according to Bennett (op cit at 155) (dealing with an almost identical s 22(6) of the RSA Act), was to ensure that 'the parties to the marriage would not be caught unawares by a property system with which they would be unfamiliar'.

The effect of this section on the legal consequences of civil marriages between Blacks contracted after 31 July 1950 in the area defined as the 'Police Zone' is significant. No longer does community of property follow unless excluded – rather, the converse applies: The marriage is out of community of property, unless declared or agreed otherwise. After a careful and authoritative analysis of s 22(6) of the RSA Act, Watermeyer CJ concluded as follows in *Ex parte Minister of Native Affairs: in re Molefe v Molefe* (1946 AD 315 at 320):

> 'The proprietary rights of native spouses who contract a valid marriage at a time when no customary union subsists between the husband and another woman, and who do not make a declaration in terms of s 22(6) of Act 38 of 1927, will, except in so far as there is a specific statutory provision, depend upon whether or not parties have entered into any antenuptial agreement with regard to their proprietary rights after marriage. If they have entered into such an antenuptial agreement then their proprietary rights will depend upon the legal effects, whatever they may be, of such agreement. If they have not entered into any such antenuptial agreement then, since community of property, and of profit and loss, does not result from marriage, each spouse retains, subject to any statutory provision, the ownership of his or her own property, but the control of the property of the spouses vests in the husband by virtue of his marital power.'

Those remarks apply, *mutatis mutandis*, to s 17(6).

Mofuka v Mofuka 2001 NR 318 (HC) at 320B-322E

COMMENT ON
Namundjebo-Tilahun NO & Another v Northgate Properties (Pty) Ltd & Others
(SA 33/2011) [2013] NASC 12 (07 October 2013)

Note that certain statements in this opinion are, with respect, confusing. The opinion notes at para 32 that "in terms of s 25(1) of the Black Administration Act, No 38 of 1927, read with s 21(1) and 48(1) of the Black Trust and Land Act, No 18 of 1936 and in terms of Government Notice R.188 of 1969, the then State President of South Africa issued certain Black Areas Land Regulations which also applied to the then South West Africa".

The *Black Administration Act 38 of 1927* was apparently never applicable to South West Africa; the equivalent law in South West Africa was the Native Administration Proclamation 15 of 1928.

The Black Areas Land Regulations in RSA Proc. R.188 of 1969 (RSA GG 6364) were issued in terms of the *Development Trust and Land Act 18 of 1936*, which was repealed in Namibia by the Communal Land Reform Act 5 of 2002 (brought into force on 1 March 2003). There was no savings clause in the Communal Land Reform Act 5 of 2002 Act 5 of 2002 for regulations issued under the repealed laws.

Black Reserves (South West Africa) Act 44 of 1945

Summary: This Act (SA GG 3514), originally called the "Native Reserves (South-West Africa) Act", authorises the disestablishment of one area reserved for Black occupation, in exchange for the establishment of another. There were no amendments to the Act in South Africa prior to Namibian independence.

Applicability to SWA: This Act applies specifically to South West Africa by virtue of its subject matter. It governed only one particular transaction.

The terminology in the Act is affected by the global changes made by the Bantu Laws Amendment Act 42 of 1964 (RSA) (RSA GG 801), read together with section 16(1) of the Native Laws Amendment Act 46 of 1962 (RSA) (RSA GG 240) and brought into force on 1 January 1965 by RSA Proc. 339/1964 (RSA GG 967), and by section 17 of the Second Bantu Laws Amendment Act 102 of 1978 (RSA) (RSA GG 6095), which was brought into force on 1 August 1978 by RSA Proc. R.198/1978 (RSA GG 6120).

Regulations: The Act makes no provision for regulations.

See also Racial Discrimination Prohibition Act 26 of 1991 (**CRIMINAL LAW AND PROCEDURE**).

See also **CUSTOMARY LAW**.

See also *Crown Land Disposal Ordinance 57 of 1903 (Transvaal)* (reservation of land for the use of "aboriginal natives, coloured persons and Asiatics") (**LAND AND HOUSING**).

See also *Black Authorities Service Pensions Act 6 of 1971* (**PENSIONS**).