EVIDENCE

Procedure and Evidence Proclamation 8 of 1938, section 7

Summary: Most of this Proclamation (OG 747) has been repealed. The only remaining provision is section 7, which states that in criminal proceedings arising out of the fact that a cheque has been dishonoured, the onus is on the accused to prove that he had good reason to believe that the cheque would be honoured on the due date.

Amendments: This Proclamation is amended by General Laws Amendment Ordinance 11/1954 (OG 1846) (amending section 6 which was subsequently repealed), the SA *Supreme Court Act 59 of 1959* (which repeals section 4), the RSA *Civil Proceedings Evidence Act 25 of 1965* (RSA GG 1066) (which repeals sections 1-3 and 5), and the RSA *Maintenance Amendment Act 39 of 1970* (which repeals section 6).

Civil Proceedings Evidence Act 25 of 1965, as amended in South Africa to November 1979

Summary: This Act (RSA GG 1066) regulates the law of evidence in civil proceedings.

Applicability to SWA: Section 1 defines "Republic" to include "the territory of South West Africa". Section 43 states "This Act and any amendment thereof which may be made from time to time shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel referred to in section three of the South West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951)."

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. There were two amendments to the Act in South Africa after the date of transfer and prior to Namibian independence – the *Transfer of Powers and Duties of the State President Act 97 of 1986* and the *Law of Evidence Amendment Act 45 of 1988* – neither of which was made expressly applicable to SWA.

Section 3(1)(n) of the transfer proclamation excluded all references 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).

Amendments: An item in the Schedule to the Act is repealed by the *Criminal Procedure Act 51 of 1977* (RSA GG 5532).

Regulations: The Act makes no provision for regulations.

Cases: *Cultura 2000 v Government of the Republic of Namibia* 1992 NR 110 (HC); *S v Taapopi & Another* 2001 NR 101 (HC) (sections 34-35); *Seagull's Cry CC v Council of the Municipality of Swakopmund & Others* 2009 (2) NR 769 (HC) (section 5 discussed at 782G-H).

General Law Amendment Act 101 of 1969, section 29, as amended in South Africa by *General Law Amendment Act 102 of 1972*

Summary: Section 29 of this Act (RSA GG 2464) authorises the withholding of evidence from any court of law if the Administrator-General (or the responsible Minister) is of the opinion that disclosure of the information could be detrimental to state security.

Applicability to SWA: Section 29(3) states "The provisions of this section and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel."

Transfer to SWA: It is not clear how this Act was administered, and thus we have not ascertained what, if any, transfer proclamation applied. However, the case of *Mweuhanga v Administrator-General of South West Africa & Others* 1990 (2) SA 776 (A) at 784C-785E considered who is empowered to act in respect of South West Africa for purposes of this provision:

> This then brings me to South West Africa. In the section South West Africa is grouped together with the provincial administrations, and this is hardly surprising. Whatever the constitutional differences may have been between the provinces and South West Africa, they had, at all relevant times, one feature in common which is of decisive importance for present purposes. This feature is that their administrations were divided ones. Certain governmental functions were performed in the provinces and South West Africa by the central Government in the course of governing the country as a whole (including South West Africa) whereas others were performed by the local administrations (see eg the South West Africa Constitution Act 39 of 1968 and, in particular, ss 22 and 38). There was therefore a need for the head of the administration of South West Africa (at that stage the Administrator) to be granted the same rights in respect of his administration as were granted to the heads of the provincial administrations and the Government departments. The fact that, in s 29, South West Africa is included without comment with the provincial administrations suggests that this indeed was what was intended. However, Mr Gauntlett points out that there is a difference in the wording. Whereas the Act speaks of 'a provincial administration' it refers to the 'territory of South-West Africa'. A territory, he contends, cannot be responsible for governmental actions, and therefore the section must mean something different in reference to South West Africa from what it does in reference to the provincial administrations.
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> Now, of course, a possible explanation for this wording is simply that the draftsman did not repeat the word 'administration' with respect to South West Africa: in other words, that he meant 'in the case of a provincial administration or the administration of the territory of South West Africa'. Elliptical expressions of this sort are, as we know, quite common. This possibility gains added force if one considers possible alternative meanings of the reference to South West Africa. In his written heads of argument Mr Gauntlett contended that
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> > '(w)here as a matter of territorial jurisdiction South West Africa is "concerned", its Administrator is the relevant authority'.
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> This contention raises the question: when is South West Africa concerned as a matter of territorial jurisdiction? It can hardly be suggested, and was not in fact suggested, that this happens whenever the performance of a governmental action affects the territory or its inhabitants, since this would cover a large part of the central Government's activities. At one stage Mr Gauntlett suggested that the test was whether the proceedings in which privilege was claimed were conducted in South West Africa. This would, however, mean that governmental actions of the administration of South West Africa could not be protected from disclosure before a tribunal in any other part of the country, and Mr Gauntlett later accepted that the place where the privilege is claimed, could not be decisive. In the result the appellant's argument did not attribute any clear meaning to the expression 'in the case of ... the territory of South West Africa', and a great deal of extensive interpretation would be required to ascribe a sensible meaning to it which would afford the Administrator of South West Africa greater powers than his counterparts in the provinces. **I conclude, therefore, that there was no intention to distinguish between the various provinces on the one hand, and South West Africa on the other, and that the power of an Administrator of any of these territories to invoke the privilege was limited to matters falling under the authority of his administration.** As I have

indicated, this result is achieved by simply reading the word 'administration' as also being implied in respect of South West Africa. **In the present matter the affidavit signed by the Minister of Defence clearly related to a matter falling under the Department of Defence and not under the administration of South West Africa. The Minister of Defence was, accordingly, the proper person to make this affidavit.**

This case holds that the statute empowered the Administrator-General *and* any other Minister to act in terms of section 29 with respect to a power falling under their administration – thus implying that there was no single authority which 'administered' the provision in question. In any event, the issue of transfer is not relevant to the content of section 29 since there were no amendments to that section in South Africa between the earliest possible date of transfer and the repeal of the section in South Africa.

Section 29 was repealed in South Africa by the *Internal Security Act 74 of 1982* (RSA GG 8232), which was not applicable to SWA. It was held in *Mweuhanga v Administrator-General of South West Africa & Others* 1990 (2) SA 776 (A) at 780H-781G that this repeal was not effective in respect of SWA:

> "I now turn to the merits of the appeal. It will be recalled that the affidavit by the Minister of Defence which was filed in the interlocutory application purported to be based on both s 66 of the Internal Security Act of 1982 and s 29 of the General Law Amendment Act of 1969. As appears from the judgment of the Court a quo, the appellant contended in that Court that neither of these Acts applied in South West Africa. **The Court held that the Internal Security Act did not apply in South West Africa but that s 29 of the General Law Amendment Act was in force there, although the latter section had, insofar as the Republic of South Africa was concerned, been repealed by s 73 of the Internal Security Act** […]
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> On appeal before us Mr Gauntlett, for the appellant, accepted the Court's finding that s 29 of the General Law Amendment Act applied in South West Africa, but that the Internal Security Act did not. **I agree with this. Section 29(3) of the General Law Amendment Act specifically provides that the provisions of s 29 and any amendment thereof apply also in the territory of South West Africa. No corresponding provision is found in the Internal Security Act.** And it is noteworthy that s 66(1) and (2) of the Internal Security Act corresponds almost word for word with s 29(1) and (2) of the General Law Amendment Act (as substituted by s 25 of the General Law Amendment Act 102 of 1972) save that the latter contains a reference to South West Africa whereas the former does not. […] [I]ts absence from s 66 of the Internal Security Act is a further indication that the latter Act was not intended to apply in South West Africa."

Amendments: The *General Law Amendment Act 102 of 1972* (RSA GG 3610) substitutes subsections (1) and (2) of section 29.

Second General Law Amendment Act 94 of 1974, section 2

Summary: Section 2 of this Act (RSA GG 4510) requires the permission of the Minister of Trade and Industry for the furnishing of information on business carried on in or outside Namibia in compliance with any order, direction or letter of request emanating from outside Namibia in connection with any civil proceedings.

Applicability to SWA: The text of the Act itself makes no reference to South West Africa. No legal authority for the application of the Act to South West Africa has been located, but section 2 of the Act was 'substituted' in post-independence Namibia (effective 15 September 2001), which would seem to make it part of Namibian law now even if it was not previously.

Amendments: The International Co-operation in Criminal Matters Act 9 of 2000 (GG 2327) substitutes section 2.

> Note that there are two versions of GG 2327. The correct one states at the top: "*This Gazette replaces previous Gazette No. 2327.*"

Foreign Courts Evidence Act 2 of 1995

Summary: This Act (GG 1033) provides for the obtaining of evidence of persons in Namibia by courts outside Namibia. It repeals the South African *Foreign Counts Evidence Act 80 of 1962*.

Amendments: The International Co-operation in Criminal Matters Act 9 of 2000 (GG 2327), brought into force on 15 September 2001 (GN 185/2001, GG 2614), amends sections 2, 4 and 7.

> Note that there are two versions of GG 2327. The correct one states at the top: "*This Gazette replaces previous Gazette No. 2327*."

Note that section 10 of the Act gives the Minister of Justice the power to amend the Schedules to the Act by notice in the *Gazette.*

Regulations: The Act provides that anything done under the repealed *Foreign Courts Evidence Act 80 of 1962* which could have been done under a provision of this Act will be deemed to have been done under this Act. However, this Act makes no provision for regulations, so no regulations made under the repealed Act could survive.

Cases: The following case concerns the predecessor to this Act, the *Foreign Courts Evidence Act 80 of 1962* –

S v Lofty-Eaton & Others (2) 1993 NR 405 (HC).

Electronic Transactions Act 4 of 2019

Summary: This Act (GG 7068) provides for the legal recognition of electronic transactions and the admissibility of electronic evidence, as well as consumer protection in electronic commerce. It repeals the Computer Evidence Act 32 of 1985 (OG 5152). It was brought into force on 16 March 2020 – with the exceptions of section 20, Chapter 4 and Chapter 5 – by GN 75/2020 (GG 7142).

Regulations: Regulations are authorised by section 58. There is no savings clause for regulations made under the repealed Act, which contained no authority for regulations.

Cases: The following cases were decided under the repealed Act:

S v Ningisa & Others 2013 (2) HC 504 (SC) (Act applicable only to civil proceedings, as it explicitly states, and not relevant to criminal proceedings)

Rally for Democracy and Progress & Others v Electoral Commission & Others 2013 (2) NR 390 (HC).

Commentary: PH Masake & P Balhao, "A Need to Reform the Computer Evidence Act 32 of 1985: A Letter to the Law Reform and Development Commission of Namibia", *UNAM Law Review*, Volume 1, Issue 2, 2013, available at http://unamlawreview.info.

Related international agreements:
African Union Convention on Cyber Security and Personal Data Protection, 2014

COMMENTARY

Alet Greeff, "Does Namibia's Constitution provide an enforceable and pursuable environmental right?", *Namibia Law Journal*, Volume 4, Issue 1, 2012

Sisa Namandje, *The Law on Hearsay Evidence in Namibia*. PPC Press, 2016.

See also Combating of Rape Act 8 of 2000 (evidence in rape cases) and Witness Protection Act 11 of 2017 (**CRIMINAL LAW AND PROCEDURE**).