INHERITANCE

Political Ordinance of 1 April 1580, articles 20-29

Summary: This Ordinance unified the law of intestate succession in the provinces of North Holland and South Holland so that the whole of the Netherlands was governed by the "Skependomserfreg" (Southern Provinces System) principle of *per stirpes* inheritance. See a translation and summary of this law in English below.

Amendment and interpretation: The *Interpretation of 13 May 1594* and *Octrooi of 10 January 1661* clarify and amend the 1580 Ordinance.

Applicability to SWA: The *Octrooi of 10 January 1661* clarified that both the Ordinance and the 1594 Interpretation applied to the Cape Colony. (The *Octrooi* applied the Political Ordinance to the "Indies", which at the time included the Cape Colony.) They were subsequently made applicable to SWA by the SWA Administration of Justice Proclamation 21 of 1919, as interpreted by *Tittel v The Master of The High Court* 1921 SWA 58.

Regulations: The Ordinance makes no provision for regulations.

Cases: *Frans v Paschke & Others* 2007 (2) NR 520 (HC) (citing the *Political Ordinance of 1580,* the *Interpretation of 13 May 1594* and the *Octrooi of 1661,* explaining their historical background and the route by which they became applicable to SWA at paragraphs 9-14, and finding the rule that children born outside marriage may not inherit intestate from their fathers to be unconstitutional).

Translation and summaries from
Howard, *The Administration of Estates*, 1908
See *Frans v Paschke & Others* 2007 (2) NR 520 (HC), footnotes 10-11

Political Ordinance of 1 April 1580, articles 19-29

Art 19: Regarding inheritances, the States are hereby withdrawing and repealing all written rights, customs and laws applicable in the States and countries of Holland and Friesland concerned with intestate deaths or where a person dies without a last will. These regulations concern all movable and immovable properties. From now on only these new Articles that follow will be applicable.

Art. 20: Firstly, children and other direct descendants *ad infinitum* succeed by representation or *per stirpes*.

Art. 21: If both parents of the intestate be alive, they succeed absolutely upon failure of children and descendants of remoter degree.

Art 22: If one or both of the parents be dead, the succession must go absolutely to the intestate's brothers and sisters and their children and grandchildren *per stirpes* or by representation.

Art. 23: Half-brothers and half-sisters, their children and grand-children, and other collateral relations who were related to the intestate through one parent only, take with the "half-hand" and according to the degree of consanguinity in which they stood related to him.

Art. 24: Failing all descendants, father, mother, brothers and sisters and their children and grandchildren, the uncles and aunts, and their children, take *per stirpes*.

Art. 25: But, however, if grandfather and grandmother on the one side be both alive, they succeed, as regards property derived from that side, in preference to the uncles and aunts and their children descended from these grandparents of the intestate; but these grandparents do not oust the intestate's brothers and sisters as regards such property.

Art 26: In the case of own parents or other ascendants when the bed has been severed and one alone survives, the latter does not participate in the succession.

Art. 27: "The estate of the deceased shall go to his next of kin on the father's and mother's side, and be divided into two equal parts, without any distinction being made whether the deceased inherited more from his father than from his mother, or vice versa." Now, the context clearly shows that this section was intended to apply to the case in which the deceased died without either descendants or parents him surviving. In such a case the general rule is laid down that the succession shall be *per lineas*, one-half of the estate going to the next of kin on the paternal side, and the other half to the next of kin on the maternal side.

Art. 28: Representation shall not be admitted among collaterals, further than the grandchildren of brothers and sisters, and the children of uncles and aunts, inclusively, and all other collaterals, being the next of kin of the deceased, and in equal degrees, shall take per capita, to the exclusion of all who are in a more remote degree of consanguinity, the nearest excluding those more remote.

Art. 29: Children who have received from their parents any money or property given as a marriage gift or for the purpose of benefiting the children in business affair or otherwise in such matters, must collate or bring into the estate of their parents such money or property before sharing the estate with the other successors. the amount to be collated is the value of the donation at the time it was made, if the property had not had a valuation placed upon it; but if such was the case, the valuation must be followed in collating. The property must then be divided into equal parts, one half going to the surviving spouse, and the other half the heirs take: This will also take place in the first, second and third generations. The foregoing rules regarding succession and collation rule when no contrary provisions exist by virtue of a "testament, antenuptial contract, deeds executed before the Orphan Chamber, or any other contracts".

Interpretation of 13 May 1594

This Interpretation essayed to elucidate the difficult and doubtful points that arose in regard to the terms of the Political Ordinance: Half-brothers and half-sisters must succeed with the half-hand if both of the parents of the intestate predeceased him; that is, the full brothers and sisters or their children or grandchildren by representation must take one-half of the estate, whilst the other half they share equally with the half-brothers and half-sisters, or their children or grandchildren by representation, who are related to the intestate on the one side only. But if that parent alone is dead through whom the half-brothers and half-sisters have their claim upon the intestate, the other parent of the intestate being still living, they, or their children or grandchildren by representation, succeed with a full hand: not otherwise, however. The same applies to the case of other collaterals, in their various degrees, when related to the intestate on the one side only. [Compare, however, the rule stated below, regarding collaterals related through other ascendants.] Further descendants of brothers and sisters, in the fifth and remoter degrees, rank before grandparents and remoter ascendants, as also uncles and aunts, their children and grandchildren, and further descendants, and they succeed per capita, not per stirpes. If, on the one side, only one of the ascendants [as in Art 26, the application hereof to parents is nullified by the Charter of 1661] be alive, neither he, nor any persons, related to the intestate through the deceased spouse alone, will succeed to the intestate. The division of the intestate's estate per lineas, to the father's and the mother's side equally, occurs only when the parents are both dead. And the above rules must govern.

Octrooi of 10 January 1661

In applying the above laws to the Indies, this Charter partially altered Art 26 of the Ordinance: When the marriage of the intestate's parents has been dissolved, and only one of them is living, he or she will succeed to the intestate along with the brothers and sisters, whether of the full or the half blood, or their children or grandchildren by representation. That is, the surviving parent takes one-half, and the brothers and sisters, or their children or grandchildren by representation, take the other half; but the half relations in order to succeed must be related to the intestate through his deceased parent. If there be neither brothers nor sisters alive, their children or grandchildren by representation will in like manner take one half, the parent taking the other. If there be neither, brothers, sisters, their children nor grandchildren alive, the surviving parent of the intestate will succeed to the estate absolutely, and exclude all collaterals. Land, houses and other immovable property must follow the law and customs of the Provinces, Districts of places where it is situated.

"By virtue of the Administration of Justice Proclamation, 21 of 1919, the Roman-Dutch common law applied in the Province of the Cape of Good Hope became the common law of Namibia. Mr Schickerling correctly points out that the common law on intestate succession was based upon the old Political

Ordinance of 1580 and the Interpretation Ordinance of 1594, as modified by the Octrooi of 1661, all passed in the Netherlands and imported to the Cape Colony. The system was based upon consanguinity (blood relationships). The unfairness of intestate succession under the common law upon a spouse was ameliorated in South Africa by the Succession Act, 1934 by conferring rights of intestate succession upon a surviving spouse. Similar legislation was enacted in Namibia some 12 years later when the Intestate Succession Ordinance, 1946 was passed. The Ordinance amended the common law of intestate succession by providing that the surviving spouse of a deceased is declared to be an intestate heir of the deceased's spouse according to certain rules set out in that ordinance which essentially provide for a surviving spouse to succeed to the extent of a child's share or a certain amount whichever was the greater. The amount in question was subsequently increased in amendments to the Ordinance in 1963 and again in 1982."

Tjingaete v Lakay NO & Others 2015 (2) NR 431 (HC) at para 34 (footnotes omitted), citing Corbett, Hahlo, Hofmeyr *The Law of Succession in South Africa (2nd ed)* at 565.

***Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941, repealed but with some continued relevance

Summary: This Proclamation (originally published in OG 920) (which was amended by the Administration of Estates Amendment Act 4 of 1981 (Rehoboth), *Official Gazette 37 of Rehoboth*, dated 21 August 1981) previously regulated the administration of estates in Rehoboth.

> Note that *Official Gazette 37 of Rehoboth* appears to have been misprinted as *Official Gazette 38 of Rehoboth*. Some copies bear a handwritten notation showing the correct number as *Official Gazette 37 of Rehoboth*.

The Estates and Succession Amendment Act 15 of 2005 (GG 3566) repeals the Proclamation, but provides that the rules of intestate succession that applied by virtue of Schedule 2 of the Proclamation before the date of its repeal "continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said Proclamation not been repealed". Therefore, Schedule 2 of the repealed Act continues to be of relevance. (The repealing Act also provides that the repeal does not affect the validity of a will which would have been valid in terms of the Proclamation had it not been repealed.)

Amendments: The Proclamation was amended by the Administration of Estates Amendment Act 4 of 1981 (Rehoboth) (*Official Gazette 37 of Rehoboth*, dated 21 August 1981). It was repealed by the Estates and Succession Amendment Act 15 of 2005 (GG 3566), with the caveat described above.

> Note that *Official Gazette 37 of Rehoboth* appears to have been misprinted as *Official Gazette 38 of Rehoboth*. Some copies bear a handwritten notation showing the correct number as *Official Gazette 37 of Rehoboth*.

Regulations: The Act made no provision for regulations.

Cases: *Ayoub v Januarie & A Similar Matter* 2023 (4) NR 958 (HC) (requirements for valid redistribution agreement).

Intestate Succession Ordinance 12 of 1946

Summary: This Ordinance (originally published in OG 1259) sets forth rules for intestate inheritance by surviving spouses and other relatives.

Amendments: The Ordinance is amended by Ord. 6/1963 (OG 2460) and Act 15/1982 (OG 4721), both of which simply substitute the amounts referred to in section 1. (The amounts which are currently applicable are all set at R50 000.)

Regulations: The Act makes no provision for regulations.

Cases: Legislative history discussed in *Tjingaete v Lakay NO & Others* 2015 (2) NR 431 (HC), as well as section 1(2).

Wills Act 7 of 1953, as amended in South Africa to November 1979

Summary: This Act (originally published in SA GG 5018) covers the execution of wills.

Repeals: The Act repeals the Wills Proclamation 23 of 1920 (OG 33) in respect of SWA.

Applicability to SWA: In the original Act, section 8 stated: "This Act shall apply also in the Territory of South-West Africa." Section 8 was substituted, with retrospective effect, by the *General Law Amendment Act 80 of 1964* (RSA GG 829) to make all amendments to the Act automatically applicable to South West Africa. As substituted, section 8 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)." Section 1 defines "Court" and "Master" accordingly.

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

Amendments: The following pre-independence amendments in South Africa were applicable to SWA –

- *Wills Amendment Act 48 of 1958* (SA GG 6122) (The wording of section 8 in the original Act did not make amendments to the Act automatically applicable to South West Africa, but this amendment was made expressly applicable to South West Africa by its own terms; see section 2 of the amending Act.)
- *General Law Amendment Act 80 of 1964* (RSA GG 829) (amends section 8 of the Act with retrospective effect to make all amendments to the Act automatically applicable to South West Africa)
- *Wills Amendment Act 41 of 1965* (RSA GG 1084).

The definitions of "Court" and "Master" are substituted by the Walvis Bay and Off-shore Islands Act 1 of 1994 (GG 805).

Regulations: The Act makes no provision for regulations.

Cases:

Lerf v Nieft NO & Others 2004 NR 183 (HC) (lack of testamentary capacity)

Hoveka NO & Others v The Master & Another 2006 (1) NR 147 (HC) (factual dispute about compliance with section 2(1)(a); costs)

Kalomo v Master of the High Court & Others 2008 (2) NR 693 (SC) (valid German will of German citizen residing in Namibia at time of death covered by section 3*bis*)

Vermeulen & Another v Vermeulen & Others 2012 (1) NR 286 (HC) (burden of showing invalidity on grounds of mental incompetency to make a will under section 4 lies with the persons challenging the will; test for testamentary capacity); reversed on appeal in *Vermeulen & Others v Vermeulen & Another* 2014 (2) NR 528 (SC) (test for lack of testamentary capacity; re-evaluation of factual evidence in light of standard of proof of testamentary capacity and appropriate degree of caution)

Afrikaner v The Master of the High Court of Namibia & Others 2013 (4) NR 1129 (HC) (noncompliance with section 2(1)(a)(v) cannot be condoned; rectification after death of testator is impermissible)

Mwoombola & Another v Master of the High Court 2018 (2) NR 482 (HC) ("substantial compliance" with formalities in section 2(1)(a) suffices to declare a will to be valid, so as not to frustrate the fundamental Constitutional right to freedom of testation; the court strongly recommended "that the Law Reform and Development Commission investigate the violation of the fundamental human rights that may be caused by the strict and unyielding interpretation of the Wills Act")

Schkade v Gregory NO & Others 2018 (4) NR 986 (HC) (correct procedure for challenging validity of signature on disputed will is declarator from court, not a challenge to administrative action by Master; question of possible fraud needs to be addressed by means of action rather than application).

Damaseb v Minister of Land Reform & Others 2019 (3) NR 775 (HC) (discusses sections 2(1)(a) and 4 and determines will to be valid), overturned on appeal in *Shalukeni & Others v Damaseb & Others* 2021 (1) NR 50 (SC) (which found will to be suspect in several respects, especially since only a copy was presented instead of the original, and held that the validity of the will could not be determined on the papers (at paras 26-35)).

JN v EN & Others 2022 (3) NR 657 (HC) (interest in property bequeathed by will vests only upon the death of the testator and cannot be considered as having been transferred before that event; to "dispose of" and to "bequeath" property in Art 16 of Namibian Constitution have different meanings).

The following cases deal with the interpretation and construction of wills:

Beukes & Others v Engelbrecht & Others 2005 NR 305 (HC)

Kuhlmann & Others v The Master & Others 2007 (2) NR 611 (HC)

Commentary:

Namibia Institute for Democracy, *Wills, Testaments and Estates*, 2001

Legal Assistance Centre, *Training Manual for Trainers on Will Writing and Inheritance in Namibia,* 2004, available here (languages: English, Afrikaans, Oshiwambo, Otjiherero, Khoekhoegowab, Silozi, Rukwangali)

Legal Assistance Centre, *Wills and Inheritance*, undated pamphlet, available here

Elsie Beukes, Master of the High Court, *Review of Namibian legislation on Wills,* August 2020.

General Law Amendment Ordinance 12 of 1956, section 5

Summary: Section 5 of this Ordinance (originally published in OG 2018) deals with the power of the High Court in certain situations where an unborn person will be entitled to an interest in immovable property in terms of a will. (Section 4 of this Ordinance is discussed under ARMS AND AMMUNITION. Sections 6-7 of this Ordinance are discussed under CRIMINAL LAW AND PROCEDURE)

Amendments: This portion of the Ordinance is amended by Ord. 36/1965 (OG 2642).

Regulations: There is no provision in this section for regulations.

Administration of Estates Act 66 of 1965, as amended in South Africa to November 1979

Summary: This Act (originally published in RSA GG 1128) governs the liquidation and distribution of the estates of deceased persons. It was brought into force in South Africa, with the exception of Chapter III, on 2 October 1967 by RSA Proc. R.242/1967 (RSA GG 1858). Those portions of the Act in force in South Africa came into force in South West Africa on 1 April 1972 when the amendments made by Act 54 of 1970 (RSA GG 2827), including the insertion of section 108A, were brought into force in respect

of SWA with effect from 1 April 1972 by RSA Proc. R.68/1972 (RSA GG 3425), which also brought into operation the amendments to the Act made by *Act 54 of 1970.*

Repeals: This Act repeals the *Administration of Estates Act 24 of 1913.*

The Estates and Succession Amendment Act 15 of 2005 (GG 3566) repeals the Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941 and portions of section 18 of the Native Administration Proclamation 15 of 1928. It makes this Act applicable to all deceased estates, testate or intestate, of persons who died on or after the date of commencement of the amending Act (29 December 2005). Act 15 of 2005 also provides transitional provisions in section 3 in respect of estates already being administered in terms of the repealed laws where the liquidation and distribution were not yet complete; the general rule is that those estates will continue to be administered under the repealed laws, but any person with an interest in an estate has the option to request that the estate be administered in terms of this Act. Act 15 of 2005 also inserts section 4A, which authorises the Minister to assign functions of the Master to magistrates.

> **Section 18 of the Native Administration Proclamation 15 of 1928 (OG 284), as amended by Act 27/1985 (OG 5147):** This section previously governed the administration of the estates of "natives" in some parts of Namibia. Section 18(3) and (9) were applied to the area north of the Police Zone with retroactive effect from 1 August 1950 (GN 67 of 1 April 1954). 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 of 15 February 1974. Thus, sections 18(3) and 18(9) on succession applied in Owambo, Kavango and Caprivi (with effect from 1950), while the whole of section 18 on succession applied to the remainder of Namibia (with effect from 1974).
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> The Estates and Succession Amendment Act 15 of 2005 (GG 3566) repeals section 18(1), (2), (9) and (10), 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".
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> **Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941:** This Proclamation (OG 920) (which was amended by the Administration of Estates Amendment Act 4 of 1981 (Rehoboth) (*Official Gazette 37 of Rehoboth*, dated 21 August 1981) previously regulated the administration of estates in Rehoboth.
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> > Note that *Official Gazette 37 of Rehoboth* appears to have been misprinted as *Official Gazette 38 of Rehoboth*. Some copies bear a handwritten notation showing the correct number as *Official Gazette 37 of Rehoboth*.
>
> The Estates and Succession Amendment Act 15 of 2005 (GG 3566) repeals the Proclamation, but provides that *the rules of intestate succession* that applied by virtue of Schedule 2 of the Proclamation before the date of its repeal "continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said Proclamation not been repealed". Therefore, Schedule 2 of the repealed Act continues to be of relevance.

Applicability to SWA: Section 1, as amended by *Act 54 of 1970*, defines "Republic" to include "the territory", which is defined as "the territory of South West Africa". Section 108A, inserted by *Act 54 of 1970*, states "This Act and any amendment thereof shall apply also in the territory, including the Eastern Caprivi Zipfel, but shall, in the territory known as the 'Rehoboth Gebiet' and defined in the First Schedule to the agreement referred to in the Schedule to Proclamation No. 28 of 1923, of the territory, not apply to the estate of any person to whom Proclamation No. 36 of 1941, of the territory, applies". (The Proclamation referred to is the Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941 (OG 920), which was repealed by the Estates and Succession Amendment Act 15 of 2005 (GG 3566); Act 15 of 2005 provides that the administration of all estates in future falls under this Act.)

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

Section 3(1)(o) of the Transfer Proclamation as originally enacted excluded sections 2, 88, 91, 92, 93, 97 and 103(1)(b) (power to make regulations on payments out of working balances of the guardian's fund) from the operation of section 3(1) of the General Proclamation, and excluded all the references to the Republic in the Act from 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). Section 3(1)(o) of the Transfer Proclamation, as amended by the SWA Administration of Estates Amendment Act 2 of 1987, no longer listed any specific sections, but continued to exclude all the references to the Republic in the Act from section 3(1) of the General Proclamation.

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

- *General Law Amendment Act 102 of 1967* (RSA GG 1771)
- *Establishment of the Northern Cape Division of the Supreme Court of South Africa Act 15 of 1969* (RSA GG 2315)
- *Administration of Estates Amendment Act 54 of 1970* (RSA GG 2827)
- *Administration of Estates Amendment Act 79 of 1971* (RSA GG 3196)
- *General Law Amendment Act 57 of 1975* (RSA GG 4760)
- *Administration of Estates Amendment Act 15 of 1978* (RSA GG 5919)
- *Divorce Act 70 of 1979* (RSA GG 6506).

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), amends certain terminology.

Act 17/1981 (OG 4568) amends sections 18, 29 and 34 of the Act.

Act 6/1986 (OG 5196) and Act 2/1987 (OG 5338) both make substantial amendments to the Act.

The Married Persons Equality Act 1 of 1996 (GG 1316), which was brought into force on 15 July 1996 by GN 154/1996 (GG 1340), repeals section 17, amends section 72 and substitutes section 85.

Act 15/2001 (GG 2672), which was brought into force on 1 July 2002 by GN 107/2002 (GG 2760), amends sections 1, 18, 28, 30, 34, 80, 90, 91, 93, 102 and 103 of the Act.

The Estates and Succession Amendment Act 15 of 2005 (GG 3566) inserts section 4A. As mentioned above, it also repeals the Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941 and portions of section 18 of the Native Administration Proclamation 15 of 1928. The effect is to make this Act applicable to all deceased estates, testate or intestate, of persons who died on or after the date of commencement of the amending Act (29 December 2005). Act 15 of 2005 also provides transitional provisions in respect of estates already being administered in terms of the repealed laws where the liquidation and distribution were not yet complete; the general rule is that those estates will continue to be administered under the repealed laws, but any person with an interest in an estate has the option to request that the estate be administered in terms of this Act. Act 15 of 2005 also inserts section 4A, which authorises the Minister to assign functions of the Master to magistrates.

The Magistrates Amendment Act 5 of 2009 (GG 4307) substitutes the expression "Chief Magistrate" for the expressions "Chief: Lower Courts" and "Chief of lower courts" wherever they occur in any legislation – which was relevant to this Act.

Act 22/2018 (GG 6813) amends sections 1, 87, 88 and 103 and inserts section 87A.

The Child Care and Protection Act 3 of 2015 (GG 5744), which was brought into force by GN 4/2019

(GG 6829), amends section 72.

Act 9 of 2022 (GG 7988) repeals section 87A, which required the payment of certain moneys in respect of minors and persons under curatorship into the guardian's fund (even in cases where there was a will).

The Abolition of Payment by Cheque Act 16 of 2022 (GG 7995), which was brought into force on 15 March 2023 by GN 47/2023 (GG 8050), amends sections 28, 35 and 87.

RSA Proclamation R.57/1987 (RSA GG 10689) amends section 86 of the Act *as it applied in South Africa* to provide financial arrangements pertaining to the guardian's fund of SWA:

> Section 86 of the Administration of Estates Act, 1965 (Act 66 of 1965), is hereby amended by the addition of the following subsection:
>
> > "(3) Moneys in the guardian's fund received by the Master of the Supreme Court of South-West Africa on or before 31 March 1987 for the benefit of the said guardian's fund, together with the interest allowed thereon in terms of section 88, shall be paid into the guardian's fund of South-West Africa on 1 April 1987."

Regulations: Regulations are authorised by section 103(1) of the Act. Section 103(3) provides that any regulations made under section 118 of the repealed Administration of Estates Act 24 of 1913, shall be deemed to have been made under subsection 103(1).

General regulations are contained in RSA GN R.473/1972 (RSA GG 3425), as amended by the following:

- RSA GN R.817/1977 (RSA GG 5542)
- RSA GN R.1209/1980 (RSA GG 7068)

  This amendment is *after the date of transfer*, but it explicitly states that the tariff it contains has been determined with the consent of the Administrator-General for the Territory of South West Africa and shall also apply in the Territory.
- RSA GN R.2542/1981 (RSA GG 7925)

  This amendment is *after the date of transfer*, but it explicitly states that it was made with the consent of the Administrator-General for the Territory of South West Africa and shall also apply in the Territory.
- GN 107/1985 (OG 5128)
- GN 56/1993 (GG 645)
- GN 33/1999 (GG 2051).

  In South Africa, the regulations were additionally amended *after the date of transfer* by the following, none of which explicitly stated that they applied to SWA: RSA GN R.2482/1985 (RSA GG 9986) (as corrected by RSA GN R.655/1986, RSA GG 10185), RSA GN R.2738/1987 (RSA GG 11063), RSA GN R.610/1989 (RSA GG 11792) and RSA GN R.1208/1989 (RSA GG 11920).

Regulations determining the amounts set in terms of various sections of the Act are contained in GN 108/2002 (GG 2760).

> See also the **Regulations Prohibiting the Liquidation or Distribution of the Estates of Deceased Persons by any Person other than an Attorney, Notary, Conveyancer or Law Agent,** originally made in terms of the *Attorneys, Notaries and Conveyancers Admission Act 23 of 1934*, contained in RSA GN R.910/1968 (RSA GG 2080) as amended by RSA GN R.1013/1969 (RSA GG 2439) and RSA GN R.1376/1971 (RSA GG 3227); these regulations appear to survive in terms of the Legal Practitioners Act 15 of 1995 due to a chain of saving clauses. (See the entry for that Act for a full explanation.)

Notices: GN 43/2006 (GG 3591), issued in terms of section 4A of the Act, assigns certain powers of the Master of the High Court to magistrates in respect of intestate estates. This notice refers to the amount determined in respect of section 18(3) of the Act. That amount is currently set at N$100 000 by GN 108/2002 (GG 2760).

Notices of unclaimed monies are not listed here.

Cases:

Berendt & Another v Stuurmann & Others 2003 NR 81 (HC) (the application of the Act)

Kuhlmann & Others v The Master & Others 2007 (2) NR 611 (HC) (review under section 95 of Master's refusal to appoint co-executor under section 18; Master's role under sections 18 and 19)

Kanguatjivi & Others v Shivoro Business and Estate Consultancy & Others 2013 (1) NR 271 (HC) (section 35(4) directory and not peremptory, meaning that substantial compliance suffices)

Tjingaete v Lakay NO & Others 2015 (2) NR 431 (HC) (section 18(3))

First National Bank of Namibia Ltd v SSS Motor Spares CC & Another 2015 (4) NR 1112 (HC) (provisions of Act do not preclude creditor from instituting action against deceased estate for payment of money owed, arising in context of unopposed summary judgment)

Kamuhanga NO v Master of the High Court & Others 2016 (1) NR 141 (SC) (review of decisions under section 35(10); section 47)

Wyss & Another v Hungamo & Others 2016 (4) NR 1054 (HC) (section 11); *Wyss & Another NO v Hungama & Others* 2018 (2) NR 596 (SC) (paras 9-11: discussion of whether actions concerning specific property in a deceased estate are premature if the liquidation and distribution account has not yet been finalised)

Gaya v Rittman NO & Others 2017 (1) NR 80 (HC) (section 54(1)(a)(v); review of decision of Master not to remove executor)

Husselmann & Others v Saem & Others 2017 (3) NR 761 (HC) (executor to be joined as party in all proceedings affecting deceased estates; new appointment must be made if previous executor has been released from duties)

Mpasi NO & Another v Master of the High Court & Others 2018 (4) NR 909 (SC) (court has no power to appoint an executor under section 54(1)(a) or 95)

Schkade v Gregory NO & Others 2018 (4) NR 986 (HC) (section 95; correct procedure for challenging validity of signature on disputed will is declarator from court, not a challenge to administrative action by Master; question of possible fraud needs to be addressed by means of action rather than application)

Penderis & Others v De Klerk & Others 2021 (1) NR 152 (HC) (section 54(1)(a) ("undesirable") read with section 53); appeal dismissed in *De Klerk v Penderis NO & Others* (SA 76-2020) [2022] NASC (1 March 2023) (application for condonation and reinstatement refused; prospects of success on appeal not considered)

Ayoub v Januarie & A Similar Matter 2023 (4) NR 958 (HC) (requirements for valid redistribution agreement)

Master of the High Court &Another v Moller & Others (SA66-2022) 2024 NASC (20 November 2024) (in context of application for condonation, the Supreme Court considered whether the Master of the High Court is delictually liable to the heirs of the deceased in circumstances where an executor appointed by the Master misappropriated estate funds; sections 18, 23-24, 26(1) and 100 considered, and the Court found that on the facts of this case the Master and/or her officials did not exercise reasonable care and diligence, making the State liable for the damages under section 100)

> At para 30: "It is untenable for the Master to rely on the volume of estates under supervision for not devising ways and means of monitoring performance by executors. The landscape of the Master's jurisdiction has vastly changed. Some estate practitioners do not belong to a professional body to which recourse may be had in the case of misconduct. Charlatans and similar unconscionable elements masquerading as estate practitioners will take advantage of the laxed or non-existent control or accounting measures to misappropriate estate property to the detriment of beneficiaries under the guise of administering estates. The Master's office can no longer operate business as usual. It has to be in synch with the changed times. It must innovate and leverage Information Technology to craft mechanisms for control and supervision of the executors."

Commentary: Law Reform and Development Commission, *Report on Succession and Estates,* LRDC 20, 2012, available here.

COMMENTARY

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Thomas Widlock, "Good or bad, my heritage: customary legal practices and the liberal constitution of post-colonial States", 31 (1-2) *Anthropology Southern Africa* 13 (2008) (issues relating to reform of customary inheritance laws)

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See also Child Care and Protection Act 3 of 2015 (succession by adoptive children; succession by children born outside marriage) (**CHILDREN**).

See also Financial Intelligence Act 13 of 2012 (duties in respect of testamentary trusts) (**FINANCIAL INSTITUTIONS**).

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