

MARRIAGE AND DIVORCE

Divorce Laws Amendment Ordinance 18 of 1935

Summary: This Ordinance ([OG 643](#)) amends the common law by setting forth additional grounds for divorce. It will be repealed by the Dissolution of Marriages Act 10 of 2024 ([GG 8487](#)), which has not yet been brought into force.

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 (originally published in [SA GG 2635](#)) concerns jurisdiction over divorce proceedings. It will be repealed by the Dissolution of Marriages Act 10 of 2024 ([GG 8487](#)), which has not yet been brought into force.

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The Act was repealed in South Africa with effect from 1 July 1979 by the *Divorce Act 70 of 1979* ([RSA GG 6505](#)), shortly *before* it was transferred to SWA in November 1979. The repealing Act was not made expressly applicable to SWA, but should have repealed the Act in respect of SWA by virtue of section *7ter* of Act 22 of 1939.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); *QJ v EJ* 2019 (2) NR 494 (HC) (jurisdiction under section 5, noting that Namibia is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction).

Matrimonial Affairs Ordinance 25 of 1955

Summary: Only sections 4-6 remain in force. The surviving portions of this Ordinance (originally published in [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 (originally published in [SA GG 6670](#)) governs the solemnisation of civil marriages. It will be replaced by the Marriage Act 14 of 2024 ([GG 8548](#)), which has not yet been brought into force.

Repeals: The Act repeals the Marriage Ordinance 33 of 1963 ([OG 2502](#)) in respect of SWA.

Applicability to SWA: Section 39A, which was added to the Act by the *Marriage Amendment Act 51 of 1970* ([RSA GG 2822](#)) with effect from 1 February 1972 (RSA Proc. 169/1971 ([RSA GG 3220](#))),

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 5*bis*;
- 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.

Savings: Section 39(2) contains a general savings clause:

Anything done under any provision of a law repealed by sub-section (1) shall be deemed to have been done under the corresponding provision of this Act (if any).

Regulations: Regulations under the Marriage Act 25 of 1961 are contained in GN 213/1987 ([OG 5480](#)), which repeals the race-based regulations that were previously in force.³⁴⁹

³⁴⁹ GN 213/1987 ([OG 5480](#)) repeals the regulations contained in RSA GN R.1779 of 8 October 1971 (RSA GG 3281). (These regulations were amended in South Africa, after the date of transfer, by RSA GN R.11 of 8 January 1982 (RSA GG 7983).) They were “in substitution for the regulations contained in Government Notice R.1308 of 29 December 1961, in so far as they are applicable to a person who is not a Bantu as defined in the Population Registration Act, 1950 (Act 30 of 1950), or is not a native (excluding a Nama) as defined in section 25 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928), of South-West Africa”.

GN 213/1987 ([OG 5480](#)) also repeals the regulations contained in RSA GN R.115 of 28 January 1972 (RSA GG 3371), as amended by RSA GN R. 71 of 18 January 1974 (RSA GG 4141). (These regulations were amended in South Africa, after the date of transfer, by RSA GN R.849 of 16 April 1981 (RSA GG 7549).) They applied “in relation to persons who are Bantu as defined in the Population Registration Act, 1950 (Act 30 of 1950) or who are natives (excluding Namas) as defined in section 25 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928) of South West Africa”.

In South Africa, these two regulation sets were replaced after the date of transfer by RSA GN R.2207/1986 ([RSA GG 10500](#)).

Note that there are two Official Gazettes numbered 5480. The correct one has a notation at the top stating “*This Official Gazette replaces the Official Gazette of the same number and date.*”

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.

Repeals: The Act repeals the *Dissolution of Marriages on Presumption of Death Act 23 of 1979*.

Regulations: The Act makes no provision for regulations.

Married Persons Equality Act 1 of 1996

Summary: This Act (originally published in [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, and amends numerous statutes. It 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 Banking Institutions Act 2 of 1998 was subsequently repealed by the Banking Institutions Act 13 of 2023.

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.

The Marriage Act 14 of 2024 ([GG 8548](#)), which has not yet been brought into force, will delete sections 23, 24 and 25.

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)

Tjihero v Kauari (I 2845/2012) [2017] NAHCMD 269 (19 September 2017) (consent to a written agreement for purposes of section 7(1) requires signature by the spouse married in community of property); overturned on appeal on other grounds in *Tjihero & Another v Kauri & Another* 2018 (3) NR 879 (SC)

Standard Bank Namibia Ltd v Groenewald & Others 2019 (4) NR 986 (HC) (effect of section 7 on suretyship entered into by one spouse without consent of the other; where none of the statutory exceptions in sections 7(5) or 8(1)(a) are applicable, the invalidity of the suretyship agreement applies to the creditor and not just between the spouses), overturned on appeal in *Standard Bank Namibia Ltd v Groenewald & Others* 2021 (4) NR 968 (SC) (onus of proof of absence of consent lies on the persons seeking the protection of section 7 and was not satisfied here; necessary spousal consent was present as a result of section 7(1)(h) and 7(2)(b), as there was no evidence of maladministration of joint estate by one spouse in absence of other's consent; secondarily, given the conduct of the spouse in question, the bank could not have known that the requisite spousal consent was lacking, meaning that consent is deemed to have been given under section 8(1)(a))

MN v LI & Another 2022 (1) NR 135 (SC) (Act discussed in *dicta*)

Dengeinge v Uugwanga 2023 (2) NR 348 (HC) (communal land right forms part of joint estate:
[30] To hold otherwise would have a retrogressive effect on the gains made since the advent of the Constitution and those achieved through the implementation of the provisions of the Married Persons Equality Act. In particular, it would contradict the specific provision of art 14 of the Constitution which provides that '(m)en and women of full age . . . [are] entitled to equal rights . . . during marriage and at its dissolution'. Furthermore, a holding to the contrary would contradict the provisions of s 4 of that Act, which provides that a husband and wife married in community of property have equal rights.)

Naanda v Fredrik & Another (SA 106-2022) 2024 NASC (1 November 2024) (scope and ambit of s 8(1)(a)).

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.

***Dissolution of Marriages Act 10 of 2024**  

Summary: This Act ([GG 8487](#)) consolidates and reforms the law on divorce in respect of civil marriage, making irretrievable breakdown the only ground for divorce. It covers custody, guardianship and access in respect of children of the marriage and provides for spousal maintenance, child maintenance and the

division of marital assets as well as the forfeiture of patrimonial benefits. It paves the way for allowing regional magistrate's courts to hear divorce cases and makes it possible for spouses to make a joint application for a divorce. It will be brought into force on a date set by the Minister by notice in the *Government Gazette*.

Repeals: This Act repeals the Divorce Laws Amendment Ordinance 18 of 1935, the *Matrimonial Causes Jurisdiction Act 22 of 1939* and the Matrimonial Affairs Ordinance 25 of 1955, and most of their amendments.

Notes: (1) The Act also repeals the *Matrimonial Causes Jurisdiction Act 35 of 1945* in its entirety. This law once applied to South West Africa 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". However, it was repealed by the South African Divorce Act 70 of 1979 shortly *before* the relevant transfer proclamation (the Executive Powers (Justice) Transfer Proclamation (AG 33/1979), dated 12 November 1979) was issued. The repeal in question was apparently effective for both South West Africa and South Africa. Thus, the current repeal appears to be superfluous. (2) The Act repeals the *Matrimonial Affairs Act 37 of 1953* in its entirety. This law amended the *Matrimonial Causes Jurisdiction Act 22 of 1939*, which was applicable to SWA, but the 1953 Act was not independently applicable to South West Africa, where the Matrimonial Affairs Ordinance 25 of 1955 applied. (3) The Act repeals the *General Law Amendment Act 70 of 1968* in its entirety. Note that portions of this Act amend the *Magistrates' Courts Act 32 of 1944*, which remains in force in Namibia. This repeal would not affect the current validity of those amendments, however, since they were actioned before the repeal. (4) The amendments to the *Matrimonial Causes Jurisdiction Act 22 of 1939* and the Matrimonial Affairs Ordinance 25 of 1955 made by the Married Persons Equality Act 1 of 1996 ([GG 1316](#)) are not repealed.

Regulations: The Act makes no provision for regulations. However, it amends the High Court Act 16 of 1990 to authorise the Judge-President to make rules pertaining to various aspects of divorce proceedings. It also amends the Magistrates' Courts Act 32 of 1944 to authorise the Rules Board to make rules pertaining to various aspects of divorce proceedings in regional magistrates' courts.

Cases: The following case was decided under the Divorce Laws Amendment Ordinance 18 of 1935:
WWB v Aipanda NO 2018 (2) NR 446 (HC) (sections 1(1)(a) and 2(b)).

The following cases were decided under the *Matrimonial Causes Jurisdiction Act 22 of 1939*:
SS v YS 2013 (1) NR 32 (HC) (jurisdiction under sections 1 and 5)
ZS v ES 2014 (3) NR 713 (HC)
QJ v EJ 2019 (2) NR 494 (HC) (jurisdiction under section 5, noting that Namibia is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction).

The following cases were decided under the Matrimonial Affairs Ordinance 25 of 1955:
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 14 of 2024

Summary: This Act ([GG 8548](#)) consolidates and reforms the law on the solemnisation of civil marriage. It will be brought into force on a date set by the Minister by notice in the *Government Gazette*.

Repeals: The Act repeals the *Marriage Act 35 of 1961* as amended (with the exception of section 267(6) of the amendment made by the Child Care and Protection Act 3 of 2015, which substituted section 24 of the 1961 Act).

Savings: Regulations are authorised by section 44 of the Act. Section 46 of the Act on transitional provisions provides as follows:

Despite the repeal of the laws by section 45 any marriage that, prior to the coming into force of this Act, was valid under the repealed law is not affected by the repeal of that law, and anything done under any provision of that law is deemed to have been done under the corresponding provision, if any, of this Act.

This wording could apply to regulations, which were authorised by section 38 of the *Marriage Act 35 of 1961*.

Regulations: Regulations under the *Marriage Act 25 of 1961* are contained in GN 213/1987 ([OG 5480](#)), which repeals the race-based regulations that were previously in force.³⁵⁰

Note that there are two Official Gazettes numbered 5480. The correct one has a notation at the top stating “*This Official Gazette replaces the Official Gazette of the same number and date.*”

Cases: The following cases were decided under the *Marriage Act 35 of 1961*:

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).

SELECTED CASES

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

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).

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

³⁵⁰ GN 213/1987 ([OG 5480](#)) repeals the regulations contained in RSA GN R.1779 of 8 October 1971 (RSA GG 3281). (These regulations were amended in South Africa, after the date of transfer, by RSA GN R.11 of 8 January 1982 (RSA GG 7983).) They were “in substitution for the regulations contained in Government Notice R.1308 of 29 December 1961, in so far as they are applicable to a person who is not a Bantu as defined in the Population Registration Act, 1950 (Act 30 of 1950), or is not a native (excluding a Nama) as defined in section 25 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928), of South-West Africa”.

GN 213/1987 ([OG 5480](#)) also repeals the regulations contained in RSA GN R.115 of 28 January 1972 (RSA GG 3371), as amended by RSA GN R. 71 of 18 January 1974 (RSA GG 4141). (These regulations were amended in South Africa, after the date of transfer, by RSA GN R.849 of 16 April 1981 (RSA GG 7549).) They applied “in relation to persons who are Bantu as defined in the Population Registration Act, 1950 (Act 30 of 1950) or who are natives (excluding Namas) as defined in section 25 of the Native Administration Proclamation, 1928 (Proclamation 15 of 1928) of South West Africa”.

In South Africa, these two regulation sets were replaced after the date of transfer by RSA GN R.2207/1986 ([RSA GG 10500](#)).

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](#); and Tapiwa Victor Warikandwa & Lizazi Eugene Libebe, “Namibia Superior Courts’ findings on adultery claims: A case of undermining African jurisprudence?” in Tapiwa Victor Warikandwa & John Baloro, eds, *Namibia’s Supreme Court at 30 Years: A Review of the Superior Court’s Role in the Development of Namibia’s Jurisprudence in the Post-Independence Era*, Konrad Adenauer Foundation, 2022, available [here](#).

Divorce-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).

Divorce-restitution of conjugal rights:

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)

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*)

RW v AW 2023 (2) NR 554 (HC) (order for restitution of conjugal rights inappropriate where protection order is in place prohibiting husband from contact with wife or approaching her residence; final divorce order issued, but no order for access made pending investigation by a social worker in terms of sections 42 and 139 of the Child Care and Protection Act 3 of 2015 due to allegations that minor child was threatened with physical harm).

Divorce-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)

CS (born S) v CS 2021 (4) NR 1156 (HC), upheld on appeal in *CJS v CS (born S)* 2021 (4) NR 1208

(SC) (approach to proposed cross-border relocation of custodian parent after divorce; see outline of key principles in paras 40-44)

CJV v DG (previously V) 2024 (1) NR 80 (HC) (views of child taken into account in decision on temporary custody after divorce of parents: assistance provided by Children's Advocate; principles on best interests of child in Child Care and Protection Act 3 of 2015, section 3 applied)

[77] I hold the view that since the dispute between the parties is about the care of the child, it is only befitting that the child, depending on his or her age, maturity and development stage, be heard on the subject that concerns him or her. Courts preach the *audi alteram partem* rule day in, day out, and it is only fair that the child whose welfare is at stake takes part in the proceedings that will determine his or her fate. Children should be afforded an opportunity to be involved in the process that affects them and determines their future. I take cognisance of the fact that a child may be influenced by one of the parents, another child or any other person, but this, in my view, should not be elevated to a bar from hearing the views and opinions of the concerned child for appropriate consideration.

[78] The views and opinions of the child expressed should be balanced with all other relevant factors in order to arrive at a decision that is in the best interests of the child. (at paragraphs 77-78)

Divorce-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)

Bluntly put, the drunken adulterous and maliciously deserting husband, who happens to be a millionaire, and who contributed far more to the joint estate than his innocent spouse, forfeits nothing, even in circumstances where the court makes a general forfeiture order against him. The practical effect of a general forfeiture order in such circumstances would be a mere division of the joint estate. Thus, he is obliged to give 50% of the joint estate to his innocent wife, but he forfeits nothing. The 50% division of the estate is a natural consequence of the law, and does not concern forfeiture at all. On the other hand, the worthless drunken gambler who has committed adultery, but has contributed far less to the value of the joint estate, is not entitled to half the estate when his wife sues him for divorce. In such circumstances, what he forfeits is the benefit which would have accrued to him (by operation of law), as a result of the fact that the parties were married in community of property. (para 6)

S v S 2013 (1) NR 114 (SC) (no basis for argument that forfeiture of benefits implicates Art 16 of Constitution; exposition of common law on forfeiture of patrimonial benefits)

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).
JN v EN & Others 2022 (3) NR 657 (HC) (duties and responsibilities of receivers tasked with dividing joint estate of divorced parties; receiver has a duty to report to court where settlement agreement is made into a court order; court retains control over joint estate until it is finally liquidated, meaning that a party dissatisfied with the division can approach the court to have it set aside).

Divorce – maintenance

Oberholzer v Loots & Another 2023 (4) NR 1047 (SC) (agreement made for the purpose of hiding assets and thereby frustrating child maintenance claims after a divorce is invalid as being against public policy)

Divorce-Namibia’s antiquated divorce law:

HV v SV (2) 2014 (3) NR 842 (HC), 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), 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.”

Divorce-variation of final divorce order:

RB v AB 2019 (4) NR 1160 (HC) (law does not permit court to vary own final order of divorce in respect of proprietary aspects of settlement agreement incorporated into order).

Donations between spouses

CAD v VED 2019 (3) NR 889 (SC).

Putative marriage:

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); rejected as having been wrongly decided by *MN v LI & Another* 2022 (1) NR 135 (SC)

Konrad v Ndapanda 2019 (2) NR 301 (SC) (“As a matter of public policy, equity and fairness to both parties to the union, it is imperative that the declaration of the invalidity of a marriage and that of a putative marriage, if properly raised, should be determined in tandem and not in isolation.” (para 12)).

Universal partnerships between spouses

CAD v VED 2019 (3) NR 889 (SC) (summarises relevant common law at paras 4-6 and finds “tacit commercial partnership”)

MN v FN 2019 (4) NR 1176 (SC); *MN v LI & Another* 2022 (1) NR 135 (SC) (competent for one spouse married in community of property prior to advent of Married Persons Equality Act 1 of 1996 to form a universal partnership with another woman; Court declines to reverse its previous decision under art 81 of the Namibian Constitution and explicitly rejects the Namibian case of *S v S* 2011 (1) NR 144 (HC) and the South African case of *Zulu v Zulu & Others* 2008 (4) SA 12 (D) as having been wrongly decided; Court notes at para 67 that the approach of the *Zulu* case “has the potential to leave a lot of women who cohabit with married men and raise families with them without an effective remedy and give succour to patriarchy and perpetuate inequality based on gender”, and states at para 74 that “common law should make a decisive break with our patriarchal past and infuse ethos that promotes equal value to the woman's contribution within the home setting”; endorses the principles quoted below)

- (a) The contract is increasingly becoming a remedial measure to assist parties in putative marriages, cohabitation situations and customary marriages when otherwise by the application of the strict laws of marriage, they would have no remedy;
- (b) the institution of universal partnership should be more liberally applied by the courts to assist unmarried cohabiting persons who are often without a remedy in the absence of legislative intervention;
- (c) a ‘reformative, progressive and liberal application of the universal partnership . . . may certainly allow our courts to protect . . . vulnerable parties’ in domestic relationships’;
- (d) the universal partnership is ‘constantly developing, adapting and finding application in our law’.

COMMENTARY

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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**).