

# THE ARCHIVES ACT IN SOUTH AFRICA AND NAMIBIA - A CRITICAL COMPARISON

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## Die Argiefwet in Suid-Afrika en Namibië - 'n kritiese vergelyking

Die Suid-Afrikaanse Wet op Argiewe 6 van 1962 maak voorsiening vir die berging en beheer van en kontrole oor argiewe in Suid-Afrika. Voorsiening word gemaak vir tydelike en permanente berging in argiewe. Die funksionaris is: die Argiefkommissie, die Minister van Nasionale Opvoeding en die Direkteur van Argiewe. Die minister het wye magte, onder andere 'n omvangryke regulasiebevoegdheid. Van die grootste tekortkominge van die huidige wet is: die bevoegdhede van die Minister, beperkte toegang en strawwe wat nie verband hou met die ernstigheid van oortredings nie. 'n Vergelyking tussen die Suid-Afrikaanse en Namibiese Argiefwet laat duidelik blyk dat laasgenoemde 'n aantal voordele inhou. Nogtans het dit nie alle probleme voldoende opgelos nie. Daar word aan die hand gedoen dat die huidige Suid-Afrikaanse Argiefwet dringend in heroorweging geneem moet word. Daar moet gestreef word na meer omvattende wetgewing wat ondermeer die minister se bevoegdhede beperk en die argiewe meer toeganklik maak.

The purpose of the South African Archives Act is to provide for the custody, care and control of archives in the Republic of South Africa. Provision is made for temporary and permanent custody of archives. The Act provides for the following functionaries: an Archives Commission, the Minister of National Education and the Director of Archives. The minister had extensive powers, i.a. in the making of regulations. Some of the major deficiencies of the current act are: the control and other powers of the Minister, limited access to the archives and extremely low penalties for offences. A comparison between the South African and Namibian Archives Act reveals some clear advantages of the Namibian Act. The Namibian Act has, however, not solved all problems. In conclusion it is recommended that current South African legislation needs urgent reconsideration, with a view on the introduction of a new comprehensive act that would meet the needs of our time. Such legislation would amongst others provide for the limitation of regulatory powers of the minister and easier access to archives.

## 1. Introduction

In this article a brief overview of the South African *Archives Act* 6 of 1962 is given. This is followed by an exposition of the Namibian *Archives Act* 12 of 1992 (N). In this context reference is made to the South African legislation, the National Assembly's *Archives Act* 4 of 1987, the Namibian Constitution, the reasons for the adoption of an own *Archives Act* 12 of 1992 as well as a brief overview of the sections that differ from the South African legislation. Finally a summary of the shortcomings of the two acts is given and a number of proposals is made.

## 2. The South African Archives Act 6 of 1962

### 2.1 Purpose

The 1962 Act repealed the *Archives Act* 22 of 1953. The purpose of the 1962 Act is to "provide for the custody, care and control of archives in the Republic of South Africa."

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## 2.2 Definitions

The following definitions are central to a proper understanding of the 1962 Act:

- "*accessions*" means any documents and records acquired in terms of section 7;
- "*archives*" means any documents or records received or created in a government office or an office of a local authority during the conduct of affairs in such office and which are from their nature or in terms of any other Act of parliament not required then to be dealt with otherwise than in accordance with or in terms of the provisions of this Act;
- "*archives depot*" means any archives depot referred to in section 5;
- "*government office*" means any office of the Government of the Republic, including an office of-
  - (a) any provincial administration;
  - (b) any statutory body declared to be a government office in terms of section 2A;

Section 2A provides that the Minister in consultation with the Minister of Finance may on the application of a statutory body declare an office of such body to be a government office. On 30 April 1982<sup>1</sup> MEDUNSA was declared to be a government office for the purpose of the 1962 Act.

- "*head of an office*" in the case of an office of the State, the head of such an office and, in the case of an office of a local authority, the chief executive officer of the local authority or, if another person is charged with the custody and care of the archives of such local authority, such other person;
- "*intermediate depot*" means an intermediate depot referred to in section 5;
- "*local authority*" means any institution referred to in paragraph (f) of sub-section (1) of section eighty-four of the Republic of South Africa Constitution Act, 1961;<sup>2</sup>
- "*regulations*" means any regulations made under this Act; and
- "*statutory body*" means any board, fund, institution, company, corporation or other organisation established or constituted by or under any law.

## 2.3 Physical infrastructure

The *Archives Act* 6 of 1962 provides for the establishment of archives depots (for the custody of archives) and intermediate depots (for the temporary custody of archives).<sup>3</sup>

## 2.4 Functionaries

The act provides for the establishment of an independent body, the Archives Commission, as well as for a two-tier control system for the functioning of archive depots and intermediate depots.

### 2.4.1 Archives Commission

An Archives Commission that consists of at least seven members is appointed by the Minister.<sup>4</sup> The functions of the commission are:<sup>5</sup>

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1. GN R805 GG 8177 of 3-4-1982.
2. Act No. 32 of 1961.
3. S 5.
4. S 4(1)-(2).
5. S 4(4).

- (a) to make recommendations to the Minister in regard to-
  - (i) the acquisition by the director of documents and records in terms of section 7; and
  - (ii) generally, all matters affecting archives; and
- (b) in the discretion to grant or refuse approval for the publication of any archives, accessions or any thesis or other work based on a study of any archives, accessions or original sources.”

Committees (with the right of co-option) may be appointed.<sup>6</sup>

## 2.4.2 Two-tier system of control

### 2.4.2.1 Minister of National Education

The Minister of National Education is vested with the control over the custody and care of archives and accessions.<sup>7</sup> In the performance of his functions the Director of Archives is subject to the directions of the Minister.<sup>8</sup> Disposal of archives and accessions may only take place with the approval of the Minister.<sup>9</sup> Fees are also determined by the Minister.<sup>10</sup> The Minister may also direct the Director of Archives to perform duties in connection with archives and accessions that are not explicitly listed in the act.<sup>11</sup>

Furthermore, the Minister appoints the members and the chairman of the Archives Commission.<sup>12</sup> Recommendations of the commission are made to the Minister.<sup>13</sup> The allowances of members of the commission are also determined by the Minister.<sup>14</sup>

The determination of archives and intermediate depots is done by the Minister.<sup>15</sup> He also has specific powers as far as the granting of permission regarding the non-transfer and re-transfer of archives are concerned.<sup>16</sup> Previously the Director of Archives was not permitted to transfer archives or accessions from Namibia to South Africa without the approval of the Minister.<sup>17</sup>

Access to archives and accessions may be withheld by the Minister on the ground of public policy.<sup>18</sup> He is also empowered to hear an appeal against a decision of the Director regarding the refusal of access to archives or accessions.<sup>19</sup> The Minister may also on application in his discretion authorise access to archives or accessions that are normally not in terms of the 1962 Act accessible;<sup>20</sup> such authority may be withdrawn.<sup>21</sup> If a government office or a office of a local authority decides that access to archives be given, the Minister may subject such authorisation to his directions.<sup>22</sup> The concurrence of the Minister is also a prerequisite for access to the archives relating to the South African Defence Force.<sup>23</sup>

Reports should be submitted by the Director on a yearly basis to the Minister who has to table such a report within 14 days.<sup>24</sup>

The Minister is also empowered to make regulations as to

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- 6. S 4(5)-(7).
  - 7. S 2.
  - 8. S 3(1).
  - 9. S 3(2)(e).
  - 10. S 3(2)(f).
  - 11. S 3(2)(j).
  - 12. S 4(2)-(2)bis.
  - 13. S 4(4).
  - 14. S 4(9).
  - 15. S 5.
  - 16. S 6(a).
  - 17. S 8(1).
  - 18. S 9(2)(1).
  - 19. S 9(3).
  - 20. S 9(4).
  - 21. S 9(5).
  - 22. S 9(6).
  - 23. S 9(7).
  - 24. S 10.

- "(b) the inspection by the director of archives and accessions in terms of section 3;
- (c) the meetings of the commission and of a committee thereof appointed in terms of subsection (5) of section four;
- (d) the transfer of archives from government offices or the offices of local authorities to archives depots or intermediate depots;
- (e) the admission of the public to archives depots and intermediate depots, and to government offices and offices of local authorities in which archives are kept, the access to archives and accessions by the public, and the use of equipment for the making of copies of or extracts from any archives or accessions;
- (f) *bis* the manner in which archives and accessions shall be handled by persons making use of them; and
- (g) generally, the effective administration of this Act."

The Minister may also delegate powers duties or functions conferred upon or assigned to him in terms of

- (a) Section 3(2)(e) - the disposal of archives and accessions.
- (b) Section 6(a) - the non- or re-transfer of archives.
- (c) Section 9(4) - special permission regarding access to archives and accessions that are inaccessible in terms of the *Archives Act*.
- (d) Section 9(5) - the revocation of section 9(4) permission.
- (e) Section 9(7) - the concurrence of the Minister as regards archives of the South African Defence Force.

#### 2.4.2.2 Director of Archives

The Director of Archives is appointed subject to the laws governing the public service by the Minister of National Education; he must perform his functions subject to the directions of the Minister.<sup>25</sup> He

- (a) is responsible for the custody, care and control of archives and accessions
- (b) may inspect archives and accessions
- (c) may authorise the destruction of any archives and accessions which do not in his opinion warrant permanent preservation<sup>26</sup>
- (d) may advise a head of an government or local authority office with regard to the custody, care and filing of archives or such documents and records<sup>27</sup>
- (e) may with the approval of the commission publish or authorise the publication of archives and accessions or original sources as well as of any thesis or other work based on a study thereof<sup>28</sup>
- (f) "may with the approval of the Minister, by donation, exchange or otherwise dispose of any archives or accessions in an archives depot or an intermediate depot which are redundant or unsuitable for any archives depot, to any library, museum or other body"<sup>29</sup>
- (g) may do research into archives or accessions and make copies thereof or extracts therefrom against payment of a fee determined by the Minister<sup>30</sup>
- (h) must take care of the due preservation of archives and accessions<sup>31</sup>
- (i) determines the conditions for the microfilming of archives<sup>32</sup>

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25. S 3(1).  
 26. S 3(2)(b).  
 27. S 3(2)(c).  
 28. S 3(2)(d).  
 29. S 3(2)(e).  
 30. S 3(2)(f).  
 31. S 3(2)(g).  
 32. S 3(2)(g).

- (j) determines the filing system regarding archives in government offices as well as offices of a local authority,<sup>33</sup> and
- (k) "shall perform such other duties in connection with archives and accessions as the Minister may direct."<sup>34</sup>

Control over the transfer of archives is also divided between the Director and the Minister (see 2.4.2 above).<sup>35</sup> The Director may defer transfer until such time as he deems fit; grant permission that archives less than 30 years old may be transferred, or transfer any archives to an intermediate depot. Any documents or records (which in the opinion of the Director have or may have historical value now or in the future), may be acquired by him subject to conditions and terms (if any) and deposited in an archives depot.<sup>36</sup> This power is, however, curtailed by the Archives Commission's advisory powers (to the Minister) with regard to acquisition of such documents or records<sup>37</sup> as well as by the Minister's vast power of control (see 2.4.2.1 above). The Director must obtain the approval of the Archives Commission prior to the publication of any archives, accessions or original sources (not defined) or any thesis or other work based thereon.<sup>38</sup>

The Director may also refuse access to archives and accessions on account of their fragile condition;<sup>39</sup> however, an appeal against his decision to the Minister is possible.<sup>40</sup>

The delegation of a limited number of powers, duties and functions by the Minister to the Director<sup>41</sup> has already been discussed (see 2.4.2.1 above).

## 2.5 *Management of archives*

### 2.5.1 *Transfer of archives to depots*

All archives in a government office or any office of local authority which are not in terms of an act of Parliament required to be kept in the custody of a particular person are to be transferred after thirty years.<sup>42</sup> However, it has already been mentioned that the Minister<sup>43</sup> and the Director<sup>44</sup> are empowered to deviate from this peremptory provision.

### 2.5.2 *Acquisition of documents and records for archives depots*

The Director may acquire on a permanent or a temporary basis by purchase or donation, conditionally or unconditionally documents or records which in his view have or may have historical value.<sup>45</sup> Subject to those conditions (if any) such documents or records shall be deposited in the archives depot as determined by the Director.<sup>46</sup> If written matter based on archives or accessions has been published or duplicated a copy thereof must at the request of the Director be furnished free of charge; such a copy is to be deposited in an archives depot as determined by the Director.<sup>47</sup> It is important to keep in mind that such publication must first be autho-

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33. S 3(2)(i).

34. S 3(2)(j).

35. S6.

36. S 7(1)-(2).

37. S7.

38. S 3(2)(d) read with s 4(4)(b).

39. S 9(2)(ii).

40. S 9(3).

41. S 11A.

42. S 6.

43. S 6A (1)-(3).

44. S 6B (1)-(3).

45. S 7(1).

46. S 7(2).

47. S 7(3)(a)-(b).

ried by the Archives Commission.<sup>48</sup>

### 2.5.3 *Temporary transfer of archives from one depot to another and lending of archives to libraries, museums and other bodies*

Archives and accessions may temporarily be transferred from one archives depot to another; for purposes of exhibition archives and accessions may also be lend to any library, museum or other body that in the view of the director has taken adequate safety measures for the preservation thereof.<sup>49</sup>

Section 8(1) specifically provide that

"provided that he (the Director) shall not so transfer any archives or accessions from an archives depot in the territory (the previous South West Africa) to such depot in the Republic without the approval of the Minister."

### 2.6 *Access to archives*

Access to archives and accessions which are in an archives depot is in principle prohibited subject to three exceptions:<sup>50</sup>

- (a) The provisions of the 1962 Act.
- (b) Any other law, and
- (c) The conditions (if any) under which accessions were acquired.

Section 9(2) refers to the first above-mentioned exception: every member of the public shall (subject to the provisions of the 1962 Act, any other act of parliament and the conditions under which accessions where acquired) have access to archives and accessions older than 30 years free of charge. Provision is also made for the release of such archives on a five year basis.<sup>51</sup> However this - limited - right of access may be curtailed by

- (a) The Minister on the ground of public policy.
- (b) The Director on account of the fragile condition or the process of classification, repair or treatment of such archives or accessions.<sup>52</sup> (An appeal against his decision may be made to the Minister).<sup>53</sup>

The Minister is empowered to grant access to archives and accessions that would in terms of section 9(1) not be accessible subject to such conditions as he may impose such authorisation may be withdrawn by him at any time.<sup>54</sup>

As far as the archives in a government office or an office of a local authority are concerned (i.e. (a) that the documents have not yet been transferred to the archives depot concerned either because they are not yet thirty years old;<sup>55</sup> (b) the Minister has granted permission that such archives be retained in the office concerned and not transferred in terms of section 6 to the archives depot concerned;<sup>56</sup> (c) the Director has deferred the transfer of any such archives;<sup>57</sup> or (d) archives which are in terms of an act of parliament required to be kept in the custody of a particular person).<sup>58</sup> In this regard the power of the Minister to make regulations as to the

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48. S 3(2)(d) read with 4(4)(b).

49. S 8(1)-(2).

50. S 9(1).

51. S 9(2).

52. S 9(2).

53. S 9(3).

54. S 9(4)(5).

55. S 6.

56. S 6(a)(1).

57. S 6(b)(i).

58. S (6).

transfer of archives from government offices or the offices of local authorities to archives depots or intermediate depots<sup>59</sup> may have serious implications for the accessibility of such archives. The head of such a government office or office of the local authority may in his discretion and subject to conditions as he may determine, the directions of the Minister and the provisions of the 1962 Act and any other law authorise any person access.<sup>60</sup> The South African Defence Force possesses an own archives depot; access thereto is only authorised with the approval of the Minister of National Education and the Minister of Defence.

## 2.7 *Annual report*

The Director must subject a yearly report on his and the commission's activities to the Minister; such a report must be labelled in parliament.<sup>61</sup>

## 2.8 *Regulations*

The Minister's power to make regulations as to the admission of the public to archives depots and intermediate depots as well as in the offices of local authorities, the access to archives and accessions by the public, as well as the use of equipment for the making of copies or extracts, is wide-ranging.<sup>62</sup> It would seem that

- (a) the - limited- access that members of the public have to archives and accessions older than thirty years in archives and intermediate depots,<sup>63</sup>
- (b) the discretionary access to archives in a government office or office of a local authority,<sup>64</sup>
- (c) the discretionary access to the archives depot of the South African Defence Force,<sup>65</sup> as well as
- (d) the discretionary authorisation to gain access to archives or accessions that are excluded from the ambit of section 9(2).

The following aspects may further be curtailed by regulations made under section 11(1):

GN R1380 of 1963-09-06 and GN R3390 of 1969-09-26 were replaced by GN R460 of 1982-03-12.<sup>66</sup> The 1982 regulations provide for:

- (a) Definitions<sup>67</sup>
- (b) The archives commission<sup>68</sup>
- (c) Admission of the public<sup>69</sup>
  - (i) admissions of the public to archives depots<sup>70</sup>
  - (ii) admissions of researchers to reading-rooms<sup>71</sup>
  - (iii) access to archives and accessions<sup>72</sup>
- (d) Handling of archivalia<sup>73</sup>

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59. S 11(1)(d) read with s 6(a)(i).

60. S 9(6).

61. S 10(1)-(2).

62. S 11(1)(e).

63. S 9(2).

64. S 9(6).

65. S 9(7).

66. GG 8088 of 12-3-1982.

67. Reg 1.

68. Reg 2-29.

69. Reg 30-45.

70. Reg 30-33.

71. Reg 34-35.

72. Reg 36-39.

73. Reg 40.

- (e) Copying of archivalia<sup>74</sup>
- (f) Access to archives not yet open to the public.<sup>75</sup> Applications should be directed to the Director; section (9(4) refers to archives or accessions in an archives depot or an intermediate depot to which members of the public have no access.
- (g) Consultation of archives in government offices and offices of local authorities.<sup>76</sup> Regulations 40-41 must be adhered to; perusal must be under continuous supervision.<sup>77</sup> In principle access to such archives is specifically excluded.<sup>78</sup> The head of the particular office may in his discretion and subject to conditions as he may determine, the directions of the Minister and the provisions of the 1962 Act and any other law, grant access (2.6 above).

## 2.9 *Delegation of powers, duties and functions*

Section 11 A provides for such delegation; it has already (2.4.2.1) been discussed.

## 2.10 *Offences and penalties*

Section 12 provides for a number of offences; on conviction an extremely low fine of not more than R200 may be levied. Access may be refused to an archives or intermediate depot.<sup>79</sup>

## 2.11 *Exemption from liability and limitation of actions*

Section 30(1) excludes civil and criminal liability for **bona fide** acts or omissions (if not due to negligence). The onus to prove that such act or omission was not **bona fide** or was due to negligence is transferred to the person alleging the absence of **bona fides** or the presence of negligence.<sup>80</sup> Civil actions against the state or any person in respect of acts or omission must commence within six months after the cause of action has arisen; if this time limit is not adhered to, the action is deemed to have become prescribed.<sup>81</sup>

## 2.12 *Problems*

It would seem that the 1962 *Archives Act* has a number of serious shortcomings:

1. The vast powers of the Minister: this includes his powers of control, his power to defer transfer of archives, his power to exclude access to archivalia which would otherwise be accessible on the grounds of public policy, his powers concerning the archives of government offices and offices of local authorities as well as that of the South African Defence Force, and his wide-ranging powers to make regulations as well as to order directions to the Director and the heads of government office and offices of local authorities. It also includes his power to authorise access to material that would otherwise not be accessible.
2. The Director is professionally speaking limited in what he is able to do; the control of the Minister in every aspect is - at least in theory - vast.

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74. Reg 41-43.

75. Reg 44.

76. Reg 45.

77. Reg 45.

78. S 9(6).

79. S 12; subject to a right of appeal to the Minister.

80. S 13(1)-(2).

81. S 13(3).



He is also in principle handicapped by the powers of the Archives Commission.

3. One of the major deficiencies of the present South African Archives Act 6 of 1967 regards access:
  - a. The thirty year period for archives and accessions is arguably too long; this should be shortened to twenty years, and in exceptional cases - especially in a politically-speaking transitional era - should be further shortened to enable researchers to obtain a comprehensive picture of past policies in order to formulate a balanced and complete programme of restoration; in this regard a typical example would be a programme of reparation for people who have been forcibly removed and resettled in terms of especially the *Black Administration Act 38 of 1937* until its repeal in 1986 by the *Abolition of Influx Control Act 68 of 1986*.
  - b. The exclusion of access to otherwise accessible archives and accessions on the ground of public policy should be repealed.
  - c. Access to archives in government departments and local authorities should be extended at least to the individuals concerned.
  - d. Access to government departments which keep their own archives should be introduced; it should provide for automatic access to archives that are thirty years or older (or for a shortened period as discussed above) as well as for archives less than thirty years to individuals concerned.
  - e. Automatic access in the same manner as described above should be granted to all government subsidised institutions such as the Human Sciences Research Council, CSIR, universities, etc.
  - f. In the view of present transitional context a moratorium on the destruction of all government documents should be legislated; all such documents should as a matter of urgency be transferred to the control of professional people in the archives system, even if the thirty year period has not been completed. This would enable a transitional and new government to do comprehensive research and to formulate strategies that would redress past imbalances. Perhaps an ombudsman could be appointed to ensure that this recommendation is applied.
4. Penalties should be increased substantially and should also provide for compulsory imprisonment for the wilful destruction or concealment of public documents (a case in point is the refusal of the BSB to produce its official records to the Harms' commission of enquiry as well as to the Webster inquest.)
5. The provision that the onus of proving that an act or omission was not *bona fide* is transferred to the person alleging such conduct should be repealed; the normal rules of evidence should apply.
6. The archives of government departments and local authorities in the TBVC-countries does not form part of the South African system; The same applies to archives of Government departments in self-governing territories as regards those aspects that these territories have exclusive legislative and administrative powers - eg births, deaths, marriages, estates, land and mineral matters.

### 3. Namibia

#### 3.1 *Background*

The *Archives Act 6 of 1962* applied in the erstwhile South-West Africa.<sup>82</sup> Section

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82. S 15.

8(1) provided that the South African Director of archives was not allowed to transfer any archives or accessions from an archives depot in South-West Africa/Namibia to such depot in the Republic without the approval of the South African Minister of National Education.

### 3.1.1 *The South-West African Archives Act 4 of 1987*

In terms of the South-West African *Legislative Executive Authority Establishment Proclamation* 101 of 1985<sup>83</sup> the South-West African *Archives Act* 62 of 1987 was promulgated on 22 April 1987.<sup>84</sup> The major amendments of the 1987 Act were to provide for modern techniques (eg *master film material*)<sup>85</sup> recognition of the professionalism of the Director of Archives, vesting of control over the custody and care of archives and accessions in the cabinet (instead of the Minister of National Education,<sup>86</sup> shortening of the period of thirty years to twenty years,<sup>87</sup> the widening of the exclusionary power (previously the South African Act stipulated the ground of public policy<sup>88</sup> - section 10(2)(c)(i)), the empowerment of the Director to issue directives (s 12 - previously the South African Minister was empowered to make regulations),<sup>89</sup> the increase of penalties on conviction for offences to a fine not exceeding R5 000 or imprisonment for a period not exceeding 2 years and 6 months<sup>90</sup> as well as the disappearance of the archives commission).

### 3.1.2 *Reasons for the promulgation of the Namibian Archives Act 12 of 1992*

In a paper read by Brigitte Lau it is stated that a new act was deemed necessary

"because much of the terminology no longer applied, nor did other provisions of the Namibian *Archives Act* 4 of 1987. The old legislation had to be brought in line with the new constitutional dispensation; and we also wished to take the immediate opportunity to remedy what had been experienced as major problems of the previous legislation."

She states that the 1992 Act will probably have to be amended in the very near future on account of issues such as the protection of privacy and access to records as well as transfers of archives and record management.

### 3.1.3 *Namibian constitution*

Chapter 3 of the *Namibian Constitution* contains a number of fundamental rights and freedoms that are to be respected and upheld by the Executive, Legislature, Judiciary and all organs of the Government and its agencies.<sup>91</sup> Privacy is protected in terms of article 13. Article 18 deals with administrative justice:

"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons agreed by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal."

The enforcement of fundamental rights and freedoms is dealt with in article 25.

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83. S 18.

84. GN 62 *Official Gazette* 5351 of 22-4-1987.

85. S 1.

86. S 2(3)(i).

87. S 5.

88. S 9(2)(i).

89. S 11 of the 1962 Act.

90. S 14(1).

91. Art 5.

### 3.2 *The Namibian Archives Act 12 of 1992*

The major differences between the South African *Archives Act* 6 of 1962 and the Namibian *Archives Act* 12 of 1992<sup>92</sup> are

- The widening of some definitions, eg to provide for the previous transitional government structures in South-West Africa/Namibia, inclusion of statutory institutions in the definition of archives, directives issued by the head of archives, the inclusion of a definition of **documents** and **master film material**, a specific description of the meaning of **local authority** and the definition of **statutory institution** to mean "a council or board, fund, body, company, corporation or other organisation instituted or established by or under any law."<sup>93</sup>
2. Control over the custody and care of archives and accessions is returned from the Cabinet (1987 Act) to the Minister of Education and Culture.<sup>94</sup>
  3. Section 3 establishes the National Archives of Namibia and defines its functions.<sup>95</sup>
  4. The South African Director of Archives is substituted by the National Head of Archives whose powers are more extensive than that of his South African counterpart; however he is - as in South Africa - still subject to such directions as the Minister may give.<sup>96</sup>
  5. The Head of Archives may issue directives and is in principle in control of archives in government offices, offices of local authorities and statutory institutions. The head of such an office is responsible for the custody, care and filing of all archives which have not yet been transferred, and the Head of Archives may inspect the custody, care and filing of such archives.<sup>97</sup>
  6. The 1992 Act does not provide for the establishment of an archives commission.
  7. Archives depots and intermediate depots may be established by the Minister for archives which have been in existence for a period of twenty years or more, or in the case of intermediate depots or a temporary custody of archives which have been in existence for a period less than twenty years.<sup>98</sup>
  8. Transfer of archives older than twenty years and all master film material which are not required in terms of any law to be kept in the custody of particular person must be transferred to an archives depot. This includes all archives in a government office or an office of a local authority or statutory institution.<sup>99</sup> However, the Head of Archives has by and large the same powers as the South African Minister and Director of Archives to defer the transfer of or re-transfer archives.<sup>100</sup> Master film material, on the other hand, must be transferred to an archives depot immediately subsequent to completion of the production thereof.<sup>101</sup>
  9. The acquisition of documents for archives depots is similar to the South African measure.<sup>102</sup>

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92. GN 74 in GG 421 of 18-6-1992.

93. S 1.

94. S 2.

95. S 3(1)(a).

96. S 3(1)(b)-(2).

97. S 4.

98. S 5.

99. S 6(1).

100. S 6(2)-(3)

101. S 6(4).

102. S 7 - the words or records have been left out.

10. Where written material based on archival material has been published or duplicated a copy thereof must be provided free of charge to the Head of Archives<sup>103</sup> (in South Africa the Director of Archives must request such a copy). In a case of film material based on archives or accessions immediately subsequent to the production thereof a copy must be made available to the Head of Archives to enable him or her to make copies thereof.<sup>104</sup> Copies of the section 8(1)-(2) material is to be placed in an archives depot as determined by the Head of Archives.
11. Temporary transfer of archives and successions is regulated as in South Africa.<sup>105</sup>
12. Access - as in South Africa - is also in principle limited to archives or accessions kept in an archives depot or intermediate depot.<sup>106</sup> Section 10(2) stipulates that the public shall have access to archival material and accessions which have been in existence for a period of over thirty years if in archives depots and intermediate depots;<sup>107</sup> immediate access to all film archives is provided for.<sup>108</sup> However the Namibian Minister may exclude access to the section 10(2) accessible material; in contrast to South Africa not even the vague limitation on this exclusionary power, viz. "the ground of public policy", is present; the Minister (and previously in terms of the 1987 Act the then cabinet) has a wide and unfettered discretion.<sup>109</sup> However, it would seem that the peremptory provisions of the *Namibian Constitution* as set out as above would enable an aggrieved party to question the validity of such an administrative act. Access may also be refused on technical grounds by the Head of Archives.<sup>110</sup> The minister is also empowered - as in South Africa - to authorise access to material that is not accessible in terms of section 10(2)(a)-(b); such authorisation may be withdrawn.<sup>111</sup> As far as access to archives in a government office or an office of a local authority or statutory institution is concerned the head of such an office with the permission and on the conditions determined by the Head of Archives may authorise access.<sup>112</sup> The powers of the Head of Archives in this regard are much wider than in South Africa; there the Minister may give directions, while in Namibia the permission of the Head of Archives is a prerequisite.<sup>113</sup> A similar provision as to the South African Defence Force applies.<sup>114</sup>
13. The report of Head of Archives need not be tabled in the National Assembly.<sup>115</sup>
14. Instead of enabling the Minister to make regulations as in South Africa the Namibia National Assembly has opted for a system that would enable the Head of Archives to issue directives.<sup>116</sup> A serious disadvantage of this system is that no publication of such directives need take place.
15. Delegation of the Minister's power concerning the authorisation of

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103. S 8(1).

104. S 8(2).

105. S 9.

106. S 10(1).

107. S 10(2)(a).

108. S 10(2)(b).

109. S 10(3)(a).

110. S 10(3)(b) - as in South Africa.

111. S 10(5)(a)-(b).

112. S 10(6).

113. S 10(6).

114. S 10(7).

115. S 11.

116. S 12.

access to otherwise not accessible material and as regards the Namibia Defence Force is contained in section 13(1). Section 13(2) is a new enabling measure that allows the Head of Archives to delegate his powers, functions and duties;<sup>117</sup> however such delegation or assignment does not divest the Minister or Head of Archives, as the case may be, of their respective powers; furthermore anything done in terms of such delegation or assignment may be amended or set aside by respectively the Minister or the Head of Archives.<sup>118</sup> Such delegation or assignment may also at any time be withdrawn.<sup>119</sup>

16. The penalty on conviction for offences under the 1992 act have been further increased: provision is made for a fine not exceeding R8 000 and imprisonment for a period not exceeding two years.<sup>120</sup> Convicted persons may also be refused access to archive depots; as in South Africa an appeal to the Minister is available.<sup>121</sup>
17. Liability for actions and omissions is regulated as in South Africa with the exception that criminal proceedings are excluded from the exemption provision; the transfer of the onus to prove negligence or the absence of *bona fides* does not occur in the Namibian Act.

### 3.3 Evaluation

It is submitted that the Namibian *Archives Act* - apart from technical shortcomings - is deficient as far as the following aspects are concerned:

1. The absence of a duty to table the report of the Head of Archives.
2. The in principle unfettered discretion of the Minister to exclude access, and
3. The absence of a measure providing for the compulsory publication of directives made by the Head of Archives.

However, the inclusion of all statutory institutions (i.e. institutions established under or in terms of any law) is a major advance; regrettably access to material that has not yet been transferred is in principle excluded (as is the case with material in the offices of government departments and local authorities). The increase in penalties is also to be welcomed; however, the wilful concealment or refusal to transfer archives should also be punishable. The transfer of archives after twenty years (South Africa thirty years) is to be welcomed; however the additional ten years before such archives become accessible seems to be extraordinary long. The fact that archives after completion of a thirty year period become accessible at the end of each year (instead of on a five year basis) is also to be welcomed.

### 4. Conclusion

It would seem that the Namibian *Archives Act* 12 of 1992 has a number of advantages to the South African *Archives Act* 6 of 1962. However, not all the deficiencies inherent in the South African system have been adequately addressed. It is recommended that the South African *Archives Act* 6 of 1962 should be seriously reconsidered with a view on the introduction of a new comprehensive act that would meet the needs of our time. Such legislation should inter alia provide for

1. The recognition of professionalism.
2. The limitation of the control and regulatory powers of the Minister.
3. The publication in the Government Gazette of all directions.

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117. S 13(2).

118. S 13(3).

119. S 13(4).

120. S 14(1).

121. S 14(2)-(3).

4. The re-integration of archives of the 4 TBVC-countries and the 6 self-governing territories.
5. The shortening of the period after which archives are to be transferred to depots as well as of the thirty year requirement as regards accessibility.
6. Special provision should also be made for the inclusion as in Namibia of compulsory system of archives in all statutory institutions.
7. Access to archives that have not yet been transferred to depots (government offices and offices of local authorities and statutory institutions) should be guaranteed.
8. In the present transitional period it is of the utmost importance that provision is made for the immediate transfer of archives to depots and the control over such archives by independent professionals. Only in this way the destruction of material necessary for the building of a new South Africa can be saved.
9. Penalties for the destruction, concealment and refusal to hand over public documents should be increased substantially.
10. The protection of privacy, freedom of information and the needs of a new South Africa should be carefully balanced in the proposed legislation.
11. The principle of openness and access should replace the system based on exclusion and secrecy that has been part and parcel of the South African official policy regarding access to archives.