

(1 April 1997 – to date)

[This is the **current** version and applies as from 1 April 1997, i.e. the date of commencement of the Justice Laws Rationalisation Act 18 of 1996 – to date]

LAW OF EVIDENCE AMENDMENT ACT 45 OF 1988

*(Government Notice 829 in Government Gazette 11274, dated 22 April 1988. Commencement date:
3 October 1988 [Proc. 171, Gazette No. 11519, dated 30 September 1988])*

as amended by:

Justice Laws Rationalisation Act 18 of 1996 - Government Notice 632 in Government Gazette 17129, dated 19 April 1996. Commencement date: 1 April 1997 [Proc. R23, Gazette No. 17849, dated 12 March 1997].

Publisher's Note:

Although this database consists only of principal Acts and their Regulations, the Law of Evidence Amendment Act 45 of 1988 has been included as it contains substantive provisions regarding hearsay evidence.

It is hereby notified that the State President has assented to the following Act which is hereby published for general information:

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with solid line indicate insertions in existing enactments.

ACT

To amend the law of evidence so as to provide for the taking of judicial notice of the law of a foreign state and of indigenous law; and to lay down general requirements for the admissibility of hearsay evidence; to amend the Civil Proceedings Evidence Act, 1965, so as to regulate further at civil proceedings communications between spouses made during the marriage; to amend the Criminal Procedure Act, 1977, so as to make the husband or the wife of an accused a competent but not compellable witness at criminal proceedings; and to regulate further at criminal proceedings communications between spouses made during the marriage; and to provide for matters incidental thereto.

(Afrikaans text signed by the State President.)
(Assented to 15 April 1988.)

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:

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1. Judicial notice of law of foreign state and of indigenous law

- (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.
- (2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.
- (3) In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.
- (4) For the purposes of this section "indigenous law" means the law or custom as applied by the Black tribes in the Republic.

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(Section 1(4) substituted by section 4 of Act 18 of 1996)

2. Repeal of section 54A of Act 32 of 1944, as inserted by section 2 of Act 34 of 1986

Section 54A of the Magistrates' Courts Act, 1944, is hereby repealed.

3. Hearsay evidence

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to -
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,is of the opinion that such evidence should be admitted in the interests of justice.
- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay

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evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

- (4) For the purposes of this section -

“hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

“party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

4. Amendment of section 10 of Act 25 of 1965

Section 10 of the Civil Proceedings Evidence Act, 1965, is hereby amended by the insertion of the following subsection, the existing section becoming subsection (1):

“(2) Subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.”.

5. Repeal of section 11 of Act 25 of 1965

Section 11 of the Civil Proceedings Evidence Act, 1965, is hereby repealed.

6. Amendment of section 195 of Act 51 of 1977, as amended by section 5 of Act 72 of 1985 and section 7 of Act 26 of 1987

Section 195 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The wife or husband of an accused shall **[not]** be competent, but not compellable, to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with -

- (a) any offence committed against the person of either of them or of a child of either of them;
- (b) any offence under Chapter 8 of the Child Care Act, 1983 (Act 74 of 1983), committed in respect of any child of either of them;
- (c) any contravention of any provision of section 11 (1) of the Maintenance Act, 1963 (Act 23 of 1963), or of such provision as applied by any other law;

- (d) bigamy;
- (e) incest;
- (f) abduction;
- (g) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 2A, 13, 17 or 20 of the Immorality Act, 1957 (Act 23 of 1957), or, in the case of the territory, of any provision of section 3 or 4 of the Girls' and Mentally Defective Women's Protection Proclamation, 1921 (Proclamation 28 of 1921), or of section 3 of the Immorality Proclamation, 1934 (Proclamation 19 of 1934);
- (h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;
- (i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h)

[and shall be competent but not compellable to give evidence for the prosecution in criminal proceedings where the accused is charged with any offence against the separate property of the wife or of the husband of the accused, or with any offence under, in the case of the territory, section 1 or 2 of the said Immorality Proclamation, 1934].”.

7. Amendment of section 196 of Act 51 of 1977

Section 196 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) the wife or husband of an accused shall not be **[called as a witness for the defence except upon the application of the accused]** a compellable witness where a co-accused calls that wife or husband as a witness for the defence.”.

8. Amendment of section 198 of Act 51 of 1977

Section 198 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) Subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court.”.

9. Repeal of sections 216 and 223 of Act 51 of 1977

Sections 216 and 223 of the Criminal Procedure Act, 1977, are hereby repealed.

10. Short title and commencement

This Act shall be called the Law of Evidence Amendment Act, 1988, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.