



STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

GOVERNMENT GAZETTE

As 'n Nuusblad by die Poskantoor Geregistreer

Registered at the Post Office as a Newspaper

Verkoopprys • Selling price
(AVB uitgesluit/GST excluded)

Plaaslik **50c** Local
Buitelands 70c Other countries
Posvry • Post free

VOL. 274

KAAPSTAD, 22 APRIL 1988

CAPE TOWN, 22 APRIL 1988

No. 11274

KANTOOR VAN DIE STAATSPRESIDENT

STATE PRESIDENT'S OFFICE

No. 829.

22 April 1988

Hierby word bekend gemaak dat die Staatspresident sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 45 van 1988: Wysigingswet op die Bewysreg, 1988.

No. 829.

22 April 1988

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

No. 45 of 1988: Law of Evidence Amendment Act, 1988.

Wet No. 45, 1988

WYSIGINGSWET OP DIE BEWYSREG, 1988

ALGEMENE VERDUIDELIKENDE NOTA:

[] Woorde in vet druk tussen vierkantige hake dui skrappings uit bestaande verordenings aan.

_____ Woorde met 'n volstreep daaronder, dui invoegings in bestaande verordenings aan.

WET

Om die bewysreg te wysig ten einde voorsiening te maak vir die geregtelike kennisname van die reg van 'n vreemde staat en van inheemse reg; en die algemene toelaatbaarheidsvereistes vir hoorsê-getuienis te stel; om die Wet op Bewysleer in Siviele Sake, 1965, te wysig ten einde by siviele verrigtinge mededelings tussen gades tydens die huwelik gedoen, verder te reël; om die Strafproseswet, 1977, te wysig ten einde die eggenoot of eggenote van 'n beskuldigde by strafregtelike verrigtinge 'n bevoegde maar nie verpligbare getuie nie te maak; en by strafregtelike verrigtinge mededelings tussen gades tydens die huwelik gedoen verder te reël; en om voorsiening te maak vir aangeleenthede wat daarmee in verband staan.

*(Afrikaanse teks deur die Staatspresident geteken.)
(Goedgekeur op 15 April 1988.)*

DAAR WORD BEPAAL deur die Staatspresident en die Parlement van die Republiek van Suid-Afrika, soos volg:—

Geregtelike kennisname van reg van vreemde staat en van inheemse reg

1. (1) Enige hof kan van die reg van 'n vreemde staat en van inheemse reg geregtelik kennis neem vir sover sodanige reg geredelik en met voldoende sekerheid vasgestel kan word: Met dien verstande dat inheemse reg nie in stryd mag wees nie met die beginsels van staatsgedragslyn of natuurlike geregtigheid: Met dien verstande voorts dat 'n hof nie bevoeg is nie om te verklaar dat lobola-, bogadi- of ander dergelike gebruik met daardie beginsels in stryd is.

(2) Die bepaling van subartikel (1) verhinder nie 'n party om getuienis aan te voer 10 van die inhoud van 'n regsreël in daardie subartikel beoog wat by die betrokke verrigtinge in geskil is nie.

(3) In 'n geding of proses tussen Swartes wat nie tot dieselfde stam behoort nie mag die hof nie by ontstentenis van 'n ooreenkoms tussen hulle met betrekking tot die besondere inheemse regsisteem wat in daardie geding of proses toegepas moet word, 'n ander inheemse regsisteem toepas nie as dié wat heers in die plek waar die verweerder of respondent woon of besigheid dryf of in diens is, of, ingeval twee of meer verskillende sisteme in daardie plek heers (as dit nie in 'n stamgebied geleë is nie), mag die hof nie so 'n sisteem toepas nie tensy dit die reg is van die stam (as daar een is) waartoe die verweerder of respondent behoort. 20

(4) By die toepassing van hierdie artikel beteken "inheemse reg" die Swart reg of gebruike soos toegepas deur die Swart stamme in die Republiek of in gebiede wat voorheen deel van die Republiek uitgemaak het.

Herroeping van artikel 54A van Wet 32 van 1944, soos ingevoeg deur artikel 2 van Wet 34 van 1986 25

2. Artikel 54A van die Wet op Landdroshowe, 1944, word hierby herroep.

LAW OF EVIDENCE AMENDMENT ACT, 1988

Act No. 45, 1988

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:—

Judicial notice of law of foreign state and of indigenous law

1. (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.
- 10 (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 15 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) 20 to which the defendant or respondent belongs.
- (4) For the purposes of this section "indigenous law" means the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic.

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

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

Wet No. 45, 1988

WYSIGINGSWET OP DIE BEWYSREG, 1988

Hoorsê-getuienis

3. (1) Behoudens die bepalinge van enige ander wet, word hoorsê-getuienis nie by strafregtelike of siviele verrigtinge as getuienis toegelaat nie, tensy—

- (a) elke party teen wie die getuienis aangevoer staan te word tot die toelating daarvan as getuienis by die verrigtinge toestem; 5
- (b) die persoon van wie se geloofwaardigheid die getuieniswaarde van daardie getuienis afhang, self by daardie verrigtinge getuienis aflê; of
- (c) die hof, met inagneming van—
 - (i) die aard van die verrigtinge; 10
 - (ii) die aard van die getuienis;
 - (iii) die doel waarvoor die getuienis aangebied word;
 - (iv) die getuieniswaarde van die getuienis;
 - (v) die rede waarom die getuienis nie afgelê word deur die persoon van wie se geloofwaardigheid die getuieniswaarde van daardie getuienis afhang nie; 15
 - (vi) enige benadeling wat die toelating van daardie getuienis vir 'n party mag inhou; en
 - (vii) enige ander faktor wat na die hof se oordeel in aanmerking geneem behoort te word, 20

van oordeel is dat daardie getuienis in die belang van geregtigheid toegelaat behoort te word.

(2) Die bepalinge van subartikel (1) maak nie getuienis toelaatbaar wat ontoelaatbaar is op enige ander grond as dat die getuienis hoorsê-getuienis is nie.

(3) Hoorsê-getuienis kan ingevolge subartikel (1) (b) voorlopig toegelaat word indien die hof meegedeel word dat die persoon van wie se geloofwaardigheid die getuieniswaarde van daardie getuienis afhang, self in die betrokke verrigtinge sal getuig: Met dien verstande dat indien daardie persoon nie later in daardie verrigtinge getuienis aflê nie, die hoorsê-getuienis buite rekening gelaat word, tensy die hoorsê-getuienis ingevolge paragraaf (a) van subartikel (1) toegelaat word of ingevolge paragraaf (c) van daardie subartikel deur die hof toegelaat word. 30

(4) By die toepassing van hierdie artikel beteken—

- “hoorsê-getuienis” getuienis, hetsy mondeling of skriftelik, waarvan die getuieniswaarde afhang van die geloofwaardigheid van iemand anders as die persoon wat daardie getuienis aflê;
- “party” die beskuldigde of party teen wie hoorsê-getuienis aangevoer staan te 35 word, met ingebrip van die vervolging.

Wysiging van artikel 10 van Wet 25 van 1965

4. Artikel 10 van die Wet op Bewysleer in Siviele Sake, 1965, word hierby gewysig deur die volgende subartikel by te voeg, terwyl die bestaande artikel subartikel (1) word: 40

“(2) Subartikel (1) is ook van toepassing op 'n mededeling gedoen tydens die bestaan van 'n huwelik of 'n vermeende huwelik wat deur 'n bevoegde hof ontbind of nietig verklaar is.”

Herroeping van artikel 11 van Wet 25 van 1965

5. Artikel 11 van die Wet op Bewysleer in Siviele Sake, 1965, word hierby 45 herroep.

Wysiging van artikel 195 van Wet 51 van 1977, soos gewysig deur artikel 5 van Wet 72 van 1985 en artikel 7 van Wet 26 van 1987

6. Artikel 195 van die Strafproseswet, 1977, word hierby gewysig deur subartikel (1) deur die volgende subartikel te vervang: 50

“(1) Die eggenote of eggenoot van 'n beskuldigde is [nie] bevoeg maar nie verpligbaar nie om getuienis vir die vervolging in strafregtelike verrigtinge af te lê [nie], maar is bevoeg en verpligbaar om getuienis vir die vervolging in sulke verrigtinge af te lê waar die beskuldigde aangekla word van—

- (a) 'n misdryf gepleeg teen die persoon van die een of die ander van hulle of 55 van 'n kind van die een of die ander van hulle;

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Hearsay evidence

3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

- 5 (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
- 10 (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;
 - 15 (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,

20 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) 25 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 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 30 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;
- 35 “party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

Amendment of section 10 of Act 25 of 1965

4. Section 10 of the Civil Proceedings Evidence Act, 1965, is hereby amended by the insertion of the following subsection, the existing section becoming subsection 40 (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.”.

Repeal of section 11 of Act 25 of 1965

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

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

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

- 50 “(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 55 either of them;

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- (b) 'n misdryf ingevolge Hoofstuk 8 van die Wet op Kindersorg, 1983 (Wet 74 van 1983), ten opsigte van 'n kind van die een of die ander van hulle gepleeg;
- (c) 'n oortreding van 'n bepaling van artikel 11 (1) van die Wet op Onderhoud, 1963 (Wet 23 van 1963), of van so 'n bepaling soos deur 'n ander wet 5 toegepas;
- (d) bigamie;
- (e) bloedskande;
- (f) ontvoering;
- (g) 'n oortreding van 'n bepaling van artikel 2, 8, 9, 10, 11, 12, 12A, 13, 17 of 10 20 van die Ontugwet, 1957 (Wet 23 van 1957), of, in die geval van die gebied, van 'n bepaling van artikel 3 of 4 van die "Meisjes en Geestelik Gekrenkte Vrouwen Bescherms Proklamasie, 1921" (Proklamasie 28 van 1921), of van artikel 3 van die Proklamasie van 1934 Betreffende Immoraliteit (Proklamasie 19 van 1934); 15
- (h) meened gepleeg in verband met of vir die doeleindes van geregtelike stappe wat deur een van hulle teen die ander ingestel is of ingestel staan te word of beoog word, of in verband met of vir die doeleindes van strafregtelike stappe ten opsigte van 'n misdryf in hierdie subartikel bedoel;
- (i) die wettregtelike misdryf van die aflê van 'n valse verklaring in 'n beëdigde 20 of 'n bevestigde, plegtige of geattesteerde verklaring, indien dit afgelê is in verband met of vir die doeleindes van enige van die in paragraaf (h) bedoelde stappe

[en is bevoeg maar nie verpligbaar nie om vir die vervolging getuienis in strafregtelike verrigtinge af te lê waar die beskuldigde aangekla word van 'n 25 misdryf teen die afsonderlike eiendom van die eggenote of van die eggenoot van die beskuldigde, of van 'n misdryf ingevolge in die geval van die gebied, artikel 1 of 2 van bedoelde Proklamasie van 1934 Betreffende Immoraliteit].”.

Wysiging van artikel 196 van Wet 51 van 1977

7. Artikel 196 van die Strafproseswet, 1977, word hierby gewysig deur paragraaf 30 (b) van subartikel (1) deur die volgende paragraaf te vervang:

“(b) die eggenote of eggenoot van 'n beskuldigde **[slegs op aansoek van die beskuldigde]** nie 'n verpligbare getuie is waar 'n mede-beskuldigde daardie eggenote of eggenoot as 'n getuie vir die verdediging **[opgeroep word]** oproep nie.”. 35

Wysiging van artikel 198 van Wet 51 van 1977

8. Artikel 198 van die Strafproseswet, 1977, word hierby gewysig deur subartikel (2) deur die volgende subartikel te vervang:

“(2) Subartikel (1) is ook van toepassing op 'n mededeling gedoen tydens die bestaan van 'n huwelik of 'n vermeende huwelik wat deur 'n bevoegde hof 40 ontbind of nietig verklaar is.”.

Herroeping van artikels 216 en 223 van Wet 51 van 1977

9. Artikels 216 en 223 van die Strafproseswet, 1977, word hierby herroep.

Kort titel en inwerkingtreding

10. Hierdie Wet heet die Wysigingswet op die Bewysreg, 1988, en tree in werking 45 op 'n datum wat die Staatspresident by proklamasie in die *Staatskoerant* bepaal.

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- (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;
- 5 (d) bigamy;
- (e) incest;
- (f) abduction;
- (g) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 12A, 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);
- 10 (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;
- 15 (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)
- 20 **[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]."**
- 25

Amendment of section 196 of Act 51 of 1977

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

- 30 "(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."

Amendment of section 198 of Act 51 of 1977

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

- 35 "(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."

Repeal of sections 216 and 223 of Act 51 of 1977

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

40 Short title and commencement

10. 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*.

