

Malawi

Evidence by Commissions Act

Chapter 4:03

Legislation as at 31 December 2014

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Assented to on 24 July 1967

Commenced on 28 July 1967

[This is the version of this document at 31 December 2014.]

[Note: This version of the Act was revised and consolidated in the Fifth Revised Edition of the Laws of Malawi (L.R.O. 1/2018), by the Solicitor General and Secretary for Justice under the authority of the Revision of the Laws Act.]

[16 of 1967; 9 of 1977]

An Act to provide for the taking of evidence within or without 16 of 1967 Malawi in relation to proceedings pending before courts within or without Malawi, for the ascertainment of foreign laws, and for other purposes connected therewith

1. Short title

This Act may be cited as the Evidence by Commissions Act.

Part I – Evidence by commissions outside Malawi

2. Evidence in civil proceedings

Where in any civil proceedings in any court in Malawi, an order for the examination of any witness has been made and a commission, order or other request for the examination of such witness has been addressed to any court of competent jurisdiction outside Malawi, such latter court or the chief judge thereof may nominate some fit person to take the examination, and any deposition or examination taken before an examiner so nominated shall be admissible in evidence to the same extent as if it had been taken by or before the court to which the commission, order or request was addressed.

3. Evidence in criminal proceedings

Where in any criminal proceedings in Malawi an order for the examination of any witness, who is to be found outside the jurisdiction of the Malawi courts, has been made, and a commission, order or other request for the examination of such witness has been addressed to a court of competent jurisdiction in the country in which such witness is to be found, such court or the chief judge thereof may nominate any judge or magistrate or other judicial officer within the jurisdiction of such court to take the examination of such witness and any deposition or examination so taken shall be admissible in evidence to the same extent as if it had been taken by or before the court to which the said commission, order or other request was addressed.

[9 of 1977]

4. Effect of evidence taken on commission

Whenever, in pursuance of sections 2 and 3 any person is examined outside Malawi, such person may be examined on oath, affirmation or otherwise in accordance with the law in force in the place where the examination is taken, and any deposition or examination so taken shall be as effectual for all purposes as if the witness had been so examined before the court in Malawi ordering the examination.

Part II – Evidence by commissions within Malawi

5. Examination of witnesses in matters before foreign courts or tribunals

- (1) Whenever, upon application being made for this purpose, it appears to a court or a judge having authority under this Act, that any court or tribunal of competent jurisdiction of any country to which this Part applies before which any civil or commercial matter is pending, is desirous of obtaining the testimony, in relation to such matter, of any witness within Malawi such court or judge having authority under this Act may order the examination of such witness upon oath or affirmation, upon interrogatories or otherwise before any person named in such order, and by the same or subsequent order may command the attendance of any person named in such order for the purpose of being examined or the production of any document specified in such order.
- (2) Any order made under subsection (1) may give such directions as to the time, place and manner of the examination and all matters connected therewith as may appear reasonable and just, and any such order may be enforced in like manner as an order made in a cause pending in the court or before the judge concerned.

6. Certificate of diplomatic representative

- (1) A certificate under the hand of a diplomatic representative of the country concerned that any matter in relation to which an application is made under this Part is a civil or commercial matter pending before a court or tribunal in the country of which he is the diplomatic representative and that such court or tribunal is desirous of obtaining the testimony of the witness to whom the application relates shall be evidence of the matters so certified.
- (2) Where no certificate is produced under the preceding subsection other evidence to that effect shall be admissible.

7. Examination on oath

Every person authorized to take the examination of witnesses by order made in pursuance of this Part may take all such examinations upon the oath or affirmation of the witness to be administered by the person so authorized.

8. Expenses of witness

Every person whose attendance is required under this Part shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial.

9. Refusal to answer questions, etc.

- (1) Every person examined under any order made under this Part shall have the like right to refuse to answer questions tending to incriminate himself and other questions which a witness in any cause pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made would be entitled to.
- (2) Any person who refuses to answer a question under the preceding subsection shall not be compelled to produce under any such order as aforesaid any document that he would not be compellable to produce at a trial of such a cause.

10. Courts and judges having authority under this Part

- (1) The High Court of Malawi and the court of a resident magistrate, and any judge or resident magistrate of any such court shall respectively be courts or judges having authority under this Part.

- (2) For the purposes of this Part, save as the context otherwise requires “judge” includes a resident magistrate.

11. Persons giving false evidence

Notwithstanding any other written law, every person examined upon oath or affirmation as a witness under this Part, who upon such examination wilfully gives any false evidence shall be guilty of perjury and liable to the penalties therefor.

12. Countries to which this Part applies

The countries to which this Part applies shall be such countries as the Minister may, by notice published in the *Gazette*, declare to be countries to which this Part applies.

Part III – Law ascertainment

13. Ascertainment of law outside Malawi

- (1) Whenever in any action pending in any court in Malawi it appears to the court that it is necessary or expedient, for the proper disposal of the action before it, to ascertain the law applicable to the facts of the case as administered in another country on any point on which the law of such country is different from the law of Malawi, it shall be competent for the court in which the action is pending to direct a case to be prepared setting forth the facts—
- (a) as these may be ascertained by the practice and procedure of the court;
 - (b) as may be agreed upon by the parties; or
 - (c) by such person as may be appointed by the court for that purpose in the event of the parties not agreeing.
- (2) Upon the case being approved of by the court or a judge or magistrate thereof under subsection (1), —
- (a) the parties thereto shall settle the question of law arising out of the case on which they desire to have the opinion of another court; and
 - (b) the judge or magistrate shall accordingly make an order remitting the question of law as settled under paragraph (a) together with the case to the court in the country whose opinion is desired upon the law administered by such court as applicable to the facts set forth in the case and desiring that court to pronounce its opinion on the question submitted to it under this Part.
- (3) It shall be competent for any of the parties to any such action to present a petition to the court whose opinion is to be obtained praying that that court may hear the parties or their counsel and to pronounce its opinion thereon under this Part or to pronounce its opinion without hearing the parties or their counsel.
- (4) The court to which a petition is presented shall, if it thinks fit, appoint an early date for hearing the parties thereto or their counsel and shall thereafter pronounce its opinion upon the questions of law as administered by it which are submitted to it by the court in Malawi.
- (5) The court to which the petition is presented shall be entitled to take such further procedure thereupon as it deems fit.

14. Certified copies of opinion

- (1) Whenever an opinion is pronounced under [section 13](#), a copy thereof certified by an officer of such court shall be given to each of the parties to the action by whom the same shall be required.

- (2) The copy of an opinion so certified shall be deemed and held to contain a correct record of the opinion.

15. Application of opinion

- (1) It shall be competent for any of the parties to the action, after having obtained a certified copy of the opinion, to lodge the same with an officer of the court in which the action is pending, together with a notice of motion setting forth that the party will on a certain day named in the notice move the court to apply the opinion contained in the certified copy thereof to the facts set forth in the case.
- (2) The court shall thereupon apply such opinion to the facts in the same manner as if the same had been pronounced by the court itself upon a case reserved for the opinion of the court.

Part IV – Miscellaneous

16. Proof of acts of state

- (1) Subject to this section, all proclamations, treaties and other acts of state of any country may be proved in any court in Malawi or before any person having by law or by consent of parties authority to hear, receive and examine evidence either by examined copies or by copies duly authenticated.
- (2) A copy of any document mentioned in subsection (1), duly sealed or purporting to be sealed with the seal of the country to which the original document belongs, shall be deemed to be duly authenticated and shall be admissible in evidence to the same extent as the original document would be admissible in evidence, without proof of the seal thereon.

17. Rules

The Minister may, in consultation with the Chief Justice, make rules as shall be necessary or proper for giving effect to this Act and regulating the procedure thereunder.