

Dispute Resolution

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In this issue

SOUTH AFRICA

- Commissioning affidavits virtually: Yay or nay?
- The construction mafia: The not-so-new normal



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Commissioning affidavits virtually: Yay or nay?

The COVID-19 pandemic was an unprecedented event that required big shifts in how businesses operate, and the legal industry was no different. Court hearings on MS Teams and filing papers on Caselines meant that many of the administrative hurdles of practice could be overcome. One issue that remained, however, was the commissioning of affidavits.

This article will discuss the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (Act) and its accompanying Regulations, which require that oaths must be administered to the deponent *"in the presence of"* a commissioner of oaths (commissioner), with reference to the Pretoria High Court cases of *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Correctional Services* [2024] ZAGPPHC 446 and *Nedbank v Altivex 15 (Pty) Ltd and Others* [2024] ZAGPPHC 597.

LexisNexis South Africa (Pty) Ltd v Minister of Justice and Correctional Services

Background

The applicant brought an unopposed application seeking an order:

- for the words *"in the presence of"* in Regulation 3 of the Act to be interpreted broadly, to include the virtual presence of a commissioner, and;
- for Regulation 3 of the Act to be interpreted in such a way that it does not require the use of an advanced signature as envisaged by section 13 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA).

The law

The Minister of Justice promulgated regulations in terms of section 10 of the Act, which prescribe how the oath or an affirmation is to be administered.

Regulation 3 provides that the deponent shall sign the declaration in the presence of the commissioner.

Regulation 4(1) states that below the deponent's signature or mark the commissioner shall certify that the deponent has acknowledged that they know and understand the contents of the declaration and they shall state the manner, place and date of taking the declaration.

Regulation 4(2) provides that the commissioner shall sign the declaration and shall print their business address and full name below their signature. They shall also state their designation and the area for which they hold their appointment.

The applicant's argument

The applicant's contended that:

- the purpose of the Act and the Regulations is to ensure that the commissioner is able to view the deponent's identity document in order to verify the deponent's identity;
- if the deponent and the commissioner meet virtually, the commissioner can nevertheless ensure that the deponent understands the contents of the declaration, and that the deponent's signature or mark, as well as the certification of the commissioner, is appended to the declaration; and therefore

Commissioning affidavits virtually: Yay or nay?

CONTINUED



- the purpose of the Act can be achieved even though the commissioner and the deponent may not be in each other's physical presence.

The court's decision

The court referred to two cases dealing with non-compliance with the Regulations concerning the administration of oaths or affirmations.

The first was *Knuttel N.O. and Others v Bhana and Others* [2022] 2 ALL SA 201 (GJ), where the founding affidavit was administered virtually, as the deponent had contracted COVID-19 and was unable to attend the commissioner's offices. The applicant's attorney explained comprehensively what steps had been taken in order to comply with the Regulations, as far as possible. The court in *Bhana*, relying on *S v Munn* [1973] (3) SA 734 (N.C.D.) held that the Regulations were directory, rather than peremptory, and that, if there is substantial compliance with the Regulations, a court has a discretion to allow the affidavit into evidence. The court in *Bhana* held that in that particular case, there had been substantial compliance with the Regulations and the in limine point was dismissed.

The second case the court referred to was that of *ED Food S.R.L v Africa's Best (Pty) Ltd* [2024] ZAGPJHC 1619, where the founding and confirmatory affidavits of the applicant had been commissioned via video conference call, while the deponents were in Italy, and the commissioner was in South Africa. The court in *Africa's Best* expressed the opinion that courts should "open themselves to the modern trend of technology". The court further held that in that particular case there had been substantial compliance with the Regulations, and the affidavits were admitted into evidence.

The court pointed out that these two cases were requests to the court to accept the affidavit on the basis that there was substantial compliance with Regulation 3, notwithstanding that the affidavits were commissioned virtually. In the matter at hand, however, the court was asked to interpret the Act and Regulations broadly, so as to provide that the administration of oaths through a virtual platform accords with Regulation 3.

In looking at the meaning of "presence", the court:

- referenced the Oxford English Dictionary, which defines "presence" as "the fact or condition of being present; the state of being with or in the same place as a person or thing", and "a number of people assembled together"; and
- referred to the case of *Gulyas v Minister of Law and Order* [1986] (3) SA 934, where the court held that presence meant immediate proximity.

The court also quoted from *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] (4) SA 593 (SCA) which stated that: "Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used."

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Yay or nay?

CONTINUED

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The court then referred to *Firststrand Bank Ltd v Briedenhann* [2022] (5) SA 215 (ECG), as the only matter in which it was argued that Regulation 3 should be interpreted in the manner that applicant contends for. *Briedenhann* held:

"The language of Regulation 3 (1) when read in the context of the Regulations as a whole, suggest that the deponent is required to append their signature to the declaration in the physical presence or proximity of the commissioner. This accords with the concern for place, insofar as the exercise of the authority to administer the oath is concerned, as appears from the Act."

The court agreed with *Briedenhann*, and held that the case rightfully declined to apply the broad interpretation sought therein, as is the case in this matter. The applicant argued that *Briedenhann* was incorrect and if it were allowed to stand, there would be uncertainty as to whether the oath or affirmation may be administered virtually.

The court held that this criticism of *Briedenhann* was incorrect, as the default position is that the oath or affirmation must be administered in the physical presence of the commissioner. In certain circumstances, where the physical appearance of the deponent before the commissioner is not reasonably possible, then the party relying on the affidavit must argue that there had been substantial compliance with the Regulations in the particular case.

The applicant also argued that the object of the Act and the Regulations can be achieved by virtual means as the commissioner can identify the deponent, confirm that the deponent is familiar with the contents of the affidavit, and the commissioner can observe the deponent signing the affidavit. The commissioner can append their signature electronically, thereby complying with the provisions of section 13 (4) of the ECTA.

The court, while acknowledging that this was a tempting proposition to follow, ultimately concluded that to find for the applicant would require the court to ignore the clear meaning of the words in the Regulations, which would cross the divide between interpretation and legislation, as warned of in *Endumeni*.

The court accordingly dismissed the application.

Nedbank v Altivex 15 (Pty) Ltd and Others***Background***

The applicant had delivered an application for summary judgment. The respondents raised two points in limine in opposition, one of which was the remote commissioning of the affidavit in support of summary judgment.

Commissioning affidavits virtually: Yay or nay?

CONTINUED



The applicant submitted that the court should, on the basis of *Briedenhann*, exercise its discretion based primarily on considerations of substantial compliance with the provisions of the Act and condone the virtual commissioning of the affidavit.

The court's decision

In *Briedenhann*, as well as the cases referred to therein, it was made abundantly clear that the exercise of the court's discretion in that matter was based on the relevant factual matrix presented to it by the applicant as explanation for the non-compliance:

*"The advantages of the system used by the plaintiff are, however, **not a basis upon which an existing regulation may be ignored.** It is, in my view, not open to a person to elect to follow a different mode of oath administration to that which is statutorily regulated. That is true even if in doing so every effort is made to substantially comply. The regulations stipulate that the declaration is to be signed in the presence of the commissioner. Unless that cannot be achieved, the Regulations must be followed. **The fact that the regulation is directory does not mean that a party can set out to achieve substantial compliance with such regulation rather than to comply with its requirements...**"*

In the Knuttel case the need to protect persons from infection with COVID-19 precluded the appearance of the deponent before the commissioner. In the Munn, Sopete and Mtembu matters, all of which involved criminal prosecutions, the non-compliance was inadvertent and related to form. That was also the case in the other instances I have highlighted. When a court is asked to exercise its discretion to condone non-compliance, the reasons advanced for such non-compliance are plainly relevant. I doubt that a court would readily accept that an affidavit substantially complies with regulated formalities in circumstances where the non-compliance is as a result of a deliberate choice. In my view, to do so would countenance a situation of self-help."

The court held that even though the applicant may have deposed to the exact same affidavit (regardless of the method of commissioning) and that remote commissioning may be more expedient, since *Briedenhann*, no legislative changes have been made to the Act or the Regulations.

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Commissioning affidavits virtually: Yay or nay?

CONTINUED



2023

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Cliffe Dekker Hofmeyr

The court also had regard to the doctrine of separation of powers in the Constitution, which requires that the judicial branch should not:

"[U]nder the guise of a general discretion or in the interest of justice, circumvent the authority of the legislature by condoning non-compliance with laws or regulations simply because said law or regulation may be considered archaic or outdated."

The court held that its discretion must be exercised judicially, and if there are no facts placed before a court upon which to exercise its discretion, it cannot make a generalised finding on the commonly held views of litigants (or even the court itself) as to what is expedient and in keeping with the latest technological advancements. A court exercising its discretion in favour of applicants in each instance where virtual commissioning is used, regardless of a proper explanation for such non-compliance, would constitute impermissible judicial overreaching.

The importance of these cases

Both cases provide clarity on whether a party can depose to an affidavit virtually, and also highlight the importance of the doctrine of the separation of powers when judges interpret legislation. The cases acknowledge the advancement of technology and the need for the courts to keep up to date with modern trends. However, they simultaneously reiterate that the purpose of the courts is to interpret legislation as it stands and not to substitute the ordinary meaning with one that is in accordance with the court's perception of what is practical.

Therefore, the default position is that the oath must be administered in the physical presence of a commissioner, unless the physical presence can be shown to not be possible having regard to the facts at hand – in which case, the oath may be administered to the deponent virtually.

Eugene Bester and Loyiso Bavuma



The construction mafia: The not-so-new normal

South Africa's construction industry continues to be held to ransom in what began as isolated incidents of extortion on construction projects in early 2015, has now evolved into a nationwide threat, costing the country billions of rand in revenue and jeopardizing vital infrastructure development.

The perpetrators of these criminal activities, who disrupt and extort construction projects in all aspects of the project value chain, are known as the "construction mafia".

False fronts and fear tactics: The *modus operandi*

It is important to understand how the construction mafias operate in order to understand what kind of solutions would be best for ensuring that these syndicates are dealt with.

Whenever construction companies have a project, such as building a road, shopping complex or any other residential and/or commercial development, they are likely to face interference on the construction site. The question arises: "Who exactly causes these disturbances on the sites?". The simple answer is that these disruptions are caused by a group of people posing usually as local business forums and local community interest groups demanding their "piece of the pie" without using the proper channels like stakeholder engagement forums to air grievances and encourage collaboration. Their demands range from employment opportunities to contract opportunities and even demand for cash. These 'business forums' are, more often than not, unregistered and it is extremely difficult to track down any 'members' acting under the auspices of the said forums or interest groups. Their extortive

means are sometimes a guise for accessing work from projects through sub-contractor appointments outside of the framework of the agreed project procurement processes and procurement law prescripts. The use of the socio-economic ill of unemployment in the affected communities results in the unemployed being the convenient tool used in disrupting projects.

The usual approach taken by these mafias is that they approach the site manager/ project manager on the construction site, or anyone in a position of seniority, to channel their demands. The mafias' extortion strategy relies on recruiting residents who are allegedly part of the affected community. These residents are then used to stage disruptive protests and hinder construction activities, effectively strong-arming the construction companies to adhere to their demands. The construction companies have no alternative in the circumstances but to approach the High Court to interdict any party involved in such unlawful actions. As part of the *modus operandi*, the use of non-residents of the relevant affected communities has been an effective means of concealing the identity of the perpetrators who cause disruptions. The true effect of this tactic is that the unknown community members complicate the enforcement of any relief sought and granted in the High Court interdict proceedings.

Government's response to construction mafias

The Government is trying to address the issue through the introduction of certain policies and legislation to curtail mafias in the construction sector. The legislation and policies include the Critical Infrastructure Protection Act 8 of 2019, the National Infrastructure Plan, the Critical Infrastructure Programme and the Infrastructure Built Anti-Corruption Forum.

The construction mafia: The not-so-new normal

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Breaking the cycle: A community-centric approach

The solution to the construction mafia lies in a multi-pronged approach that addresses the root causes and fosters collaboration. The December 2022 Western Cape Property Development Forum town hall discussions highlighted the crucial role of community engagement.

Inception of project

Construction companies and employers need to prioritise the inclusion of the community in all stages of the project. This can be done by ensuring that there is an appointment of a paid community liaison officer (**CLO**). This should be a community leader who has influence in the community and their responsibility is to function as a representative of the community, ensuring that the interests of the community are taken into consideration by the construction company and that the interests of the construction company are also, to a certain extent, considered. Construction companies need to ensure that the appointment of the CLO takes place at the inception of the project. This is beneficial for the construction company as they gain the trust and confidence of the community, and the community will be motivated to protect their interests in the project.

Duration of project

Construction companies and employers need to ensure that they include the community throughout the duration of the project. This can include consulting with the CLO to ensure that the local businesspeople and the relevant/affected community members are provided with

business/employment opportunities within the project. One of the methods that can be adopted by employers and contractors is subcontracting a reasonable percentage of work to qualified local businesses, fostering economic inclusion and trust within communities. Employment opportunities at the relevant grade and skillset to relevant/affected community members has also been evidenced to curb project disruptions and mitigate any unlawful community protests.

Completion of the project

Communities tend to protect what they believe belongs to the community. Therefore, it is important that construction companies and employers ensure that they incorporate their corporate social investment initiatives in the project's budget. This would allow communities to see that in protecting the project, they also stand to benefit from it. It is imperative that construction companies ensure that they play a vital role in the community by:

- **Developing skills:** Investing in programmes that equip local residents with relevant construction skills, creating legitimate employment opportunities that can potentially undermine these opportunistic business forums' claims and benefit the community even after the completion of the project.
- **Tailored procurement policies:** Implementing location-specific procurement policies ensuring local communities benefit from construction projects.
- **Community upliftment:** Implementing school building projects and feeding schemes.

The construction mafia: The not-so-new normal

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Alternative remedies

In the unfortunate case where construction companies, employers and communities are faced with a threat of disruption caused by the construction mafia, affected parties must continue to seek legal recourse through proper channels, with relief such as interdicts, as these have previously led to arrests and discontinuation of mafia activities.

In order to get the best outcome, we suggest collating the following when legal recourse is sought:

- Any information on the construction project, such as the location of the project, the nature of the project, the timelines of the project as well as any contractors who are involved and authorised to be on site.
- As much information as possible about the perpetrators of the disturbances on the construction sites.
- Evidence of direct threats and extortion attempts, including the times, dates and locations where these threats and attempts take place.
- Any expert information/reports where quantity surveyors inform on any delays on the projects or any inflated cost due to the construction mafia's disturbances.
- Statements from personnel, including security, about any incident as it occurred, and a fully updated security site incident logbook.
- Any proof of reports made to the South Africa Police Services (**SAPS**) or case number if a case has been opened, information on the police officials involved in the investigation and any witness statements.

- Creating a channel of authorised project representatives that will deal with any incidents related to cite disturbance and any demands submitted to the CLO or project manager.
- Records of all stakeholder engagement such as with a local ward councillor, municipal officials, SAPS and recognised/authorised community leaders and business foru.

It is important that anyone who is aware of any illegal disturbances that impact construction sites reports these activities to the following contacts:

- Reporting criminal action to your local SAPS station.
- Call the toll-free National Anti-Corruption Hotline on 0800 701 70.
- Contact the Presidential Hotline by dialling 17737 or emailing president@presidency.gov.za.
- Contacting the Special Investigations Unit directly.

Conclusion

It is important to engage stakeholders at the infancy of projects to prevent the construction mafia's unlawful dealings from negatively impacting construction sites. Engagement with the affected communities through recognised and authorised structures and leaders becomes vital for developing and maintaining infrastructure in affected areas.

Sentebale Makara and Thobeka Dhlamini

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