

# Employment Law

ALERT | 5 November 2024



## In this issue

### SOUTH AFRICA

Keeping up with the deponents: Can an affidavit be commissioned virtually?



For more insight into our  
expertise and services

## Keeping up with the deponents: Can an affidavit be commissioned virtually?

The Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (Act), read alongside the Regulations Governing the Administration of Oaths (Regulations) promulgated in terms of section 10 of the Act, regulates the commissioning of affidavits.

The Regulations further provide that a deponent must sign the declaration or affidavit in the presence of the commissioner of oaths. The phrase “*in the presence of the commissioner of oaths*” became a point of contention in the case of *VJS v SH* (19578/2024) [2024] ZAWCHC 333 (22 October 2024). In essence, the High Court was asked to determine whether a deponent could commission an affidavit virtually in light of the wording of the provisions of the Act and Regulations.

### Factual background

The deponent in this case was domiciled in the Western Cape but situated in Islamabad, Pakistan for work purposes. The deponent was required to depose to an affidavit in a dispute concerning parental responsibilities. On 5 September 2024, the deponent, his attorney and a commissioner of oaths joined a Zoom meeting. The deponent proceeded to depose to the affidavit from Islamabad and thereafter scanned and transmitted a copy to the commissioner of oaths and his attorney. The commissioner of oaths, in the presence of both the deponent and the attorney, printed out the affidavit and completed his particulars as required in terms of the Act. The original affidavit was subsequently couriered to the deponent’s attorneys and filed in court.

### The court’s decision

The court considered the facts of this particular case in conjunction with the applicable provisions set out in the Act and Regulations. The court emphasised that it is trite that a court enjoys a discretion to reject or accept an affidavit that has been deposed to in a manner that is not compliant with the Act. A key consideration would be whether substantial compliance had been demonstrated. A determination of whether there has been substantial compliance is a matter of fact and not law, i.e. it will depend on the circumstances of each case.

The court also considered recent developments to the Superior Courts Act 10 of 2013 and the Magistrates Court Act 32 of 1944 which permit courts to receive evidence via remote audiovisual links in non-criminal proceedings, thereby enhancing flexibility and accessibility of the judicial process.

The court noted that the Act was promulgated over 60 years ago at a time when internet and video conferencing were not as common as they are today.

Ultimately, the court found that there had been “*substantial compliance with the Act and Regulations*” and, consequently, the affidavit was in order. The court further expressed a view that in order to align with the ongoing modernisation of the judicial system, the Act and Regulations may need to be amended to allow for electronic signing and commissioning of affidavits. The court emphasised that electronic signing and commissioning of affidavits is less cumbersome, more cost effective, and aids in the quicker resolution of cases.

**EMPLOYMENT LAW  
ALERT**

## Keeping up with the deponents: Can an affidavit be commissioned virtually?

CONTINUED

### Importance of this judgment

The court's findings that there had been substantial compliance with the Act, even though the affidavit in question was deposed to virtually by the deponent, are coherent with the digitisation and globalisation of the legal profession and judicial systems. In today's day and age, it is not uncommon for a deponent to be in a different geographical location to their attorneys or the commissioner of oaths, thus making it impractical for a deponent to depose in the physical presence of the commissioner of oaths.

It is important to take note that the court did not declare the relevant provisions of the Act and Regulations to be unconstitutional, but stated that courts must respect the legislation, provided that it does not offend the Constitution.

**Yvonne Mkefa, Thato Maruapula and Tasneem Jacobs**



## OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



### Aadil Patel

Practice Head & Director:  
Employment Law  
Sector Head:  
Government & State-Owned Entities  
T +27 (0)11 562 1107  
E aadil.patel@cdhlegal.com



### Anli Bezuidenhout

Director:  
Employment Law  
T +27 (0)21 481 6351  
E anli.bezuidenhout@cdhlegal.com



### Asma Cachalia

Director:  
Employment Law  
T +27 (0)11 562 1333  
E asma.cachalia@cdhlegal.com



### Jose Jorge

Director:  
Employment Law  
T +27 (0)21 481 6319  
E jose.jorge@cdhlegal.com



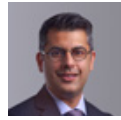
### Fiona Leppan

Director:  
Employment Law  
T +27 (0)11 562 1152  
E fiona.leppan@cdhlegal.com



### Imraan Mahomed

Director:  
Employment Law  
T +27 (0)11 562 1459  
E imraan.mahomed@cdhlegal.com



### Nadeem Mahomed

Director:  
Employment Law  
T +27 (0)11 562 1936  
E nadeem.mahomed@cdhlegal.com



### Yvonne Mkefa

Director:  
Employment Law  
T +27 (0)21 481 6315  
E yvonne.mkefa@cdhlegal.com



### Phetheni Nkuna

Director:  
Employment Law  
T +27 (0)11 562 1478  
E phetheni.nkuna@cdhlegal.com



### Desmond Odhiambo

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E desmond.odhiambo@cdhlegal.com



### Hugo Pienaar

Sector Head:  
Infrastructure, Transport & Logistics  
Director: Employment Law  
T +27 (0)11 562 1350  
E hugo.pienaar@cdhlegal.com



### Njeri Wagacha

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E njeri.wagacha@cdhlegal.com



### Mohsina Chenia

Executive Consultant:  
Employment Law  
T +27 (0)11 562 1299  
E mohsina.chenia@cdhlegal.com



### Jean Ewang

Counsel:  
Employment Law  
T +27 (0)11 562 1499  
E jean.ewang@cdhlegal.com



### Thabang Rapuleng

Counsel:  
Employment Law  
T +27 (0)11 562 1759  
E thabang.rapuleng@cdhlegal.com



### Ebrahim Patelia

Legal Consultant:  
Employment Law  
T +27 (0)11 562 1000  
E ebrahim.patel@cdhlegal.com



## OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



**Rizichi Kashero-Ondego**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E rizichi.kashero-ondego@cdhlegal.com



**Daniel Kiragu**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E daniel.kiragu@cdhlegal.com



**Jordyne Löser**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1479  
E jordyne.loser@cdhlegal.com



**Lee Masuku**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1213  
E lee.masuku@cdhlegal.com



**Leila Moosa**

Senior Associate:  
Employment Law  
T +27 (0)21 481 6318  
E leila.moosa@cdhlegal.com



**Christine Mugenyu**

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E christine.mugenyu@cdhlegal.com



**Kgodisho Phashe**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1086  
E kgodisho.phashe@cdhlegal.com



**Taryn York**

Senior Associate:  
Employment Law  
T +27 (0)11 562 1732  
E taryn.york@cdhlegal.com



**Lynsey Foot**

Associate:  
Employment Law  
T +27 (0)11 562 1429  
E lynsey.foot@cdhlegal.com



**Kevin Kipchirchir**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E kevin.kipchirchir@cdhlegal.com



**Malesela Letwaba**

Associate:  
Employment Law  
T +27 (0)11 562 1710  
E malesela.letwaba@cdhlegal.com



**Biron Madisa**

Associate:  
Employment Law  
T +27 (0)11 562 1031  
E biron.madisa@cdhlegal.com



**Thato Makoaba**

Associate  
T +27 (0)11 562 1659  
E thato.makoaba@cdhlegal.com



**Thato Maruapula**

Associate:  
Employment Law  
T +27 (0)11 562 1774  
E thato.maruapula@cdhlegal.com



**Sheilla Mokaya**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E sheilla.mokaya@cdhlegal.com



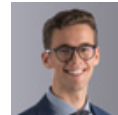
**Billy Oloo**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E billy.oloo@cdhlegal.com



**Sashin Naidoo**

Associate:  
Employment Law  
T +27 (0)11 562 1482  
E sashin.naidoo@cdhlegal.com



**Alex van Greuning**

Associate:  
Employment Law  
T +27 (0)21 481 6309  
E alex.vangreuning@cdhlegal.com



**Melisa Wekesa**

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E melisa.wekesa@cdhlegal.com

**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

©2024 14086/NOV

