

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 2023-010096

Date of hearing: 3 November 2023

2 April 2024

Date delivered: 29 April 2024

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHERS JUDGES: YES / ~~NO~~

(3) REVISED

DATE: 29/4/24

SIGNATURE

In the matter of:

LEXISNEXIS SOUTH AFRICA (PTY) LTD

Applicant

and

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Respondent

JUDGMENT

SWANEPOEL J:

[1] The astonishing technological advances of the past few years, especially in the field of communications, have changed the face of society. One is able to communicate by cell phone from some of the most remote places on earth, and one is able to hold face-to-face meetings through the internet. Many companies no longer maintain large offices, preferring to conduct business by electronic media. The Covid-19 pandemic, which resulted in the world of commerce virtually

coming to a halt, accelerated the development of alternative means of communication. The legal profession was no exception to these developments. In this Division the use of CaseLines to access court files digitally, and the use of Teams or Zoom links, allowed courts to sit virtually, and to continue working without interruption. These technological developments would have seemed far-fetched and science fiction a brief few years ago.

[2] Legislation has not always kept abreast of technology. One piece of legislation which has not kept pace with technology is the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 ("the Act"), which requires oaths to be administered to deponents whilst they are in the presence of a commissioner of oaths.

[3] This application came before me in the unopposed motion court on 3 November 2023. The applicant is a global publishing company which seeks an order in the following terms:

[3.1] That it be declared that the words "*in the presence of*" in Regulation 3 of the Regulations Governing the Administering of an Oath or Affirmation, published under Government GN 1258 in GG 3619 dated 21 July 1972 are to be broadly interpreted and shall include the administration of an oath or affirmation by means of live electronic communication, consisting of simultaneous audio- and-visual components;

[3.2] That it be declared that Regulation 3 does not require the use of an advanced electronic signature as contemplated by section 13 of the Electronic Communications and Transactions Act 25 of 2002.

[4] If the relief sought were to be granted, it would have a profound impact on the manner in which oaths or affirmations are administered. The respondent unfortunately did not participate in the matter, and therefore I do not have the

advantage of the Minister's perspective on the matter. In order to explore other perspectives, I thought that it would be useful to invite three law bodies to participate as amici curiae. Unfortunately, no response was received from any of these bodies, and I do not, therefore, have the privilege of other views other than that of the applicant.

[5] The Minister of Justice has 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 as follows:

"(1) The deponent shall sign the declaration in the presence of the commissioner of oaths.

(2) If the deponent cannot write he shall in the presence of the commissioner of oaths affix his mark at the foot of the declaration: Provided that if the commissioner of oaths has any doubt as to the deponent's inability to write, he shall require such inability to be certified at the foot of the declaration by some other trustworthy person." (my emphasis)

[6] Regulation 4 (1) provides that below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration. Regulation 4 (2) provides that the commissioner of oaths shall sign the declaration and shall print his business address and full name below his signature. He shall also state his designation and the area for which he holds his appointment. I have highlighted the above passages to illustrate that the Regulations emphasize the place where the oath is administered.

[7] The applicant says that the purpose of the Act and the Regulations is to ensure that the commissioner of oaths is able to view the deponent's identity

document in order to verify the deponent's identity. The applicant says that if the deponent and the commissioner of oaths meet virtually, the commissioner of oaths 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 of oaths is appended to the declaration. The purpose of the Act can therefore be achieved even though the commissioner of oaths and the deponent may not be in each other's physical presence, the applicant argues.

[8] In this Division two matters have dealt 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*¹. In this matter the respondents took the *in limine* point that the commissioning of the founding affidavit did not comply with the Regulations. The deponent had been stricken with the Covid-19 virus and was unable to attend at the commissioner of oaths' offices. The oath had therefore been administered virtually. The applicant's attorney explained comprehensively what steps had been taken in order to comply, as far as possible, with the Regulations.

[9] The Court, relying on *S v Munn*², 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 held that in that particular case, there had been substantial compliance with the Regulations and the *in limine* point was dismissed.

[10] In the unreported judgment in *ED Food S.R.L v Africa's Best (Pty)*³ Ltd the respondent took the point that the founding and confirmatory affidavits of the applicant had been commissioned via video conference call whilst the deponents were in Italy, and the commissioner of oaths was in South Africa. The Court expressed the opinion that Courts should "open themselves to the modern trend of technology". It held that in the particular case there had been substantial

¹ [2022] 2 ALL SA 201 (GJ)

² 1973 (3) SA 734 (N.C.D.)

³ (2022/1245) ZAGPJHC 1619 (14 March 2024)

compliance with the Regulations, and the affidavits were admitted in evidence.

[11] I must distinguish the two above matters from this case. In both *Knuttel* and *ED Food* the Courts were not asked to declare that the Regulation 3 should be broadly interpreted, so that the words "in the presence of" include deponents appearing virtually by electronic means. In these two matters the Courts were asked to accept the affidavits on the basis that they complied substantially with Regulation 3, notwithstanding that the affidavits were commissioned virtually. In the application before me, however, I am asked to find that the Act and Regulations must be broadly interpreted, and that that the administration of oaths by a virtual platform accords with the provisions of Regulation 3.

[12] The only matter, to my knowledge, in which it was argued that Regulation 3 should be interpreted in the manner that applicant contends for in this case, was *Firststrand Bank Ltd v Briedenhann*⁴. In this matter the applicant sought judgment by default on a loan agreement and mortgage bond. The plaintiff's affidavit in support of the application was signed by electronic signature, and the oath had been administered during a virtual meeting. Goosen J (as he was then) raised the issue with the plaintiff's counsel, and sought argument on the recognition of the administration of oaths by virtual hearing.

[13] Following a postponement of the matter, the plaintiff filed a further affidavit explaining the steps taken to ensure the authenticity and reliability of the virtually commissioned affidavit. The plaintiff explained that it had, in cooperation with LexisNexis, set up a digital platform for the commissioning of affidavits. Goosen J considered whether the Regulations could be interpreted as the plaintiff contended for.

[14] The Oxford English dictionary 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". I have been unable to

⁴ 2022 (5) SA 215 (ECGq)

find any dictionary which does not define the words in terms of a physical presence. Goosen J referred to the matter of *Gulyas v Minister of Law and Order*⁵ which dealt with the arrest of a person without a warrant, in circumstances where an offence is committed 'in the presence of a peace officer. In *Gulyas* the Court held that 'presence' meant immediate proximity:

"Which simply brings us back to the ordinary meaning of the word 'presence' as used by ordinary literate people: the peace officer must be there on the scene, close enough to see, hear, feel or smell enough to lead him to the reasonable conclusion that an offence is being committed or has just been committed."⁶

[15] The well-known words of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* once again bear relevance to this matter:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as

⁵ 1986 (3) SA 934 (C) [1986] 3 ALL SA 357 (C)

⁶ At 959 A

reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'" (my emphasis)

[16] The purpose of a judge who is called upon to interpret a statute or other document, is, therefore, to ascertain the objective meaning of the words used, within the context of the document as a whole, and given the purpose of the document. In considering the context in which the words were used the words, Goosen J wrote:

"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."

[17] I respectfully agree with the above passage. The wording of the Regulation does not allow for any other interpretation. Given the clear grammatical meaning of the words, Goosen J declined to ascribe the broad interpretation contended for by the plaintiff. The applicant criticized the *Briedenhann* judgment, firstly on the basis that if it were correct, then the swearing in of acting judges by virtual means would be open to attack. This criticism is without foundation. Schedule 2 to the constitution simply requires a judge or acting judge to swear before the Chief Justice or another Judge designated by him or her. It does not require the Judge or Acting Judge to be in the presence of the person administering the oath. The second criticism levelled at *Briedenhann* is that any affidavit deposed to by virtual means would always be open to attack. The applicant argues that if *Briedenhann*

were to stand, there would be widespread uncertainty whether the oath or affirmation may be administered by virtual means. This criticism is also not valid. 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 it is open to the party relying on the affidavit to argue that there had been substantial compliance with the Regulations in the particular case. In fact, in *Briedenhann*, having considered the particular circumstances under which the affidavit had been signed, the Court admitted it in evidence. There is no uncertainty on the matter.

[18] Applicant's argument, that the object of the Act and the Regulations can be achieved by virtual means is tempting. After all, 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 his signature electronically, thereby complying with the provisions of section 13 (4) of the Electronic Communications and Transactions Act, 25 of 2002.

[19] However, to find for applicant would require me to ignore the clear meaning of the words in the Regulations. In so doing I would be 'crossing the divide between interpretation and legislation', as Wallis JA warned of in *Endumeni*. It is not for a Court to impose its view of what would be sensible or businesslike where the wording of the document is clear.

[20] In the circumstances I make the following order:

[20.1] The application is dismissed.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR THE APPLICANT:

ATTORNEY FOR THE APPLICANT:

DATE HEARD:

DATE OF JUDGMENT:

Adv C. Thompson

Lee Attorneys

3 November 2023 and

2 April 2024

29 April 2024