

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEAL CASE NO: A2024-061772

GJ CASE NO: 1245/2022

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED: YES <i>on 29/09/25 to correct appearances.</i>
September 2025	
DATE	SIGNATURE

In the matter between:

AFRICA'S BEST FOODS (PTY) LTD

Appellant

and

ED FOOD S.R.L

Respondent

JUDGMENT

Maier-Frawley J

Introduction

[1] This appeal lies principally against the order of Den Hartog AJ (the court *a quo*) dismissing a point *in limine* raised by the appellant, Africa's Best Foods (Pty) Ltd ('Africa's Best') in motion proceedings which served before the court *a quo*. The point raised by the appellant was that the affidavits filed by the respondent, ED Food S.R.L

(‘ED Food’) were non-compliant with the Regulations promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 (‘the Act’). The objection was that ED Foods’ affidavits were virtually commissioned by commissioners of oaths seated in South Africa with each of the deponents being seated in Italy, and therefore their affidavits were not signed in the physical presence of the Commissioner as required by regulation 3(1). Further, that the Commissioner lacked the power to administer an oath outside the Republic of South Africa (‘RSA’).

[2] Ed Food instituted motion proceedings (as applicant *a quo*) against Africa’s Best (as respondent *a quo*), *inter alia*, for payment of the sum of Euro 28 000, being the outstanding balance owing by Africa’s Best to ED Food in terms of an agreement concluded between the parties in settlement of an action instituted by ED Food against Africa’s Best. ED Foods complied with its obligations under the settlement, *inter alia*, by withdrawing the action whilst Africa’s Best only partly complied with its payment obligations thereunder.

[3] The application succeeded on the merits with the court *a quo* ordering Africa’s Best to pay the amount claimed by ED Food together with interest and costs. Although Africa’s Best filed a notice of appeal against such order (including the punitive costs order made) the appeal on these grounds was not pursued at the hearing of the matter. Nor was any written or oral argument presented on behalf of Africa’s Best in relation to the order made on the merits. The judgment of the court *a quo* traverses the merits in detail and will therefore not be repeated herein. Suffice it to say that the merits were decided on common cause facts supported by email correspondence and Whats App messages exchanged between representatives of the parties evidencing the terms of

the settlement agreement, as alleged by ED Food, as well as various promises made by representatives of Africa's Best to pay the outstanding amount claimed by ED Food. Insofar as Africa's Best sought, for the first time, to introduce certain additional terms of the settlement agreement favourable only to it in its answering affidavit, which were disputed in reply, its version was found to be implausible and therefore rightly rejected. In short, the court *a quo*'s order is unassailable on the merits.

[4] In the court *a quo*, Africa's Best contended that ED Food's affidavits were irregular and fell to be regarded as *pro non-scripto* for want of compliance with the regulations. This notwithstanding, it sought the referral of the matter to oral evidence rather than the dismissal of the application.

[5] Prior to the hearing of the appeal, this court enquired from the parties whether it would '*not be premature for this Court to pronounce on what appears to be substantially similar issues that are now pending before the SCA*' in the light of the fact that leave to appeal to the Supreme Court of Appeal had been granted in the matter of *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Correctional Services* (2023-010096) [2024] ZAGPPHC 446; 2025 (2) SACR 36 (GP) (29 April 2024).¹ The appellant held the view that the issues arising in this appeal were substantially similar to those which are pending before the Supreme Court of Appeal. The respondent held the view that the issues arising in the LexisNexis matter were distinguishable, regard being had to

¹ In the LexisNexis matter the court was asked to declare that the words '*in the presence of*' in Regulation 3 published under GN 1258 in GG3619 dated 21 July 1972, be interpreted broadly to include deponents appearing virtually by electronic means. In other words, the requirement that the oath be administered to deponents whilst they are in the presence of the commissioner of oaths in terms of regulation 3(1), be interpreted to include virtual presence.

paragraph 11 of that judgment,² such that the appeal in *LexisNexis* would have no bearing on the present matter whether or not that appeal succeeded. Pursuant to oral argument presented on behalf of the parties at the hearing of the matter, a ruling was made that the matter proceed.

[6] Pursuant to the hearing of the appeal, the parties were requested to submit further heads on three questions.³ Both parties provided supplementary heads. However, upon reflection, the questions, as posed, were ineffectual in resolving the real issues arising in the appeal. As will become clear from the discussion below, the appeal essentially turns on whether or not the court *a quo* correctly exercised its discretion to permit the affidavits in question. The following issues arise:

- (a) whether there was non-compliance with regulation 3(1) in circumstances where the affidavits were commissioned virtually; and

² The following was stated in par 11 of the LexisNexus judgment:

"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 the administration of oaths by a virtual platform accords with the provisions of Regulation 3."

³ The following questions were posed:

- (1) In which country (place) is an oath administered in circumstances where an ex officio commissioner of oaths administers the oath virtually whilst seated in South Africa to a deponent who virtually takes the oath whilst seated abroad?
- (2) Whether the court has the power to condone non-compliance with s 7 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963, read with Government Notice 903 in Government Gazette 19033 of 10 July 1998 ("GN 903") if the court were to conclude that the powers afforded to the ex officio commissioners of oath implicated in the present matter were exceeded by them?
- (3) Whether (or not) the fact that the oath was administered virtually, has any impact on the answer to paragraph 1 above. In so far as the answer will depend on an interpretative exercise, full submissions in relation thereto are required

- (b) whether the commissioner lacked the authority or exceeded his powers by administering the oath, albeit virtually, to deponents based abroad; and
- (c) whether the court *a quo* exercised its discretion to receive the affidavits judicially in the interests of justice upon a consideration of the relevant facts and circumstances.

Background

[7] ED Foods, a company based in Italy, had instituted an action for monies due and owing to it by Africa's Best in the Gauteng division of the High Court. They were at all material times, represented by attorneys in South Africa in the litigation. The parties subsequently reached a settlement agreement pursuant to which the action was withdrawn. When Africa's Best failed to comply with all its payment obligations under the agreement, having paid some but not all the monies owing to ED Foods, the latter launched motion proceedings for the recovery of the outstanding amount owing to it. The affidavits were ostensibly settled in South Africa by ED Food's attorneys. The affidavits were signed by the deponents in Italy in the virtual presence of the respective Commissioners of Oath during a video conference call.

[8] In its answering affidavit, Africa's Best raised an objection *in limine* to the founding and confirmatory affidavits of ED Foods. It likewise objected to ED Food's replying and supporting affidavits in a further affidavit delivered in response to the replying affidavit. One, Mr Kemp, virtually commissioned the founding and confirmatory affidavits whilst seated in Port Elisabeth, whilst one, Mr Hardie, virtually commissioned

the replying and supporting affidavits whilst seated in Johannesburg. Both were *ex officio* commissioners of oaths by virtue of their holding office as attorneys.

[9] Substantially the same objection was raised by Africa's Best in the answering affidavit and the further affidavit delivered in response to the replying affidavit. Its pleaded case was to the following effect:

- (a) ED Food's affidavits were signed and commissioned before a commissioner of oaths, based in South Africa, over "video conferencing – Zoom";
- (b) Virtual commissioning of affidavits is not permitted by the Regulations Governing the Administering of an Oath or Affirmation;
- (c) ED Foods was required to have its replying affidavits deposed to in the physical presence of a commissioner of oaths;
- (d) As regards the founding and confirmatory affidavits, ED Foods failed to explain to the Court why the affidavits were commissioned on a virtual platform and why it circumvented the formal requirements of not having the affidavits authenticated by the relevant official in Italy, with a certificate of authentication, for use in the Republic. ED Food failed to annex any supporting confirmatory affidavit by the alleged commissioner of oaths concerning the alleged virtual meeting that occurred to demonstrate that the commissioning of the documents occurred with integrity and that the integrity of the affidavits, as data messages, remained preserved throughout the commissioning process and/or an affidavit that demonstrates *bona fides*;

(e) As regards the replying and supporting affidavits thereto, there were no facts or any *bona fide* reasons given for why ED Foods elected to have the replying affidavits virtually commissioned instead of complying with the Regulations. It was also not impossible for the Applicant to comply with the Regulations and it was not permitted to simply resort to a commissioning process of its choice. In the circumstances, the ED Food also failed to substantially comply with the Regulations. The commissioner of oaths was also not an officer in terms of section 8 of the Act.

(f) By virtue of ED Food's non-compliance with the regulations, its affidavits must be regarded as *pro non scripto* and accordingly disregarded by the court.

[10] The court *a quo* determined the point *in limine* at the outset of the hearing. The point *in limine* was dismissed with costs on 7 March 2024, whilst judgment on the merits was delivered on 14 March 2024.

[11] An affidavit deposed to by Mr Kemp was delivered with the replying affidavit setting out the commissioning process followed by him. Relevant portions of that affidavit were set out in paragraph 7 of the court *a quo*'s judgment and will accordingly not be reproduced herein. The commissioning process followed by Mr Hardie formed part of his certification. Both commissioners confirmed the manner in which the oath was administered and the process followed by them in commissioning the affidavits virtually. Amongst others, they confirmed having satisfied themselves as to the identity of the relevant deponent, that he or she indeed took the oath, knew and understood its effect and was the person who signed the affidavit. Thereafter, they appended their

signature with details of place, area and designation. Mr Kemp certified that the affidavits were signed and sworn before him at Port Elisabeth whilst Mr Hardie certified that the affidavits were signed before him over video conferencing –Zoom.

Findings of court *a quo*

[12] The court *a quo* found that the commissioner of oaths was entitled to administer the oath outside of South Africa on the basis that he was ‘an attorney, duly admitted to the High Court of South Africa and consequently a Commissioner of Oaths appointed by the Supreme Court of South Africa in terms of the provisions of Section 8(1)(b) of the Justice of the Peace and Commissioner of Oaths Act.’

[13] On the strength of Mr Kemp’s affidavit, the court *a quo* found that there had been substantial compliance with the Regulations notwithstanding that ED Food’s affidavits were commissioned virtually.

Discussion

Virtual commissioning

[14] Whether virtual commissioning is valid, is a question of interpretation of Regulation 3(1) of the Regulations governing the administration of oaths or affirmations. Regulation 3(1) requires a deponent to sign the document *in the presence* of the commissioner of oaths.

[15] In *Briedenhann*,⁴ the court held that the language of Regulation 3 suggests that the deponent is required to append his/her signature in the physical presence of the

⁴ *Firststrand Bank Limited v Briedenhann* (3690/2021) [2022] ZAEQBHC 6; 2022 (5) SA 215 (ECGq) (5 May 2022) a decision of the Eastern Cape High Court (Gqeberha) (*Briedenhann*).

commissioner of oaths. Goosen J reasoned that sections 5, 7 and 8 of the Act ‘reflect a clear concern with physical or territorial jurisdiction. Commissioners are appointed for defined areas and may only exercise their powers within such areas, unless they exercise such powers by virtue of their office. In this event, their authority to administer oaths or affirmations is not area bound. This concern with territoriality is relevant to contextual interpretation of the Regulations.’⁵ Despite acknowledging the evolving technological landscape in the wake of the covid pandemic, the court held that legislative action would be required to recognise and legitimise the use of such technologies.⁶ Goosen J held that ‘the plain meaning of the expression ‘in the presence of’ within its context in Regulation 3(1), requires that the deponent to an affidavit takes the oath and signs the declaration in physical proximity to the commissioner. The Regulation does not therefore cover such deposition in the ‘virtual presence’ of a commissioner.’⁷

[16] *Briedenhann* has been accepted and applied in several cases in this division.⁸ Having considered the various judgments (including *Briedenhann*) I am of the view that the conclusions in *Briedenhann* are correct or, put differently, I am unable to find that they are clearly wrong. Several academic writers and courts have recognized the need

⁵ Id par 20.

⁶ Id par 28. Goosen J adopted a cautionary approach, as regards the process of interpretation, heeding the call in *Endumeni* for judges “to be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To so do in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation;...

⁷ Id Paras 29 and 35. In par 29, the following was said: “...the plain meaning of the expression ‘in the presence of’ within its context in Regulation 3(1), requires that the deponent to an affidavit takes the oath and signs the declaration in physical proximity to the commissioner. The Regulation does not therefore cover such deposition in the ‘virtual presence’ of a commissioner.”

⁸ See *LexisNexus* above par 5; *SB Guarantee Company (Pty) Ltd v De Sousa* (2023/035447) [2024] ZAGPJHC 459; 2024 (6) SA 625 (GJ) (6 May 2024); *Nedbank Limited v Marx* (42653/2021) [2024] ZAGPPHC 619 (19 June 2024)

for the Act and its regulations to be amended to provide for virtual commissioning.⁹ The Act is outdated. It has not been adapted to embrace the age of digitalisation in which we live. As noted in *Zoolaka*,¹⁰ it is a fact that the use of video conferencing/zoom and or Microsoft teams is the new normal.

[17] The upshot of the foregoing is that, in the absence of legislative intervention to bring the Act and Regulations in line with modern technological advances so as to provide for virtual commissioning (with all its attendant advantages) virtual commissioning of affidavits is impermissible and not sanctioned in term of the existing legislation.

Virtual commissioning for foreign-based deponents

[18] Leaving aside the impermissibility of virtual commissioning for the moment, the question arising is whether, within a virtual commissioning setting, the respective *ex officio* commissioners of oaths exceeded their authority by administering the oath to deponents who were outside of the RSA.

[19] Africa Best's case in the court *a quo* was that regulation 3 was not complied with by virtue of the virtual commissioning of RD Food's affidavits. Further, that because ED Foods had failed to explain why a virtual commissioning process had been followed (rather than employing overseas processes available for the commissioning of its

⁹ See for example, *Briedenhahn*, above fn 4; *LexisNexus*, above par 5; *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perle* (28154/2011) 2013 ZAGPJHC 311, where Satchwell J discussed the 'marvels of modern technology' and the need for courts who dispense justice to adapt to the 'requirements of the modernities'; Cires Singh "*In the 'presence' of the Commissioner: Is there a need for an amendment to the Justices of the Peace and commissioners of Oaths Act 16 of 1963*" published in 2024 De Jure Law Journal at 133; Peter Otzen & Aran Brouwer "*Remote commissioning of affidavits: Who can commission them and how is it done?*" published in *De Rebus* in 2020 (June) DR 22.

¹⁰ *Zoolakha v G L Events Oasys Consortium and Another* (19126/18) [2021] ZAGPPHC 433 (18 June 2021) at par 43.

affidavits in terms of section 8 of the Act) or Rule 63 of the Uniform Rules, it failed to substantially comply with the regulations.

[20] The court *a quo* erred in concluding that the relevant commissioner, by virtue of his office as a duly qualified attorney, was an *ex officio* attorney, “duly admitted to the High Court of South Africa and consequently a Commissioner of Oaths appointed by the Supreme Court of South Africa in terms of the provisions of Section 8(1)(b) of the Justice of the Peace and Commissioner of Oaths Act.”

[21] Section 8(1)(a) of the Act empowers the Minister to declare by notice in the Government Gazette that “*the holder of any office in any country outside the Republic shall in the country in which or at the place at which he holds such office, have the powers conferred by section seven upon a commissioner of oaths...*” The Minister designated, *inter alia*, the following persons with the powers conferred by section 7 upon a commissioner of oaths: “*Any person who exercises in a state to which independence has been granted by law a legal profession equivalent to that of an attorney, notary or conveyancer in the Republic.*”¹¹ Thus, for example, a qualified notary or attorney in Italy has the powers of a commissioner of oaths for South Africa in that country. Once such legal professional in the foreign country administers the oath in such country, i.e., outside of SA, he is required in terms of section 8(2) to “authenticate the affidavit or declaration in question by affixing thereto the seal or impressing thereon the stamp used by him in connection with his office or, if he possesses no such seal or stamp, certifying thereon under his signature to that effect.” Any affidavit made before

¹¹ In terms of the regulation published under GN 1872 in GG 7215 of 12 September 1980 as amended by GN 2828 in GG 9018 of 30 December 1983 and GN R527 in GG 9621 of 15 March 1985.

such professional in the foreign country and authenticated in accordance with the provisions of section 8(2) is admissible as evidence in SA on its mere production in terms of section 8(3) and “shall be as effectual as if made in the Republic before a commissioner of oaths.” (section 8(4)).¹²

[22] Thus, affidavits sworn to in countries outside SA before foreign office holders designated by the Minister with authority to administer the oath may be accepted in SA provided they are validly executed in their countries of origin, subject to the rules of authentication, and despite not conforming to the requirements of the Act and the regulations promulgated thereunder. In terms of Uniform Rule 63(4), the court “*may accept as sufficiently authenticated any document which is shown to the satisfaction of*

¹² In *Lehane NO v Lagoon Beach Hotel (Pty) Limited and Others* 2015 (4) SA 72 (WCC) at [67] it was held that an affidavit which had been commissioned by a notary in the Republic of Ireland was entitled to act as a commissioner of oaths as contemplated in the Act: “*As to the issue of authentication, the first respondent objects to the founding affidavit being utilised as evidence on the basis that it was not properly authenticated. I have considered the basis of this complaint and, in doing so, I have found that, ex facie the founding affidavit, the individual who commissioned same was a notary in the Republic of Ireland and duly authenticated the affidavit in the manner contemplated in GN R1872 in Government Gazette 15 of 12 September 1980, which contains a schedule setting out a list of officers outside the Republic of South Africa entitled to act as commissioners of oaths as contemplated in the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.*”

In *S v Oates* 1982 (4) SA 819 (TkS), it was held by Hefer CJ and Davies AJ that: (i) affidavits which are executed outside the Transkei which were validly executed in their countries of origin may be accepted in the Transkei subject to the rule of authentication, even if they do not conform with the requirements of the Act and the regulations published in terms of the Act; (ii) in terms of Rule 63 of the Rules of Court, affidavits “*executed in foreign countries before persons who do not have the powers of commissioners of oaths in terms of section 8(1) [of the Act] are receivable and, secondly, that such affidavits need not be valid in terms of Transkeian law*”; (iii) that the common law was not abrogated by the introduction of section 8 of the Act and that affidavits executed outside the Transkei “*are not to be rejected merely because they do not conform to the requirements of the 1963 Act (of the regulations published in terms of that Act). If they are validly executed in their countries of origin, they may be accepted here subject, of course, to the rules of authentication ...*” (at page 822) and (iv) “*In the instant case, the affidavit tendered by the State should not have been rejected merely because the person before whom it had been sworn was not a commissioner of oaths according to Transkeian law.*” (at page 823)

such court ... to have been actually signed by the person purporting to have signed the document". As set out in Rule 63, the definition of a document includes an affidavit.

[23] Section 8 provides for authorised foreign office holders, either in the foreign country or the place at which they hold office, to administer an oath or affirmation or to take a solemn or attested declaration from any person in accordance with the requirements of the foreign domestic law, subject to authentication.

[24] A Commissioner of Oaths appointed by the Supreme Court of South Africa in terms of the provisions of Section 8(1)(b) of the Act is different to an *ex officio* commissioner who is, in terms of section 6 of the Act, a holder of an office which has been designated by the Minister in a notice in the Gazette as a commissioner of oaths for any area specified in such notice. An *ex officio* commissioner who holds a designated office is not appointed by the 'Supreme Court of South Africa'.

[25] In terms of Uniform Rule 65, "Every person duly appointed as a commissioner of any Division of the High Court of South Africa for taking affidavits in any place outside the Republic shall, by virtue of such appointment, become a commissioner of the said High Court, and shall, as such, be entitled to be enrolled by the registrar of every other Division as a commissioner thereof..." Rule 38 provides for evidence on commission. In terms of Rule 38(3), "*A court may, on application on notice in any matter where it appears convenient or necessary for the purposes of justice, make an order for taking the evidence of a witness before or during the trial before a commissioner of the court, and permit any party to any such matter to use such deposition in evidence on such terms, if any, as to it seems meet, and in particular may order that such evidence shall be taken only after the close of pleadings or only after the giving of discovery or the furnishing of any particulars in the action.*" The rule envisages an application

to court and the appointment by the court of a commissioner to take evidence on affidavit.

[26] What must be remembered is that at the time that the Act and the regulations thereunder were promulgated, virtual commissioning was unheard of and thus not envisaged. If litigants overseas needed to depose to affidavits in a foreign country, they had to physically appear before one of the persons authorised by the Minister by notice in the Gazette to administer the oath, as envisaged in section 8 of the Act.

[27] In a virtual setting, however, geographic barriers are eliminated. Online appearances are not limited by location. A commissioner in South Africa could technically effectually administer the oath to deponents in Italy in accordance with the form and manner provided therefore in regulations 1 and 2 and the certification provided for in regulation 4.¹³ In such a scenario, the evidence is received in South Africa where the oath is administered. Only regulation 3(1) requiring physical presence would not have been complied with.

[28] The commissioners in *casu* performed their functions within South Africa albeit over video-link to deponents outside SA. Section 8 of the Act is not applicable in this scenario for the simple reason that the section caters for foreign office holders, either at the place at which they hold office or in the country in which they hold office to

¹³ The Regulations governing the administration of the oath are contained in GN R1258 in GG 3619 of 21 July 1972. Regulations 1 and 2 provide for the form and manner in which an oath or affirmation is administered. Regulation 3 provides for signing by the deponent and regulation 4 for the commissioner's certification and signature. As stated in *Briedenhahn, supra*, par 25, "The process follows a logical sequence which requires the commissioner to satisfy themselves that the deponent understands the nature of the oath; administer it; obtain confirmation of the taking of the oath by signature on the document and thereafter, to append their signature with details of place, area and designation.

administer the oath in the foreign country in accordance with the requirements of the governing law in that country. Provided the affidavits deposed to before them are authenticated, such affidavits are in terms of section 8 (4) as effectual as if made in the Republic before a commissioner of oaths, notwithstanding that the local regulations that govern the administration of an oath in SA may not have been followed.

[29] Whilst virtual commissioning was not contemplated in the Act promulgated in 1963 or the regulations in 1972, it is interesting to note that section 37C(1) of the Superior Courts Act 10 of 2013 provides that a Superior Court may, on application by any party to proceedings before that court or of its own accord, order that a witness, irrespective of whether the witness is in or outside the Republic, if the witness consents thereto, give evidence by means of audiovisual link. Section 37C(5) provides that a witness who gives evidence by means of audiovisual link is regarded as a witness who was subpoenaed to give evidence in the court in question. In *VJS v SH*,¹⁴ the court held that the deeming provision in section 37C(5) means that a witness who takes the oath and testifies via audiovisual link is considered as a witness who testified physically in court. In such a case, the court receives the evidence in South Africa as if the witness was physically present in court in SA. The Criminal Procedure Act 51 of 1977 contains a similar provision in section 158(2)(a) for obtaining evidence from a witness through audio visual means.¹⁵ These provisions are not premised on a question of where the oath is to be administered but on the purpose for which it is intended, namely, to be evidence *in*

¹⁴ *VJS v SH* [2024] ZAWCHC 333.

¹⁵ The section reads: "A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed-circuit television or similar electronic means." In *S v Nthai* [2024] ZAGPJHC 1178 (& November 2024) the court held that the primary purpose of section 153 is to ensure that proceedings before courts are fair, the qualification being that courts exercising this power must take into account the interests of justice.

South Africa. In any event, these provisions indicate that the evidence is given where the oath would be administered, i.e., South Africa.

[30] Domestically, commissioners of oaths draw their authority from the Act, either by appointment or *ex officio*. In terms of section 5 of the Act, the Minister (or delegated officer) may appoint any person as a commissioner of oaths for any area fixed by the Minister or the delegated officer. Commissioners appointed under section 5 thus have authority to act as commissioners only in fixed areas. In terms of section 6 of the Act, “The Minister may, by notice in the Gazette, designate the holder of any office as a commissioner of oaths for any area specified in such notice...” In GN903 in GG 19033 of 10 July 1988, the Minister published a list of *ex officio* commissioners within SA. Attorneys legally qualified in terms of SA law are included in such list.¹⁶ The following appears in GN 903: “I, Abdulah Mohamed Omar, Minister of Justice, hereby, under section 6 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963), designate the holders of the offices listed in the Schedule to be commissioners of oaths for the Republic of South Africa with effect from the date hereof”.

[31] Africa’s Best contends that the area specified in GN 903, is the RSA. Thus *ex officio* commissioners may only administer an oath anywhere within the geographic boundaries of the RSA. Although ED Food contends that the oaths in *casu* were in fact administered within the Republic, it argues that the word “*for the Republic of South Africa*” in GN 903 is to be interpreted purposively. In a context where the notice does not specify that the holders of the listed offices are commissioners of oaths only *in the*

¹⁶ The requirement for the designation of attorneys in South Africa as *ex officio* commissioners are that they are holders of legal qualifications in terms of the relevant legislation under which they are permitted to practice in South Africa.

Republic for purposes of performing the function of a commissioner, the word *for* should be interpreted to mean *for the requirements of the Republic*, untrammelled by the geographical territorial boundaries of the Republic. In other words, the legislature did not intend to limit the area in which an *ex officio* commissioner is authorised to perform his or her functions.

[32] Whilst the respondent's argument in its supplementary heads is interesting, sight must not be lost of section 7 of the Act, which provides, in relevant part, that any commissioner of oaths may, within the area for which he is a commissioner of oaths, administer an oath or affirmation to or take a solemn or attested declaration from any person. The Act provides for two types of commissioners domestically. One is by appointment (section 5) where the appointed commissioner is restricted to perform their functions in the area fixed by the Minister (or delegated officer). The second relates to *ex officio* commissioners who hold certain offices by virtue of which they are designated commissioners 'for any area specified in the notice'. Section 7 applies to both types of commissioners. In terms of section 7, the commissioner (either appointed or designated) is empowered to act as commissioner '*within the area for which he is a commissioner of oaths*'. *Ex officio* commissioners may perform their functions anywhere in SA whilst appointed commissioners may perform their functions only in fixed areas within South Africa.

[33] The interpretative exercise involves attributing meaning to words used in a document or statute and involves a consideration of the well-known triad of text, context

and purpose.¹⁷ As cautioned in *Endumeni*,¹⁸ where different meanings are possible, a sensible meaning is to be preferred to one that leads to an insensible result. On the respondent's argument, the holders of offices identified in GN 903 (*ex officio* commissioners) are designated therein as commissioners of oaths *for* the Republic, the word '*for*' meaning '*for the requirements of the Republic*', and not '*in*' the Republic. Ed Food submits that *ex officio* commissioners are thus not bound by territorial restrictions and may administer oaths outside South Africa.

[34] The regulations governing the administering of an oath of affirmation set out the requirements of the Republic, in other words, the form and manner in which an oath or affirmation must be administered, the signing of the affidavit by the deponent and the process of certification and signing by the commissioner. Commissioners, whether appointed or designated by the Minister, are to perform their functions according to the precepts of South African law, which, for obvious reasons, applies domestically. ED Food accepts in its supplementary heads that section 8 of the Act recognises certain foreign office holders notwithstanding that they are not subject to South African law and that it would be inappropriate for the South African Government to appoint, for example, foreign legal professionals as its commissioners of oath. The Act regulates the appointment and powers of commissioners (whether appointed or designated by the Minister) within South Africa to perform their functions domestically. This accords with the clear meaning of section 7 of the Act. The word '*specified*' in section 6 of the Act

¹⁷ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA), par 25.

¹⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*).

must be given its ordinary meaning, namely, the area *indicated* or *identified* in the notice, which is the Republic of South Africa.

Court's discretion

[35] Courts have consistently recognized that judges regularly exercise a discretion to condone non-compliance if there is substantial compliance with the Regulations.¹⁹ The discretion is not unfettered but must be exercised judicially upon a consideration of the facts of each case.²⁰ As Goosen J put it in *Briedenhahn*, at par 56, “the discretion with which I am vested must be exercised judicially, upon consideration of all the relevant facts and in the interests of justice.” It is for the court, after considering the totality of the evidence, to determine whether, as a fact, substantial compliance with the regulations is proved.²¹

[36] There are several cases in which courts in different divisions have exercised their discretion to permit affidavits deposed to virtually before a commissioner of oaths in South Africa whilst the deponents were abroad.

[37] In *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perle* (28154/2011) 2013 ZAGPJHC 311, Satchwell, J allowed the use of a video link to lead evidence in a civil matter from witnesses who were abroad, and administered the oath to them virtually before their evidence was led. In para 25 of the judgment, Satchwell J stated that “I find that it is sufficient reason that Dragone and

¹⁹ *S v Msibi* 1974 (4) 821 T; *Lohrman v Vaal Ontwikkelingsmaatskappy* 1979 (3) SA 391 at 423; *S v Munn* 1973 (3) SA 734 (NC)

²⁰ *Van As N.O. and Others v Jacobs N.O. and Another* (A194/2021) [2022] ZAGPPHC 928 (1 December 2022) (“Van As”) at par 10, a decision of the Full Court, Gauteng Division, Pretoria.

²¹ *VJS v SH* (19578/2024) [2024] ZAWCHC 333 (22 October 2024) (“VJS”) at par 20, where Lekhuleni J further pointed out that compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith.

Barbaglia are living and working elsewhere, do not desire to travel to South Africa, have no obligation to either party by which they can be enticed so to do to find that this court should consider receiving evidence by video link.”²² The court considered whether or not it was convenient or necessary for the purposes of justice to receive evidence via video link and that this was not limited to situations where the witness was absolutely unavailable to attend at court or where it was impossible for the witness to appear in person.

[38] In *VJS*,²³ the court admitted an affidavit deposed to virtually during a Zoom video call by a commissioner of oaths in SA whilst the applicant was in Pakistan. He did so because he was of the view that there is no difference, having regard to section 37C of the Superior Courts Act and section 158 of the CPA between taking an oath through a virtual platform for purposes of testifying and taking an oath when an affidavit is commissioned using an audiovisual link. This notwithstanding, the court having noted in par 32 of the judgment, that *“interestingly, notwithstanding the provisions of Regulation 3(1) discussed above that the deponent is required to append his signature to a declaration in the physical presence of the commissioner, the regulations applicable in domestic violence application (sic) depart completely from this requirement.”* In *VJS*, the evidence produced was to the effect that the applicant was being monitored and that any visit by him to the embassy or police station would raise questions that could put his employment at risk. It was held that where difficulty or hardship is experienced by litigants to comply with the Regulations or where it is impossible for them to comply, courts ought to adopt a more pragmatic approach and accept affidavits executed via audiovisual links.²⁴

²² See too paras 30 and 32 of the judgment.

²³ Above fn 21

²⁴ *Id* par 33.

[39] In *Tinashe*,²⁵ the applicant had signed her affidavits in Zimbabwe and the affidavits were later commissioned in South Africa via a WhatsApp video call. The court found that the affidavits were non-compliant and dismissed the application. The court held that common-place impediments to physical presence which are capable of being addressed should not be elevated to exceptionality that was presented by the pandemic. *Tinashe* has not been followed in this division.

[40] In *J.V v B.V* (43696/2019) [2024] ZAGPJHC 667 (15 July 2024)²⁶ the applicant deposed to an affidavit whilst in Australia before an *ex officio* commissioner of oaths in South Africa via video conferencing. The court did not consider that special or exceptional circumstances needed to be shown in order to exercise its discretion to condone non-compliance with regulation 3(1), as was held necessary in *Tinashe*. The court rather followed *Uramin* where Satchwell J ultimately found that the relaxation of the preference of physical attendance at court should neither be considered extraordinary, nor be discouraged.

[41] In *Briedenhann*, in an application for default judgment, affidavits were signed by the deponents utilizing an electronic signature and were commissioned by way of virtual conference. The plaintiff elected to have the affidavits signed and commissioned electronically albeit with the aim of limiting the spread of the covid 19 virus.(par 12).²⁷

²⁵ *Tinashe v University of Limpopo (Turfloop Campus)* 2023 ZALMPPHC 57

²⁶ A judgment of the Gauteng Division, Johannesburg.

²⁷ In par 50 of the judgment, Goosen J noted that "In this matter the plaintiff elected to employ a new technology platform to digitize its preparation of affidavits for use in legal recoveries. Whilst it broadly framed its decision to do so in the context of the Covid 19 pandemic, its election represents a particular choice of business innovation."

Notwithstanding the elected non-compliance with regulation 3(1), in paragraph 56 of the judgment, Goosen J went on to say that ‘It follows from what I have said that I would be disinclined to receive the affidavits given the elected non-compliance with the Regulations. However, the discretion with which I am vested must be exercised judicially, upon consideration of all the relevant facts and in the interests of justice.’ In paragraph 57, the court explained that “There can be no doubt that the evidence placed before me establishes that the purposes of Regulation 3(1) have been met. To refuse to admit the affidavits would, of course, highlight the importance of adhering to the principle of the rule of law. That point is, I believe, made plain in this judgment. To require the plaintiff to commence its application for default judgment afresh upon affidavits which would contain the same allegations but which are signed in the presence of a commissioner of oaths would not, in my view, be in the interests of justice. There is after all no doubt that the deponents did take the prescribed oath and that they affirmed doing so. It would therefore serve no purpose other than to delay the finalisation of this matter with an inevitable escalation of costs, not to receive the affidavits. In the circumstances, I accept the affidavits deposed to in the manner described in this judgment as complying in substance with the provisions of the Regulations.”

[42] In permitting ED Food’s affidavits that were all virtually commissioned, the court *a quo* exercised a discretion. Ultimately this appeal turns on whether the court *a quo* exercised its discretion judicially upon a consideration of all the relevant facts and

In par 51, he stated that “... 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.”

circumstances and permitted the affidavits in the interests of justice after finding that there was substantial compliance with the Regulations.

[43] In *Van As*, the full court held that the discretion a court exercises to receive non-compliant affidavits is a 'loose' one. I respectfully agree. The difference between a 'true' discretion and a 'loose' discretion was discussed in *Trencon Construction*,²⁸ where the following was said:

"[85] A discretion in the true sense is found where the lower court has a wider range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permission options ...

[87] ... In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own discretion without first having to find that the court of instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in a loose sense, it must be guarded."

[44] Although the court *a quo* applied a wrong principle in concluding that *ex officio* commissioners are appointed by the Supreme Court of South Africa, as envisaged in section 8(1)(b) of the Act, it is trite law that an appeal is directed at undoing the result of

²⁸ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras [83] and [85]-[87]

a judgment. For that reason, an appeal can only lie against a substantive order of court and not against the reasons given for the order or findings made in the judgment.²⁹

[45] Turning to the present matter, the affidavit of Mr Kemp revealed that the deponents of ED Food's affidavits considered the signing of the affidavits to be relatively urgent, and there were also no other reasonable means available to the deponents to commission the affidavits in the presence of a commissioner of oaths in the ordinary course.

[46] Even if this court were to accept that ED Food elected to have its affidavits commissioned virtually, that does not mean that the court *a quo* was precluded from exercising its discretion to receive same where the regulations were substantially complied with, if it was in the interests of justice to do so.

[47] Full Courts in this division, following and applying what was held in *S v Munn* 1973 (3) SA 734 (NC) at 737H, have consistently found that the regulations are directory.³⁰ Even Goosen J in *Briedenhann* accepted that the regulations are directory only.³¹

²⁹ See *MEC for the Department of Public Works & Others v Ikamva Architects CC and Others* (867/2022) [2024] ZASCA 95 (13 June 2024) at par 31, citing *Tecmed Africa (Pty) Ltd v Minister of Health and another* [2012]4 All SA 149 (SCA) where the principle was explained thus: "First, appeals do not lie against the reasons for the judgment but against the substantive order of a lower court. Thus, whether or not a court of Appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same."

³⁰ *S v Msibi* 1974 (4) SA 821 (T); *Lohrman v Vaal Ontwikkelingsmaatskappy* 1979 (3) SA 391 T; *Van As*, above fn 20.

³¹ *Briedenhann*, above fn 4 at par 46, where the following was said: "The authorities referred to earlier make it plain that the Regulations, save where couched in negative terms, are directory. Accordingly, where those regulations have not been followed and adhered to, a court has a discretion whether or not to admit the affidavit. In such circumstances the court will determine whether there has been substantial

[48] The court *a quo* found that the regulations were substantially complied with. It was clear that the deponents had taken the oath and had affirmed signing the respective affidavits and that it was in the interests of justice to receive the affidavits. Cases such as *S v Munn* 1973 3 SA 734 (NC), *Mtembu v R* 1940 NPD 7, and *R v Sopete* 1950 3 SA 769 (E) have held that non-compliance with the Regulations will not automatically invalidate an affidavit and that substantial compliance with the formalities is sufficient if it gives effect to the purpose of obtaining a deponent's signature to an affidavit. The purpose of Regulation 3 is to ensure that the Commissioner can, *inter alia*, confirm the identity of the deponent and confirm that the correct affidavit is properly attested to. The purpose of obtaining a deponent's signature to an affidavit is primarily to obtain undisputable evidence that the deposition was indeed sworn to (*Knuttel NO v Bhana* 2021 (JOL) 51059 (GJ) at paras 53-54). In par 25 of *Briedenhann*, Goosen put it thus: "The essential purpose of the Regulations is to provide assurance to a court receiving an affidavit that the deponent, properly identified as the signatory, has taken the oath."

[49] The court *a quo* found that Africa's Best had brought various interlocutory applications in attempts to delay the matter. It awarded punitive costs against Africa's Best ostensibly because the latter had sought to raise a sham and implausible defence, as an afterthought, in order to delay payment. Not to receive the affidavits would have served no purpose other than to delay the matter further with a concomitant escalation in costs. Given that the merits were overwhelmingly in favour of ED Food, that payment

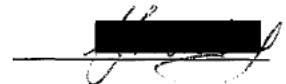
compliance with the regulations. That determination is one of fact having regard to the circumstances of the case.

of ED Food's claim had been delayed for a considerable period of time, that Africa's Best had not disputed the identity of the signatories or that the affidavits were signed by the said signatories who were identified by the commissioners, nor had it disputed that the process followed in commissioning the affidavits complied fully with Regulations 1, 2 and 4, it would not have been in the interests of justice to delay the matter further. It cannot therefore be said that the court *a quo* failed to exercise its discretion other than judicially upon a consideration of the relevant facts and circumstances.

[50] The point *in limine* was correctly dismissed and the order for payment of the amount of Euro 28 000 together with interest and costs was properly granted.

[51] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the respondent's costs, including the costs of counsel on scale C.



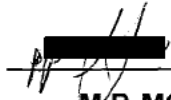
A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree


M.P. MOTHA

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 September 2025.

APPEARANCES

For the appellant:	Adv A. Pillay
Instructed by:	C&O Incorporated
For the respondent:	Adv. M. Niewhoudt
Instructed by:	Werthschroder Inc
Date of hearing:	21 May 2025
Date of judgment:	26 September 2025