

## *Tinashe v University of Limpopo: Turfloop Campus 2023 ZALMPPHC 57*

### 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?

#### 1 Introduction

The Justices of the Peace and Commissioners of Oaths Act 16 of 1963 governs the powers and responsibilities of all Commissioners of Oaths in the Republic of South Africa. One of the primary duties of a Commissioner of Oaths is to assist members of public by administering an oath or affirmation when swearing to an affidavit (see sections 7 and 8). Section 10 of the Act provides that the Minister of Justice may make Regulations prescribing the form and manner in which an oath or affirmation must be administered. All affidavits must therefore meet the requirements as set out in the Regulations promulgated in terms of the Act. The Regulations that were made by the Minister in this regard are the Regulations Governing the Administration of an Oath or Affirmation, which were published under GN R1258 in GG3619 on 21 July 1972.

Regulation 3 of the Regulations Governing the Administration of an Oath or Affirmation of 1972 stipulates that: “the deponent shall sign the declaration in the presence of the Commissioner of Oath”. The purpose of this Regulation 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. Throughout the decades there have been several cases that have considered the duties of a Commissioner of Oaths and the attestation or affirmation process, and these judgments have confirmed that the Regulations to the Act are directory (see *S v Munn* 1973 3 SA 734 (NC), *Mtembu v R* 1940 NPD 7, and *R v Sopete* 1950 3 SA 769 (E)). These judgments 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. In other words, an affidavit will not be invalid if it is signed by a deponent while not being in the *physical* presence of a Commissioner of Oaths (the requirement for being ‘in the presence of the Commissioner of Oaths’ is analogous to requiring that the signatory to being ‘within the eyeshot’ to the Commissioner, see *Gulyas v Minister of Law and Order* 1986 4 All SA 357 (C)).

During the Covid-19 pandemic, due to the strict lockdown measures such as social distancing, restrictions on non-essential travel, curfews and other related prohibitions, the signing and commissioning of affidavits proved extremely difficult and near impossible. These non-contact regulations made it difficult for the deponent and commissioner to be in the physical presence of each other during the signing and attestation process. As a result of these hurdles many parties adopted innovative means and utilised technology to sign and commission affidavits virtually. Many used virtual mediums, such as WhatsApp and Microsoft Teams, to sign and commission affidavits in the ‘virtual presence’ of each other. This new practice of signing and commissioning affidavits virtually was accepted by many courts (see *FirstRand Bank v Briedenhann* [2022] 3690 (ECG), *Knuttel NO v Bhana* 2021 (JOL) 51059 (GJ) and *Maluleke v JR 209 Investments* [2021] 60330-2021 (GP); see also the Canadian Superior Court of Justice case of *Rabbat v Nadon* 2020 ONSC 2933). This approach was hugely welcomed by practitioners, and as a result several IT companies implemented new technologies to assist with the electronic signing and commissioning of affidavits virtually. (see Findlay, Singh, Hartman & Fourie *Quo Vadis: Affidavits in the Digital Age* by Lexis Nexis <https://lnkd.in/gaTZAnHW> (last accessed 2021-12-01), and Tech4Law “Commissioning Affidavits over Video- Tech Talk Legal” <https://www.tech4law.co.za/courses-on-offer/webinar/commissioning-affidavits-over-video-tech-talk-legal/> last accessed 2022-02-07)). The recent case of *Tinashe v University of Limpopo (Turfloop Campus)* 2023 ZALMPPHC 57, has however questioned this development. In this matter, the Limpopo High Court held that an affidavit that has not been signed and commissioned in the physical presence of a Commissioner of Oaths is not valid. This note briefly seeks to analyse the *Tinashe* judgment and the virtual commissioning of affidavits, and further evaluate whether there is a need for an amendment of the Justices of the Peace and Commissioners of Oaths Act. It will be submitted that as we move into the fourth industrial revolution and the age of digitalisation, there is an increasing need for technology to be adapted into court processes, failing which we are at risk of our legal system becoming severely outdated and draconian (see Singh ‘Signed, Sealed and Delivered (electronically): Embracing the Digital Takeover: A Brief Consideration of Electronic Signing and Delivery in South Africa’ 2022 *SLR* 618, and Singh “A Sign of the Times: A Brief Consideration of E-signatures in Agreements and Affidavits in South African Law” 2024 *Obiter* 38 for a deeper discussion on the role of technology in the law).

## 2 The Covid-19 Pandemic

As indicated above, during the height of the Coronavirus pandemic and its resultant lockdown regulations, the commissioning of affidavits proved to be a difficult task as parties were firstly, unable to travel to each other to get affidavits signed and commissioned; and secondly, they were unable to be in each other’s physical presence during the signing and commissioning process. As a result, parties adopted innovative techniques to resolve these challenges while still endeavouring to

substantially comply with the commissioning Regulations. As a result, many practitioners started using technology to sign and commission affidavits virtually. This process proved more cost effective and was also quicker than the traditional (wet ink) commissioning process. However, it was questionable whether this new virtually commissioning process was in accordance with the Regulations, and whether virtually commissioned affidavits were valid.

*Knuttel NO v Bhana* was one of the first cases that considered the virtual commissioning of affidavits during the Covid-19 pandemic. The case involved an application by the trustees of a trust who wanted to evict a tenant from a property owned by the trust. At the time of the application, the trustee contracted Covid-19, and was required to self-isolate. This made it impossible for her to sign any of the affidavits, supporting the application, in the physical presence of the Commissioner of Oaths as required by the Regulations. The trustee's attorney arranged for the deponent to sign the affidavit and email it back to him, and then got the affidavit commissioned virtually during a WhatsApp video call between the deponent and a Commissioner of Oaths. The trustee's attorney gave a detailed account in a separate affidavit of the measures taken by him and the deponent to satisfy the Commissioner of Oaths in the WhatsApp video call to the identity of the deponent, and outlined other measures taken to ensure substantial compliance with Regulation 3 (paras 55-57). The respondents nevertheless contended that the affidavit was invalid as it was not signed by the deponent in the physical presence of a Commissioner of Oaths as required by the Regulations (para 23). In considering the validity of the affidavit, the court referred to *S v Munn* (734-737), where the full bench confirmed that non-compliance with the Regulations does not invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent's signature to an affidavit. The purpose of obtaining a deponent's signature to an affidavit is primarily to obtain undisputable evidence that the deposition was indeed sworn to (paras 53-54). Accordingly, the requirement of person-to-person presence between a Commissioner of Oaths and a deponent is not peremptory, and can be relaxed upon proof of the facts of substantial compliance with the requirements (para 60). The court also noted that judicial recognition had been given for the relaxation of the requirement of person-to-person presence for the administering of an oath in *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perle* (28154/2011) 2013 ZAGPJHC 311 where 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 (para 62). Taking this into consideration, the court in *Knuttel* found that after examining the extraordinary steps taken to commission the affidavit, as well as the surrounding circumstances related to Covid-19, there had been substantial compliance with Regulation 3 of the Regulations Governing the Administration of an Oath or Affirmation, and that the affidavit was valid (para 64).

Another case that considered the validity of an affidavit signed while not in the physical presence of a Commissioner of Oaths, due to the Covid pandemic, was *Maluleke v JR Investments*. In this matter, similar to the facts in *Knuttel*, the deponent to the affidavit had contracted Covid-19 and was in self-isolation (para 5). The deponent was therefore unable to leave their premises to get the affidavit commissioned, and consequently signed the affidavit with the guidance of his attorney over the telephone and emails. The attorney had deposed a separate affidavit providing detailed explanations as how they endeavoured to ensure considerable or substantial compliance with Regulation 3 (paras 11-12). Referring to *S v Munn*, the court found that the requirement of physical presence between the deponent and the Commissioner is not peremptory and can be relaxed on proof on the facts of substantial compliance with the requirements. The court held that given the prevailing circumstances, in particular the positive Covid-19 diagnosis of the deponent, there was substantial compliance with the requirements and the affidavit was valid (paras 13-14).

The issue of virtual commissioning of affidavits was considered in more detail, by Goosen J, in the case of *FirstRand Bank v Breidenhann*. This case involved a default judgment application by FirstRand Bank against Breidenhann, as a result of default in payments in terms of a mortgage loan agreement (para 2). FirstRand had utilised electronic signatures and virtual commissioning to sign its affidavits and claimed that this practice was in line with the Electronic Communication and Transaction Act 25 of 2002 ('ECTA'). FirstRand Bank further filed a separate affidavit setting out, in detail, the process they followed to assure the authenticity and reliability of virtually commissioned affidavits (paras 6-7). This affidavit set out the circumstances in which the affidavits were signed by electronic signature and commissioned in the virtual presence of a Commissioner of Oaths via a video conference using the Microsoft Teams platform. FirstRand Bank claimed that, in an effort to be line with global digital trends and also reduce the spread of Covid-19, relying on the provisions in the ECTA relating to electronic signatures, it had used the Lexis Nexis digital platform to embark on a process of signing and commissioning their affidavits electronically (paras 12-13). The court acknowledged the fact that the introduction of the use of digital products and remote or virtual technologies have been thrust to the fore, in the recent years, especially considering the outbreak of a global pandemic. Within the legal sector, new rules and directives were issued to allow courts to continue to provide access to justice notwithstanding the global lockdown restrictions. As the course of the pandemic has worn down, the adoption of innovative technology has continued to grow (paras 8-9).

The court thereafter considered the provisions governing commissioning and found that it was clear that Regulation 3 required a deponent to sign the affidavit in the presence of the Commissioner. The court considered the meaning of the term 'in the presence of' and found that the Oxford Dictionary defines the word presence as 'being in the

same place as a person'. FirstRand Bank argued that 'presence' need not always be physical and could be achieved virtually via a live video stream in which both parties were able to see and hear the other, to observe their actions and to identify one another, for purposes of the Regulations (para 26). The court, however, did not agree with this argument and held that the language of Regulation 3 suggests that the deponent is required to append their signature in the 'physical' presence of the Commissioner of Oaths. The process follows a logical sequence which requires the Commissioner of Oaths to satisfy themselves that the deponent understands the nature of the oath, administers it, obtains 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. These steps are to occur in the presence of the Commissioner of Oaths. 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 (para 25). The plain meaning of the expression 'in the presence of' within its context in Regulation 3, requires that the deponent to an affidavit takes the oath and signs the declaration in physical proximity to the Commissioner of Oaths. The Regulation does not cover such deposition in the 'virtual presence' of a Commissioner of Oaths (para 29). It was, however, trite that where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the deponent (paras 36-39, referring to *Knuttel, Munn, Mtembu and Sopete*). It was thus clear that the Regulations were directory and peremptory, and in circumstances where the Regulations were not adhered to, the court had a discretion whether to admit the affidavit (para 48).

The facts revealed that FirstRand Bank had elected to employ new technology to digitalize its affidavits. This was done in the context of Covid-19 and considering business innovation. The advantages of the system, however, did not allow existing Regulations to be ignored, and the fact that the Regulation is directory does not mean that a party can set out to achieve substantial compliance rather than to fully comply with its requirements. A court would not readily accept that an affidavit substantially complies with regulated formalities in circumstances where the non-compliance a result of a deliberate choice (paras 50-52).

Although, FirstRand Bank's actions were *bona fide*, legislative action would be required to recognise and legitimise the use of such technologies. Accordingly, Regulations can be framed to bring commissioning in line with the broader objects of the ECTA and to facilitate the use of technologies such as LexisSign (paras 53-54).

Given the relevant facts, Goosen J exercised his discretion and admitted the affidavit, finding that there had been substantial compliance with the Regulations. It was clear that the deponent had taken the oath and affirmed signing the affidavit. At para 57, Goosen J noted that if the affidavit was rejected, FirstRand Bank would be required

to bring a fresh application, based on the same affidavit, the only difference being the new affidavit being physically signed before a Commissioner of Oaths. Such as delay would not be in the interest of justice.

The three judgments discussed above confirm the position that substantial compliance with Regulation 3 is sufficient. Although the cases of *Knuttel* and *Maluleke* found that it was not vital for an affidavit to be signed and commissioned in the presence of the Commissioner of Oaths, these findings were *obiter* and must also be considered in light of the prevailing circumstances of the case, namely the Covid-19 pandemic and the diagnosis of the deponents. In *Breidenhann*, the court found that the signing in the presence of the Commissioner of Oaths is essential to the purpose of attestation. This can only be fulfilled by the physical presence of the Commissioner of Oaths and deponent. Despite this point, the court accepted the validity of the affidavit, finding that there had been substantial compliance with the Regulations. Goosen J, however, pointed out that there may be a need for the legislature to reconsider the Regulations and possibly allow for the virtually commissioning of affidavits.

The above cases highlight the need for an amendment to the Regulations and the Justices of the Peace and Commissioners of Oaths Act (Singh 2022 *SLR* 626-627). After the above decisions, several parties continued to utilise technology to sign and commission affidavits, using the *Knuttel*, *Maluleke* and *Breidenhann* judgments as precedent for this new procedure. The recent case of *Tinashe* considered this new commissioning process. This case will be discussed in detail below.

### **3 *Tinashe v University of Limpopo***

This case revolved around an application by Tinashe, who was a PhD student at the University of Limpopo, demanding the release of her thesis results from the university. The university opposed the application indicating that the student had not exhausted the internal remedies available to her before proceeding to court, and further contended that there were aspects of scholarly dishonesty attendant in her thesis that still needed to be determined (para 4). The University also raised a point *in limine* arguing that the affidavits before the court were not properly commissioned and were thus not compliant with Regulation 3 of the Regulations Governing the Administering of Oath or Affirmation (para 5). Consequently, the University claimed that the entire application should be dismissed.

The facts revealed that Tinashe had signed the affidavits in Zimbabwe, and the affidavits were later commissioned in South Africa via a WhatsApp video call. Tinashe claimed that this practice was sound in law as the signing was in accordance with the exception to the general rule that affidavits must be signed in the presence of a Commissioner of Oaths (para 7).

The court noted that Regulation 3 succinctly provides that the deponent to an affidavit shall sign the declaration in the presence of the Commissioner of Oaths. Monene J was nevertheless alive to the fact that this practice was not always strictly adhered to, and courts did routinely condone substantial compliance with the commissioning requirements (para 11 referring to *S v Munn*). Tinashe relied on the findings in *Knuttel* as authority for the view that substantial compliance with Regulation 3 was condonable in circumstances where physical presence of the deponent with the Commissioner of Oaths was impossible. The question now was whether *Knuttel* created a new precedent allowing anyone who raises a concern about the ability to be physically present during commissioning to nevertheless sign an affidavit while not being in the physical presence of the Commissioner of Oaths. Monene J did not believe that this was the position (para 13).

Monene J held that the *Knuttel* case was decided during extra-ordinary circumstances, namely during the time of a world-wide pandemic, where travel restrictions and social distancing measures were in place. These legal restrictions made the physical presence requirement in the Act and Regulations near impossible. Consequently, such extra-ordinary circumstances allowed for substantial compliance with the commissioning requirements to be condoned. In the current matter, Tinashe contended that due to financial constraints she was unable to travel to South Africa to get the affidavit properly commissioned. Monene J found this not to be extra-ordinary or exceptional to fall within the rationale of *Knuttel* (para 15), as the applicant was still at liberty to attend to any South African embassy in Zimbabwe to get the affidavit properly commissioned (referring to section 8 of the Justices of the Peace and Commissioners of Oaths Act).

The court held that common-place impediments to physical presence which are capable of being addressed one way or another should not be elevated to the exceptionality that was presented by a pandemic, for to do so would open the floodgates in such a manner that the spirit and purport of Regulation 3 would be defeated (para 14). Accordingly, Monene J found that the affidavits were non-compliant and dismissed the application.

#### **4 Conclusion and Recommendations**

All the cases discussed above confirm the position that the Regulations Governing the Administering of Oath or Affirmation are directory and substantial compliance with the provisions are sufficient to validate an affidavit. Accordingly, an affidavit will not automatically be invalid, if a deponent was not in the physical presence of a Commissioner of Oaths during the signing and commissioning process. As shown above, during the Covid-19 pandemic, most parties sought to ensure substantial compliance with the Regulations by signing affidavits in the 'virtual' presence of a Commissioner of Oaths. After the *Knuttel* decision, it was thought that this practice was acceptable, however, the *Tinashe* judgment

made it clear that this was not the case. In *Tinashe*, the Limpopo High Court found that substantial compliance with the Regulations was only allowed during extra-ordinary circumstances, and where it was impossible for the deponent to be in the physical presence of a Commissioner of Oaths. Mere inconvenience was not sufficient to condone a deviation from the Regulations, as it was clear that the 'virtual' presence of the parties was not envisaged in the Act or Regulations. Accordingly, the court in *Tinashe* found that an affidavit not signed in the 'physical' presence of a Commissioner of Oaths is invalid.

In *Breidenhann*, FirstRand Bank argued that there are several provisions in the ECTA that allows for the electronic signing of affidavits, and the use of advanced electronic signatures to cater for the commissioning of affidavits. The court did not dispute this and confirmed that electronic signatures can be used to sign affidavits, in accordance with the ECTA. The challenge, however, is that the Justice of the Peace and Commissioners of Oaths Act still requires that the signing and commissioning process occur in the presence of the Commissioner, and this cannot be done virtually in terms of the current Regulations (see also Singh 2024 *Obiter* 43, 60-62).

It is trite that South Africa's legal system depends significantly on evidence being supplied by affidavits. In practice, almost every court application requires a signed and commissioned affidavit. The traditional signing and commissioning of affidavits is extremely cumbersome, as this process is costly and time consuming (see Singh 2024 *Obiter* 61 and *Quo Vadis* webinar, wherein Singh provides a summary of the traditional signing and commissioning process, *inter alia*, the need for the affidavit to be printed, travel arrangements to be made for signing and commissioning in the presence of the Commissioner of Oaths, and scanning or posting to the attorneys). The virtual commissioning and signing of affidavits could serve as an easier, faster and cost-effective measure to undertake this exercise. In *Breidenhann*, the court held that the essential purpose of the commissioning Regulations is to provide assurance, to a court receiving an affidavit, that the deponent, properly identified as the signatory, has taken the oath. It is submitted that this can be done virtually, and the deponent need not be in the physical presence of a Commissioner of Oaths.

The challenge with the current Regulations is the requirement that affidavits must be commissioned 'in the presence' of a Commissioner of Oaths. It is submitted that this requirement can be fulfilled electronically with the use of a video conferencing system such as WhatsApp, Skype, Microsoft Teams or Zoom. In other words, the signing and commissioning of an affidavit could potentially be done on-line via a video conference whereby the deponent and the Commissioner of Oaths are able to identify each other, and the signing occurs in the 'virtual' presence of one another thereby complying with the Justice of the Peace and Commissioners of Oaths Act and its Regulations (see Otzen and Brouwer "Remote commissioning of affidavits" 2020 *De Rebus* 22,



referring to *Elchin Mammadov and Vugar Dadashov v Jan Stefanus Stander and Three Others* (GP) (unreported case no 100608/15), which provided several steps for the commissioning of an affidavit virtually). The requirement that the signing must occur in the presence of the Commissioner of Oaths is to ensure that the Commissioner is able to identify the signor. It is contended that this identification is achievable virtually, and proof of this can be evidenced by a video recording.

In this regard, it is contended that the Justice of the Peace and Commissioners of Oaths Act and its Regulations should be amended by allowing for the virtual commissioning of affidavits. This can simply be done by adding the words 'physical or virtual' in Regulation 3, amending the provision to read: 'the deponent shall sign the declaration in the *physical or virtual* presence of the Commissioner of Oaths'. It is noted that the Justice of the Peace and Commissioners of Oaths Act is 60 years old, and its relevant Regulations are over half a century old. The Act and the Regulations are in need of being amended to be brought in line with the current digital age and technological developments. These amendments and approach is necessary given the digital era we live in.

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