IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)

Reportable

In the matter between: Case No: 3690/2021

FIRSTRAND BANK LIMITED **Plaintiff**

And

JACQUES LOUIS BRIEDENHANN **Defendant**

Summary: *Default judgment on basis of loan agreement and mortgage bond. Due notice given in terms of s 129(1) of **National Credit Act** – Summons served – no appearance to defend entered.*

*Affidavits filed in support of default judgment application executed in digital form and signed with electronic signatures pursuant to provisions of **Electronic Communications and Transactions Act** (**ECTA**).*

Oath Administered by Commissioner of Oaths by way of video conference with deponent.

Whether Regulation 3(1) of regulations Governing Administration of Oaths and Affirmations to be interpreted to include 'virtual presence'.

Held: *That Regulation 3(1) envisages signature of declaration in physical presence or proximity of commissioner.*

Held*:* *That to interpret Regulations 3(1) to include such 'virtual depositions' would involve court straying into legislature's terrain. Important policy issues arise in relation to innovations to embrace virtual technologies that are properly within sphere of legislature and executive.*

Whether the affidavits substantially comply with directory provisions of Regulation 3(1).

Held*:* *That they do. Circumstances giving rise to non-compliance relevant. Courts will not condone non-compliance where it results from election not to follow requirements.*

Court accepting plaintiff's bona fides. Court's discretion involves considerations of interest of justice.

Held: *That affidavits substantially comply with Regulation 3(1). Judgment entered in favour of plaintiff.*

JUDGMENT

GOOSEN J:

[1] The substantive question of whether to grant judgment by default is not in issue and not the subject of this judgment. Instead, it concerns a question which our recent experience of a global pandemic has thrust to the fore: namely the acceptance of digital or remote commissioning of affidavits for use in court proceedings.

[2] Before turning to that question I must deal briefly with the underlying merits of the application for default judgment. The plaintiff instituted action against the defendant for payment of the sum of R928 138.42 together with interest on that amount and costs. The cause of action is founded upon the conclusion of a written loan agreement on 1 June 2016. The loan was subject to the registration of a mortgage bond over an immovable property being Erf 1009, Charlo, in Nelson Mandela Bay. In terms of the loan agreement and mortgage bond the defendant bound the property as continuing security for the payment of all amounts owing to the plaintiff. The plaintiff complied with its obligations. The defendant, however, in breach of the agreement failed to pay the instalments due to the plaintiff and accordingly fell into arrears.

[3] The plaintiff gave due and proper notice in terms of s 129(1) of the **National Credit Act** (hereinafter '**NCA**')[1]. The defendant failed to respond to the notice and failed to avail himself of the remedies available to him in accordance with the provisions of the **NCA**.

[1] Act No. 34 of 2005.

[4] The summons, which was issued on 2 December 2021, was served upon the defendant at his chosen *domicilium citandi et executandi* address on 14 December 2021. No notice of intention to defend the action was filed and on 4 February 2022, the plaintiff filed an application for judgment in terms of Rule 31(5) with the Registrar of the Court. The request for judgment included, as did the prayers in the particulars of claim, an order authorizing execution against the immovable property.

[5] The Registrar referred the matter to open court. The matter came before me on Tuesday, 5 April 2022. It should be mentioned that the plaintiff sought only an order in relation to the judgment debt. This accords with the practice in this Division, namely that the entry of judgment upon the debt due to the plaintiff is antecedent to proceedings relating to execution against the immovable property as envisaged by Rule 46A of the Rules of Court. It is, in my view, unnecessary to belabour this aspect, or to deal with the practice in other Divisions insofar as such practice differs from that followed in this Court.

[6] At the hearing of the matter I drew to counsel's attention that my only concern related to the fact that the affidavit filed in accordance with Rule 14A of the Eastern Cape Rules had been signed by the deponent utilizing an electronic signature and had been commissioned by way of virtual conference. The papers included an affidavit, also deposed to virtually, which set out averments which sought to establish compliance with the provisions of the **Electronic Communication and Transaction Act**[2] (hereinafter '**ECTA'**).

[7] In light of the provisions of the Regulations Governing the Administration of an Oath or Affirmation[3] (the Regulations) promulgated in terms of the **Justices of the Peace and Commissioners of Oaths Act**[4], I requested counsel to submit argument in relation to the acceptance or recognition by a court of a virtual mode of administration of oath. The matter was postponed, initially to 8 April and, then, at the request of the plaintiff, to 19 April 2022. Following the postponement, the plaintiff filed a further affidavit dealing with the processes employed to assure the

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[2] Act No. 25 of 2002.
[3] GN R1258 of 21 July 1972, amended by GN R1648 of 19 August 1977, by GN R1428 of 11 July 1980 and by GN R774 of 23 April 1982.
[4] Act No. 16 of 1963.

authenticity and reliability of virtually commissioned affidavits. Counsel also filed helpful heads of argument for which I am grateful.

[8] As indicated in the introduction the use of digital technologies and 'remote' or 'virtual' technologies have, in recent years, been thrust to the fore. The outbreak of a global pandemic, which in its early days wrought widespread devastation in health systems around the globe and caused large scale loss of life, resulted in many countries imposing significant restrictions on ordinary social and economic activity. Within a matter of weeks in early 2020 'lockdowns' were imposed. Extensive restrictions were placed on the physical movement of people and on the conduct of usual or normal commercial activity. In reaction to these restrictive measures, widespread adoption of 'remote' technologies, in particular video conferencing via internet based digital platforms, occurred.

[9] Within the legal sector and in court and justice systems, globally, new rules and directives were issued to allow courts to continue to provide access to justice notwithstanding the 'lockdown' of social and commercial interaction. South Africa responded in similar fashion.

[10] As the course of the pandemic has worn on, initial responses were adapted and modified to take account of the progress made in medical interventions to protect against the virus and its many variants. Restrictions on the movement of people and social and commercial gatherings have been eased. Even so, the adoption of innovative technological means by which to conduct social, commercial and economic activities has not been 'undone' by the easing of economic lockdowns. There are strong indications that some of these technologies will continue to be deployed even as lockdown restrictions are finally removed.

[11] It is in this context that the issue in this matter arises. In addition to the affidavit filed in terms of Rule 14A, the deponent, Reddi, has filed a further affidavit. This affidavit concerns the production in evidence of copies of the Mortgage Bond and Loan Agreement as data messages in accordance with s 15(4) of **ECTA**. This affidavit also sets 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.

[12] Reddi states that the plaintiff has, in line with its adoption of digital record keeping systems and the adaptation of its business practices to accord with local and global digitalization trends, also sought to limit the spread of the Covid 19 virus. It has therefore embarked upon a process of having affidavits signed and commissioned electronically. In doing so, it seeks to rely upon the provisions of **ECTA** relating to electronic signatures.

[13] The plaintiff states that it has, in co-operation with LexisNexis (a global legal publishing company), set up a LexisSign digital platform for the purpose of commissioning affidavits. This system is explained in some detail by Mr Gomes, the senior manager of legal recoveries of the plaintiff, in a supplementary affidavit. Mr Gomes says that the LexisSign platform is a 'cloud' based software system used by the plaintiff's legal recoveries department. It operates as follows:

(a) The plaintiff's designated employee (the deponent to an affidavit) logs onto the system using a secure username and password;

(b) The deponent uploads their affidavit in digital form to the LexisSign platform;

(c) The deponent arranges a virtual meeting, using Microsoft Teams, with an appropriate commissioner;

(d) During the virtual meeting the commissioner logs onto the LexisSign platform;

(e) The deponent grants the commissioner access to the digital affidavit;

(f) The deponent then attests to the affidavit by taking the prescribed oath whilst in the virtual presence of the commissioner on Microsoft Teams;

(g) The deponent then appends their electronic signature to the affidavit;

(h) The commissioner in turn attaches their advanced electronic signature as required by s 18(1) of ECTA;

(i) Once both have attached their signatures the digital file is encrypted on the LexisSign platform and stored;

(j) The plaintiff is then able to retrieve the encrypted digital affidavit as a data message.

[14] Mr Gomes points out that, on the present configuration of the platform, it is not possible to initial each page of the affidavit, as practice requires in the Eastern Cape. However, the encryption of the digital affidavit renders it unalterable and secure. This provides assurance that the multiple pages of the affidavit are not susceptible to alteration once the affidavit has been signed.

The Regulations

[15] Regulations 1 and 2 of the Regulations Governing the Administration of an Oath set out the nature of the oath or affirmation to be taken and the form in which it is administered. Regulations 3 and 4 provide, respectively, as follows:

"3(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.

4(1) Below the deponent's signature or mark the commissioner of oath 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.

(2) The commissioner of oaths shall –

(a) sign the declaration and print his full name and business address below his signature; and

(b) state his designation and area for which he holds his appointment or the office held by him if he holds his appointment ex officio." (emphasis added)

[16] The regulations have been promulgated in terms of s10 of the **Justices of the Peace and Commissioners of Oaths Act**[5]. Section 10(1)(b) confers upon the Minister of Justice the power to make regulations,

"(b) prescribing the form and manner in which an oath or affirmation shall be administered and a solemn or attested declaration shall be taken, when not prescribed by any other law;

[17] Section 5 of the Act confers upon the Minister of Justice or officer delegated thereto the power to appoint 'any person as a commissioner of oaths for any area fixed by the Minister or delegated officer'. Section 7 deals with the powers of commissioners of oaths. It states 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 . . ."

[18] The proviso to this latter provision prohibits the commissioner from administering an oath or affirmation in relation to matters circumscribed by regulation or if the person is unwilling to make the oath or affirmation.[6]

[5] Act No. 16 of 1963.

[6] The Regulations preclude a commissioner from taking a declaration in relation to subject matter in which he has an interest.

[19] Section 8 deals with the administration of oaths or affirmations outside of the borders of the Republic. Section 8(1)(a) and (b) provide for the appointment of holders of any office in a country outside the Republic as commissioners of oaths at the place where they hold office. Subsection (2) requires the authentication of the affidavit or declaration by attaching the seal of the office and that such commissioners exercise the powers of commissioners at such place. In terms of ss 8(3),

> "Any affidavit, affirmation or solemn or attested declaration purporting to have been made before a person referred to in subsection (1) and to be authenticated in accordance with the provisions of subsection (2), may on its mere production, be admitted in evidence in any court or received in any public office."

Subsection (4) provides that any affidavit 'made before a person' as described shall be as effectual as if made in the Republic.

[20] These provisions 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.

'In the presence of'

[21] The *New Shorter Oxford Dictionary* provides multiple contextual meanings for the word 'presence'. Its meaning is given as, 'the fact or condition of being present; the state of being with or in the same place as a person or thing; attendance, association.' It is also given as 'the place or space around or in front of a person.' The phrase 'in the presence of' suggests 'in the company of, observed by.'

[22] In ***Gulyas v Minister of Law and Order***[7] the court considered the meaning of the phrase 'in the presence of' in the context of s 40(1)(b) of the ***Criminal Procedure Act***[8]. That section deals with the authority of a peace officer to execute an arrest, without a warrant, where the offence is committed in his presence. The court accepted that the ordinary dictionary meanings of the phrase indicate that 'in the presence of' a policeman means within eyeshot of that policeman or in his immediate vicinity or proximity.[9]

[23] The court, however, held that in the context of that section and having regard to its purpose, 'presence' means immediate proximity. The court said[10]:

> "I am not at all convinced that, as a matter of language, 'in his presence' covers the use of 'bugging devices, telescopes, and other aids to perception', for 'presence' in its ordinary meaning excludes the notion of long range perception. A detective who only hears, by means of a listening device, two persons apparently committing the offence of illicit diamond buying does not see them do this and cannot be sure who is involved. A policeman who, by means of binoculars, observes a murder across a ravine, too far away to do anything about it there and then, cannot say that it was committed in his presence even though it happened within eyeshot.
> 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."

[24] The interpretation adopted in the ***Gulyas*** matter is one that is pertinent to the context: namely the basis upon which an arrest without a warrant would be lawful. Different considerations might apply in relation to the administration of an oath. As

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[7] 1986 (3) SA 934 (C); [1986] 3 All SA 357 (C).
[8] Act No. 51 of 1977.
[9] Gulyas v Minister of Law and Order 1986 (3) SA 934 (C) at 940D.
[10] Gulyas p 958I-959B.

stated by Wallis JA in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[11]:

> ".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 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."

[25] The language of Regulation 3(1) when read in the context of the Regulations as a whole, suggests 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 an oath is concerned, as appears from the Act. Regulations 2, 3 and 4 must be read as a whole since they provide for the manner in which an oath or affirmation is administered. The process follows a logical sequence which requires the

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[11] 2012 (4) SA 593 (SCA) at 603F-604D.

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. These latter steps are to occur in the presence of the commissioner. It is apparent that the entire process is envisaged to occur in the presence of the commissioner. 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. The signature of the declaration in the presence of the commissioner establishes a guarantee that the consequences of oath taking are understood and accepted.[12]

[26] It was argued, however, that 'presence' although ordinarily meaning proximity, may nevertheless be achieved by sight and sound. 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, could, for purposes of the Regulations, achieve all of the purposes that physical proximity achieves. On this basis, the 'virtual' presence achieved by the technology falls with the ambit of the meaning of the phrase.

[27] For reasons that follow, I do not agree. The starting point, it must be emphasized, is an exercise in interpretation. This requires that meaning be assigned to the phrase on the basis of the language used, of what was intended and what the purpose was of the provision.

[28] There can be little doubt that our conception of what it means to be in the company of others or to enjoy the presence of others is undergoing dramatic changes brought about by technological innovation. This has been accelerated by the experience of a global pandemic. There can also be no doubt that the adoption of technologies such as digitalized documents, internet based communications, 'cloud' computing and video streaming has already done a great deal to transform and improve justice systems. No doubt this will continue. But the cautionary note sounded by Wallis JA, as regards the process of interpretation, bears repetition:

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[12] See S v Munn 1973 (3) SA 734 (N) at 737E.

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"Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To so do in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; . . ."

[29] In my view, 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.

<u>The provisions of ECTA</u>

[30] Before turning to the question of the directory nature of the Regulations and the question of substantial compliance, it is necessary to digress briefly to the provisions of **ECTA**.

[31] The plaintiff placed great reliance upon the provisions of **ECTA** and compliance with its terms. Chapter III of **ECTA** provides a framework for facilitating electronic transactions. The Chapter provides, *inter alia*, legal recognition to 'data messages' and electronic signatures. The relevant portions of s 13 of **ECTA** provide that:

"(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(3) . . .

(4) Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved."

[32] Section 18, which is also relevant to the present matter provides in subsection (1), that:

> "Where a law requires a signature, statement or document to be notarized, acknowledged, verified or made under oath, that requirement is met if the advanced electronic signature of the person authorized to perform those acts is attached to, incorporated in or logically associated with the electronic signature or data message."

[33] The observation may be made that **ECTA** provides a comprehensive framework for a digital based economy. That, indeed, was one of the objects sought to be achieved by facilitating e-commerce, electronic government services and the like. The legal recognition of electronic signatures and the provisions for the reception in evidence of data messages extracted from computer storage systems, is central to this purpose of **ECTA**.

[34] In relation to the matter presently before this court, it may be observed that there exists no legal impediment to the type of 'digital affidavit' to which Mr Gomes referred. Nor, it seems to me, can there be any difficulty with the employment of electronic signatures for the signature of such a digital affidavit. Section 18(1) specifically envisages the attachment of an advanced electronic signature[13] by a commissioner of oaths to a document required to be made under oath. The production of a digital affidavit which has been signed electronically, to be used in court proceedings may be adduced in accordance with s 15(1) read with s 15(4). There is therefore no reason why digital affidavits cannot be employed, subject to deposition as provided by Regulation 3(1).

[35] However, in relation to the central issue at stake, the provisions of **ECTA** do not assist. The question is not whether electronic signatures may be used or even whether an affidavit may be in digital form. **ECTA** provides as much. The question is solely whether, for purposes of Regulation 3(1), a video or virtual link may be employed. As I have already indicated, I do not consider that the Regulation may be so interpreted.

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[13] An advanced electronic signature is one which is assigned to a person in accordance with a system of accreditation referred to in s 37 of **ECTA**. As indicated by Mr Gomes it is a signature uniquely assigned to the accredited person and its use carries with it a presumption of authenticity.

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Substantial compliance with Regulation 3(1)

[36] In ***S v Munn***[14] it was held:

> "In my view, both the 1961 and 1972 regulations are directory only and the reasoning in cases such as *Ex parte Vaughan*, 1937 C.P.D. 279; *Mtembu v. R.,* 1940 N.P.D. 7; and *R. v. Sopete*, 1950 (3) S.A. 769 (E), irrefutable. These deal with the directive that the commissioner is to certify in the *jurat* that the deponent "knows and understand" the contents of the relevant document. But they are in my view equally applicable to the question of signature by the deponent."

[37] The case involved a charge of statutory perjury brought against a deponent to an affidavit. At the trial, the defence contended that the affidavit was invalidated because the deponent had signed the declaration before the oath was administered. He was acquitted and the matter was taken on appeal by the Attorney-General. The central question was whether signature before taking the oath *ipso facto* invalidates the affidavit.

[38] The court reasoned as follows[15]:

> "A study of the history and purpose of the administration of the oath leads to the view that the purpose of obtaining the deponent's signature to an affidavit is twofold: to add to the dignity or impressiveness of the occasion (cf. *Wigmore,* vol. VI, sec. 1819, pp 296-7) but primarily to obtain irrefutable evidence that the relevant deposition was indeed sworn to. The former aim would be frustrated were the signatory to sign an unsworn statement; and for the latter purpose the signature is valueless to prove that the deponent swore to the affidavit if admittedly signed before the oath was taken. <u>But if uncontradicted evidence were to be adduced that he was indeed aware of the solemnity of the occasion and voluntarily took the oath as to the veracity of the</u>

[14] 1973 (3) SA 734 (NC).
[15] At 737F-H.

contents of the document, it would in my view be to place form before substance to allege that the document produced is nevertheless invalid. Compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith, subject only to defences such as duress and possibly undue influence. 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 legislator as outline above." (emphasis added)

[39] The question of substantial compliance is a matter of fact.[16] ***Munn*** was decided on appeal. The matter was referred back to the trial court to determine, as a matter of fact, whether there had been substantial compliance with the regulations.

[40] ***R v Sopete***[17], referred to by the court in ***Munn***, dealt with a situation where the deponent had signed the declaration prior to the oath being administered and not in the presence of the commissioner. The Regulations which then applied made provision for the deponent to again sign the declaration after the oath had been administered. This latter signature was not appended. It was, however, not in issue that the oath was administered to the deponent in the presence of the commissioner. The court said the following about the directory nature of the regulations:

"But to say that the provisions are directory does not mean that all the rules are treated as 'wasted paper', for they are by the decisions already quoted treated as of great value and failure to comply with them gives the Court a discretion to treat the affidavit as of no value in proper cases."

[41] The case of ***R v Mtembu***[18] (also cited in ***Munn***) was one in which the commissioner had not appended his certificate affirming that the deponent knew and understood the oath. The issue arose in the context of a criminal trial for perjury. Evidence was, however, presented at the trial by the commissioner that he had

[16] S v Munn p 738A.
[17] 1950 (3) SA 769 (E) at 774F-G.
[18] 1940 NPD 7.

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explained to the deponent the nature of the oath. On appeal, it was affirmed that the regulations are directory and that substantial compliance was established.

[42] An examination of the law reports indicates that substantial compliance has been found to be established in circumstances where the failure to comply related to form; to the manner in which the oath was administered or the sequence of events; or to omissions by either the deponent or the commissioner[19]. Thus in ***Ladybrand Hotels (Pty) Ltd v Stellenbosch Farmers' Winery Ltd***[20] it was held that the Regulations did not require that a commissioner should in terms certify that the declaration was signed in their presence. The court went on to say that even if that were required it was apparent from the declaration and what was certified that it was signed in their presence and accordingly that the affidavit substantially complied.

[43] In ***Dawood v Mahomed***[21] the commissioner had, instead of furnishing a business address as required by Regulation 4(2), appended a private bag number. The court said the following[22]:

> "In deciding whether the non-compliance is of such a nature that the Court should refuse to entertain the affidavit it is clearly relevant to have regard to the nature and purpose of the requirement with which there has been failure to comply. In the present case it seems to me that the reason for the requirement that the commissioner should furnish his business address is to facilitate the task of anyone who might thereafter wish to locate him for any purpose connected with the affidavit and its execution. In the present case the information supplied is sufficient to enable anyone of ordinary intelligence to deduce that the business address of the commissioner of oaths is the offices of the rent board at Durban and the non-compliance is in my view of so trifling a nature that there would be no justification for excluding the affidavit purely on this ground."

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[19] See Nkondo v Minister of Police and Another 1980 (2) SA 362 (O); Cape Sheet Metal Works (Pty) Ltd v J J Calitz Builder (Pty) Ltd 1981 (1) SA 697 (O).
[20] 1974 (1) SA 490 (O).
[21] 1979 (2) SA 361 (D).
[22] Dawood v Mahomed (*supra*) at 367F-F.

[44] Similar reasoning in regard to 'formal defects' is to be found in ***Standard Bank of South Africa Ltd and Another v Malefane and Another***[23], where the defect related to reference to the incorrect Government Notice referencing the Regulations.

[45] This brings me to the judgment in ***Knuttel N.O and Others v Bhana and Others***[24]. As far as I am aware, this is the only instance where a court in this country has admitted an affidavit deposed by way of a virtual video link. The underlying dispute in the ***Knuttel*** matter is not germane, save in one respect to which I will refer hereunder. The question regarding compliance with Regulation 3(1) arose as an ancillary, *in limine* issue, in the context of what amounted to an application for eviction. The deponent to the founding affidavit was, at the time that it was attested, infected with the Covid 19 virus. A copy of the affidavit was emailed to her and she signed it. It was emailed back to the attorney. The attorney attended in person before a commissioner of oaths. The commissioner made a video call to the deponent, confirmed her identity and then administered the oath. The commissioner appended his signature to the declaration. The attorney deposed to an affidavit setting out these facts.

[46] The court in ***Knuttel*** accepted that the Regulations are directory rather than peremptory. It considered that the purpose of the declaration by the commissioner is to provide assurance that the deponent has indeed taken the oath, knows and understands its effect and is the person who signed the declaration. All of these purposes, it held, were met by the steps taken by the attorney. Accordingly, the affidavit substantially complied with the Regulations.

[47] It is, in my view, important to note that the finding by the court in ***Knuttel*** was, essentially, *obiter*. The court specifically found that the challenge to the founding affidavit was moot and served no practical effect, since the averments set out therein were before the court in another affidavit which had been properly deposed. A further point to note is that the question of substantial compliance with the Regulations

[23] 2007 (4) SA 461 (TK) at 465A-D.
[24] Unreported case, 38683/2020, Gauteng Division, Johannesburg, 27 August 2021.

arose because it was not possible for the deponent to comply with the regulations. That is not the situation in the present matter.

[48] The authorities referred to earlier make it plain that the Regulations, save where couched in negative terms[25], 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 compliance with the regulations. That determination is one of fact having regard to the circumstances of the case.

[49] This brings me to the particular circumstances of this matter and whether I should exercise my discretion to admit the affidavits deposed to virtually. In addressing this, two factors must be highlighted. The first bears upon what may be termed rule of law considerations. The second, upon the function of courts in dealing with novelty and innovation that falls outside of the ambit of an existing regulatory framework.

[50] 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. It is entirely free to do so. From what has been disclosed there are no doubt very significant advantages to so doing. As I understand it, the LexisSign system, it seems to me, offers considerable security and other advantages. It may be that many of the inherent risks associated with fraudulent document attestation in the ordinary manner and which the Regulations seek to address, will be overcome by use of technological innovation such as that employed in this case.

[51] 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

[25] See Regulations 6 and 7 cf Radue Weir Holding Ltd t/a weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers 1998 (3) SA 677 (E).

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.

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

[53] I accept that the plaintiff was here motivated by a desire to support broader efforts at digitalisation and in the interests of combatting the spread of the Covid 19 virus. I accept that it has acted entirely *bona fide*. However, where, as in the present situation, legislative action would be required to recognise and legitimize the use of technologies such as those proposed by the plaintiff, it is to the legislature or to the Minister of Justice in this case, that persuasion should be directed.

[54] This touches upon the second aspect, namely the function of the courts in dealing with such innovations. I have already adverted to the risk, at interpretation stage, of straying into the realm of the legislature. It is not the function of the courts to legislate. That power lies with the legislator and, in the case of these Regulations, with the relevant Minister in the Executive. Where the courts exercise authority to regulate their own procedures in the interests of justice and where they have rule-making powers, novel or innovative adaptations can be made. The use of video-based hearings to conduct proceedings during the National State of Disaster is a case in point. So too the many Court Practice Directives issued to similar effect or those that relate (in the Gauteng Division) to the use of CaseLines, a digital

document and evidence management platform. But the Regulations are not subject to such court-based rule making powers.

[55] I have no doubt that, in the present case, regulations can be framed to bring them in line with the broader objects of **ECTA** and to facilitate the use of technologies such as LexisSign. Such legislative exercise will no doubt then be able to address a range of policy questions which are relevant to this issue. This would include issues of territoriality in the exercise of the powers of commissioners of oaths and matters regulated by Rule 63 of the Rules of Court, which deals with the attestation of documents in a foreign country. This 'territorial' question is plainly one that arises where administration of oaths or attestation occurs virtually. It would also allow important questions of access to digital attestation services to be addressed and for guidance to be drawn from comparable development in other jurisdictions. These are matters well beyond the province of a court and are best left to the legislature.

[56] 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[26].

[57] 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

[26] Cf Dawood v Mahomed (*supra*) at 365A.

described in this judgment as complying in substance with the provisions of the Regulations.

[58] I therefore make the following order:

1. The affidavits filed by the plaintiff in support of its claim for judgment by default are admitted on the basis that they substantially comply with the provisions of the Regulations.
2. The defendant is ordered to pay to the plaintiff the sum of R928 138.42;
3. The defendant is ordered to pay interest on the said amount of R928 138.42, calculated daily and compounded monthly, at a variable rate, being the plaintiff's Homeloan Mortgage base rate varied by the plaintiff from time to time, which variable interest rate was the rate of 6.85% nominal per annum, with effect from 25 October 2021 to date of final payment, both days inclusive;
4. The defendant is ordered to pay the plaintiff's costs of suit, to be taxed as between attorney and client.

G.G. GOOSEN
JUDGE OF THE HIGH COURT

***Appearance*:**

Obo the Plaintiff	:	*Adv A. White*
Instructed by	:	*Minde Schapiro & Smith Inc*
Heard	:	*19 April 2022*

Delivered : 5 May 2022