Virtual Commissioning of Affidavits

The saying, “The wheels of justice may turn slow, but they will turn,” is typically used to describe the lengthy process in civil and criminal courts ensuring justice for someone. However, the saying can also be applied to our law, which adapts rather slowly to changing economies, moral and legal views of society, and new technology. It can also be said that the legislature in South Africa is rather slow to adapt to changing technology.

In the case of *LexisNexis South Africa v Minister of Justice [2024] ZAGPPHC 446,* the High Court of South Africa Gauteng Division, Pretoria, had the opportunity to adapt our law to accommodate the virtual commissioning of affidavits. Judge Swanepoel, however, refused to do this.

LexisNexis South Africa, which is linked to a global publishing company, brought the application most likely due to the marketing exposure it held for the company. It asked the court to order that Regulation 3 of the *Regulations Governing the Administering of an Oath or Affirmation, published under Government GN 1258 in GG 3619* dated 21 July 1972, can be interpreted to allow for virtual commissioning.

Regulation 3 requires the deponent to sign or, if he cannot write, affix his mark “in the presence of the commissioner of oaths”. Many of you have signed affidavits at a police station or in the presence of a lawyer. The court had to decide whether “in the presence” means “in the physical presence of a commissioner of oaths”, or whether the requirement can be met if the affidavit is signed whilst the deponent and the commissioner of oaths can see and hear each other via “live electronic communication, consisting of simultaneous audio-and-visual components” – for example, via Zoom, Teams or a WhatsApp video call.

LexisNexis argued that the purpose of the Regulation is for the commissioner of oaths to:

1. view the deponent’s identity document to verify his or her identity,
2. ensure that the deponent understands the contents of the declaration (the Regulation prescribes three questions the commissioner of oaths should

ask the deponent, which in my experience, does not happen at police stations), and
3. ensure that the deponent applies his or her signature or mark to the document.

LexisNexis tried to convince the Court that these requirements could substantially be fulfilled with the virtual commissioning of an affidavit as the purpose of the Regulation will still be fulfilled.

They referred to two cases where the courts had found substantial compliance with the Regulations via virtual commissioning. In *Knuttel N.O. and Others v Bhana and Others [2022] 2 ALL SA 201 (GJ)*, the Court condoned such commissioning as the deponent had contracted the COVID-19 virus. In *ED Food S.R.L v Africa's Best (Pty) Ltd (2022/1245) ZAGPJHC 1619 (14 March 2024)*, the deponent was in Italy and the commissioner of oaths in South Africa. The Court accepted the affidavit.

However, the Court in the *LexisNexis case* found that the two cases can be distinguished from the decision it had to make. The Applicant requested the Court to order that Regulation 3, in general, thus for any commissioning of an affidavit irrespective of the circumstances, covers the virtual commissioning of affidavits.

The Court was not prepared to do this, stating that:

1. "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". This was emphasised in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] (4) SA 593 (SCA);* and

2. the Court should not "under the guise of a general discretion or in the interest of justice, circumvent the authority of the legislature by condoning non-compliance with laws or regulations simply because the said law or regulation may be considered archaic or outdated."

In other words, the Court held that the legislature could not have thought of virtual commissioning when it first created the Regulations many years ago. It is up to the legislature or the Minister of Justice to change the Regulations to cater for virtual commissioning.

Hopefully, the matter will go on appeal with a different outcome, or the legislator will take the necessary steps to adjust our law to changing technology and practices.

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