

VIRTUAL COMMISSIONING IN SOUTH AFRICA

Category: Commercial Law, Privacy Law, Infosec, and POPIA, Technology Law
written by Sadia Rizvi | March 7, 2022



In South Africa, commissioners of oaths are regulated by the Justices of The Peace and Commissioners of Oaths Act ("**the Act**").^[1] In terms of the Act, and under normal circumstances, Commissioners of Oaths are required to verify the identity of the person making the sworn statement, they have to ensure that the documents annexed to the affidavit or statement are true copies, and the deponent or the person signing the statement is lead in the oath or affirmation. The deponent and the commissioner will then initial every page and the deponent must sign the document in the presence of the commissioner. The commissioner then appends his certification and stamp at the end of the affidavit. The emergence of virtual commissioning has led to South African courts relaxing the rules relating to the commissioning of affidavits required by the Act.

Recently, the Gauteng High Court^[2] had to decide whether the rules relating to the commissioning of affidavits could be relaxed. The Regulations of the Act prescribe how an oath should be administered. Regulation 3(1) states that:

The deponent shall sign the declaration in the presence of the commissioner of oaths.

The applicant in the matter was, at the time of the commissioning of the affidavit, infected with COVID-19. It was impossible for the applicant to sign the affidavit in the physical presence of the commissioner of oaths. In order to ensure substantial compliance with the Act and the Regulations, the applicant deposed to the affidavit via a WhatsApp video call. In making a decision on whether there was substantial compliance with the requirements of the Act and the Regulations, the court referred to the case of *S v Munn*,^[3] which held that the requirement of a person to person presence in

between a commissioner and a deponent is not peremptory, and can be relaxed upon proof on the facts of substantial compliance with the requirement.

The court further referred to a 2017 judgement^[4] where Judge Satchwell allowed the use of video link to lead evidence from witnesses located abroad. In this instance, the Judge administered the oath virtually before they led evidence. Relying on these judgements, the court in the Bhana case found that there was substantial compliance with Regulation 3(1) and accordingly accepted the affidavit as evidence. Furthermore, and in a similar case,^[5] Justice Lenyai accepted the founding affidavit of an applicant who was sick with COVID-19 and could not physically depose to the affidavit in the presence of a commissioner of oaths. Again, in this case, the applicant proved that there was substantial compliance with the Act and the Regulations.

In applying these decisions to a situation where your client cannot physically depose to an affidavit, it is important to note that “substantial compliance” is required. This means that the commissioner of oaths is still required to verify the identity of the deponent, and the oath must still be administered to the deponent. It will strengthen a deponent’s case if the oath can be administered via a video call and if the video call is recorded. Furthermore, it is advisable that a legal practitioner overseeing the process should depose to a separate affidavit himself giving a detailed explanation of the steps to ensure substantial compliance with the requirements of the Act and the Regulations. In addition, the deponent may also attach a positive COVID-19 test result to his affidavit. The Law Society of Ontario has developed some [guidelines](#) which can be used as best practice for virtual commissioning.

The COVID-19 pandemic has clearly shown a need for further changes to our laws such as the Justices of The Peace and Commissioners of Oaths Act to allow for virtual commissioning. The Act has not been amended since 1999, even though we have legislation such as the Electronic Communications and Transactions Act which recognises advanced electronic signatures and the admissibility of electronic communications as evidence. The use of technology can easily provide assistance in situations where a deponent is COVID-19 positive. It is important to also bear in mind that with the use of technology, there are associated risks such as fraud. Therefore, additional steps must be taken to verify the authenticity of the legal documents.

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