

# Affidavits executed abroad for use in South Africa

OH Dean\*

Jones and Buckle, *The Civil Practice of the Magistrates' Courts in South Africa, Sixth Edition*, at page 619, describe an affidavit as follows: "An affidavit is a statement in writing sworn to before someone who has authority to administer an oath; it is a solemn assurance of fact known to the person who states it, and sworn to as his statement before some person in authority 'such as a judge . . . magistrate . . . justice of the peace . . . commissioner of oaths'. The persons who can lawfully administer an oath today are set out in Act 16 of 1914." (My underlining). (Act 16 of 1914 has been superseded by the Justices of the Peace and Commissioners of Oaths Act 16 of 1963).

An affidavit should be distinguished from an authenticated document. When a signature on a document is verified as being the signature of the person whose signature it purports to be, then that document is an authenticated document. Such authentication does no more than verify the signature, and the fact that the signature has been verified does not mean that the signatory has given any solemn assurances regarding the contents of the document that he has signed. Unlike an affidavit, an authenticated document cannot, on its mere production, be admitted as evidence in any court.

Sections 5 and 6 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (hereafter referred to as "the Act") regulate the appointment of commissioners of oaths in South Africa. In terms of Section 5, the Minister of Justice may appoint any person as a commissioner of oaths, and in terms of section 6 he may "designate the holder of any office as a commissioner of oaths" by notice in the Government Gazette. Only persons appointed in this way are commissioners of oaths. No person has the inherent status of a commissioner of oaths.

Section 8(1)(a) of the Act empowers the Minister of Justice 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 7 upon a commissioner of oaths". Section 8(1)(b) confers the same powers on a person appointed as a commissioner of the Supreme Court of South Africa. It should be noted that section 8(1)(a) is extremely broadly framed and makes provision for the designation of "the holder of any office in any country". Attention is also drawn to the fact that the persons concerned are not designated commissioners of oaths, as in section 6 of the Act, but are granted the powers of a commissioner of oaths. It is submitted that this distinction is made with a view to enabling the Minister to designate holders of offices in foreign countries which are regulated by the laws of those countries, for example a foreign notary public, as having the powers of a South African commissioner of oaths. It would be inappropriate for the South African Government to appoint a foreign notary as a commissioner of oaths for South Africa, but no such objection lies against giving official recognition in South Africa to acts performed by a foreign notary in the course of his duties in his own country. If it had been the intention of the legislature that only South African officials should be appointed in terms of this provision, it is submitted that there would have been no cause for the wording to differ from that of section 6 of the Act.

## Offices designated

To date the only offices designated by the Minister of Justice in terms of the powers conferred on him by section 8 are the following:

"Head of a South African diplomatic or

\*B.A., LL.B.



consular mission; any office in the Administrative or the Professional Division of the Public Service provided that the holder of such office is an officer as defined in section 1 of the Public Service Act, 1957 (Act No. 54 of 1957); Third Secretary or Vice-Consul in a South African diplomatic or consular mission; any office, the holder of which is an officer of the Permanent Force of the South African Defence Force; South African Honorary Consul-General, Honorary Consul, Honorary Vice-Consul or Honorary Trade Commissioner; leader or deputy-leader of the South African National Antarctic Expedition; leader or deputy-leader of the South African weather station on Gough Island; controlling officer in an office of the South African Railways; Attaché Technical Services; Senior Administration Officer of Technical Services Division of South African Embassy, Paris, France". (Notice R1717 of September 29, 1972).

On a strict interpretation of the Act, no persons other than the holders of the offices mentioned above have the powers of a commissioner of oaths for South Africa in foreign countries, since only persons designated in terms of the Act have such powers. Seeing that the legislature has made provision for the holder of any office in any country to be granted the powers of a commissioner of oaths, it must be assumed that the holders of offices other than those designated in terms of this provision do not have such powers. It would follow, therefore, that an affidavit for use in South Africa can only be attested by the holders of the offices specified in Government Notice R1717, and a statement purporting to be an affidavit which is attested by a foreign notary or other person should not be regarded as an affidavit in South Africa.

The Act repealed the Justices of the Peace and Commissioners of Oaths Act, 16 of 1914 as amended. Section 8 bis of this Act, as inserted by section 3 of Act 14 of 1939, dealt with "powers as to oaths abroad". Section 8 bis (1)(a) reads as follows:

"Every person appointed by the Government of the Union to hold or act in any of the following offices may, during his tenure thereof, or while acting therein within the country in which or at the place in which he exercises the functions of the office, administer any oath or affi-

davit or take a solemn or attested declaration, viz. High Commissioner . . . " (followed by a list of various South African Government officials).

The effect of this Act and regulations promulgated under it on affidavits executed abroad was discussed in the case of *McLeod v Gesade Holdings (Pty) Limited* 1958 (3) SA 672 (W). The Court held in that case that it could accept affidavits signed before a Canadian notary in accordance with the law of that country. Ramsbottom, J. says the following at page 675 in support of this decision:

" . . . there is nothing in the Oaths Act or in the Regulations which affects the validity of an affidavit made in accordance with the laws of a foreign country . . . The Regulations are directions to Commissioners of Oaths in the Union; they are not necessarily confined to Commissioners of Oaths, as they may also apply to Justices of the Peace who administer oaths and also to Notaries Public . . . But there is nothing to indicate that it was intended that those rules should affect the validity of an affidavit duly made in accordance with the laws of another country".

In order to establish whether this decision is effective under the present Act, it is necessary to compare the corresponding sections of the present Act and the repealed Act which deal with the question of affidavits signed abroad. Such a comparison discloses a significant difference. The 1916 Act provides that "every person appointed by the Government of the Union to hold or act in any of the following offices may . . . administer any oaths or affidavits . . .". A list of various South African Government officials then follows. The 1963 Act, on the other hand, as previously stated, makes provision for the Minister to confer powers of a commissioner of oaths on "the holder of any office in any country". It will be obvious that section 8 bis of the 1916 Act in no way provides for the appointment of a holder of a foreign office as a person who may administer an oath, etc. The scope of the section is confined to South African Government officials only. The section is, accordingly, open to the interpretation that the legislature did not intend it to be exhaustive as to the persons who could attest affidavits for use in South Africa, but merely wished to confer this power on the persons specified. Since section 8



of the 1963 Act, however, enables the Minister of Justice to confer the powers of a commissioner of oaths on the holder of any office, foreign or South African, which he considers desirable, it must be assumed that persons not so appointed are not intended to have such powers. It is, accordingly, submitted that the Court's decision in *McLeod v Gesade Holdings* is not applicable to the 1963 Act. (It should be noted that the question relevant to the present discussion which was at issue in this case was whether an affidavit attested by a foreign notary was unacceptable on account of the fact that it did not comply with the formalities laid down in the regulations prescribed for South African commissioners of oaths, and not whether the person who attested the affidavit could be considered as a commissioner of oaths for South Africa).

Reverting for a moment to the question of the scope of section 8 of the 1963 Act, it is interesting to note that, unlike section 8 bis of the 1916 Act, this section does not contain the words "appointed by the Government of the Union". The omission of these words supports the contention that the legislature intended that the Minister of Justice could confer the powers of a commissioner of oaths on foreign officials. A possible reason for this change is the fact that South Africa was no longer a member of the British Commonwealth in 1963, and the same reliance could consequently no longer be placed on the assistance of British Consular services as in the past.

In practice statements under oath signed in foreign countries before notaries and the holders of various other offices are accepted as affidavits by our Courts, provided they are authenticated in accordance with rule 63 of the Supreme Court rules. This rule appears to envisage "affidavits" other than those executed before the holders of offices prescribed by section 8 of the Act. Presumably such an "affidavit" must be executed in such a way and before such a person that it would be considered as an affidavit in the country in which it was executed. Ramsbottom, J. says in the above-mentioned case that "there is nothing in the Oaths Act or in the regulations which affects the validity of an affidavit *made in accordance with the law of another country*". (My underlining).

### Authentication of documents

Rule 63 of the Supreme Court rules provides that any document executed in a foreign country for use in South Africa should be authenticated by, inter alia, various members of the South African civil service serving abroad, or honorary South African consuls, vice-consuls and trade commissioners. The procedure to be followed when authenticating documents at South African diplomatic, consular and trade offices in foreign countries, is prescribed in directives issued by the Department of Foreign Affairs. These directives, in substance, give effect to the provisions of rule 63(2) of the Supreme Court rules. Basically, provision is made for three different procedures. Firstly, a person who wishes to have his signature on a document authenticated can sign the document before the South African official concerned. Secondly, the signatory can sign the document before a person who is empowered to authenticate documents under the local law and the signature of this person can in turn be authenticated by an official of the Ministry of Foreign Affairs, either with or without intermediate verifications, depending on the circumstances. On the strength of the preceding verifications the appropriate South African official can authenticate the document. Thirdly, a notary or any other person empowered to authenticate documents under the local law can place his signature on record at the South African office, after having had it duly authenticated by the Ministry of Foreign Affairs, and thereafter a document authenticated by that notary or person can in turn be authenticated by an appropriate South African official. In the second and third procedures, the Department of Foreign Affairs' directives make provision for the South African official to state that the notary or other person is duly authorised to *authenticate* documents under the law of the country concerned. (See Rule 63(2)(c) of the Supreme Court rules). The directives go no further than this and no provision is made for a South African official to state that a notary or any other person is authorised to attest affidavits or carry out any other function of a commissioner of oaths. Consequently, when a South African official is called upon to authenticate a document which purports to be an affidavit, he can only state that the person



before whom it was signed is authorised to *authenticate* that document. This means that a South African Court will have no conclusive proof that the document concerned is an affidavit and not merely an authenticated document. As pointed out above, there is a considerable difference between the two types of documents.

In most countries notaries are empowered to attest affidavits and a South African court can consequently be reasonably sure that an affidavit signed before a notary would be considered as such in the country concerned. However, what would be our courts' attitude to a document purporting to be an affidavit, which is signed before an official of a municipality in a foreign country and authenticated by an appropriate South African official, who certifies that the Municipal official is competent to authenticate documents under the local law? Would a document such as this be considered as an affidavit in the country concerned, and does it accordingly qualify as an affidavit in this country? It is possible that a municipal official in a particular country is empowered to attest affidavits as well as authenticate documents, but on the other hand it is also possible that he does not have the first-mentioned authority. The certificate of the South African official will, therefore, have no value in determining whether the document is an affidavit or not.

### Proposals

It is submitted that the present position in our law regarding affidavits executed abroad is unsatisfactory. The offices which up to the present date have been designated in terms of section 8 of the Act as offices, the holders of which have the powers of a commissioner of oaths, are all offices which are held by South African Government officials. Such officials are only likely to be present at offices maintained in foreign countries by the South African Government, i.e. embassies, consulates, trade commissions, etc. In view of the fact that the South African Government only has such offices in relatively few countries and often in only one city in each such coun-

try, it is reasonable that other persons should have the powers of a commissioner of oaths for South Africa. Owing to the special nature of an affidavit, it goes without saying that any such person should hold an office in his own country which confers powers on him which are the equivalent of the powers of our commissioner of oaths. The office of notary public is such an office and it is accordingly submitted that the Minister of Justice should in terms of section 8(1)(a) of the Act designate the office of notary public as an office, the holder of which will have the powers conferred on a commissioner of oaths. As stated above the relevant provisions of the Act are wide enough to enable the Minister to make such an enactment. This approach would remove any doubts regarding the validity of affidavits attested by foreign notaries. Should the Minister of Justice not be prepared to confer the powers of a commissioner of oaths on foreign notaries in this way, the various officials who in terms of rule 63 of the Supreme Court rules are empowered to authenticate documents executed abroad for use in South Africa ought to be authorised and directed to certify, where appropriate, that persons attesting documents purporting to be affidavits are empowered to attest affidavits under the law of the country concerned. The legislature deems it necessary to state in rule 63(2)(d) of the Supreme court rules that, where a document is authenticated by a foreign notary, or other person, a certificate confirming that such notary is competent to authenticate the document concerned under the law of that country is required. In view of the nature of an affidavit, it is of far greater importance that a foreign notary or other person who attests an affidavit should be shown by a certificate of an appropriate person to be empowered to perform this function under the law of the country concerned.

The above proposals will not bring about changes in the practice followed in legal proceedings at present, but will, it is submitted, clarify the legal position of affidavits executed abroad for use in South Africa. □

---

## Support our Advertisers!

---