

**FORMAL WRITTEN COMMENTS, OBJECTIONS AND NOTICE OF
LEGAL AND CONSTITUTIONAL DEFECTS**

**DRAFT REGULATIONS GOVERNING THE ADMINISTERING OF AN OATH OR
AFFIRMATION, 2026**

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A. INTRODUCTION

1. Liberty Fighters Network (“LFN”) hereby submits its formal written comments and objections to the proposed *Regulations Governing the Administering of an Oath or Affirmation, 2026* (“the draft Regulations”), published for public comment in *Government Gazette* No. 55075 dated 31 July 2026.
2. These comments are submitted pursuant to the Department’s invitation calling upon interested persons to comment before 31 August 2026. The draft Regulations are intended to repeal and replace the *Regulations Governing the Administering of an Oath or Affirmation* published under *Government Notice* R1258 of 21 July 1972 (“the existing Regulations”).
3. LFN objects to the promulgation of the draft Regulations **in their present form**.
4. The objection is not founded upon resistance to technological advancement. Technology may legitimately improve access to justice. The objection is that a centuries-old evidential safeguard cannot lawfully or rationally be replaced by an electronic procedure materially weaker than the safeguard which it replaces merely because the latter procedure is technologically convenient.
5. An affidavit is not an ordinary document.
6. It constitutes evidence.
7. A person who deliberately makes a false statement in an affidavit, affirmation or solemn or attested declaration may incur criminal liability for perjury under section

9 of the *Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963)* (“the Act”).

8. The commissioning process consequently serves a fundamentally different purpose from the electronic conclusion of an ordinary commercial contract.
9. The commissioner of oaths is the independent human safeguard between —
 - 9.1. an unsigned statement and sworn evidence;
 - 9.2. an unidentified person and an identified deponent;
 - 9.3. a document merely bearing a signature and a document proved to have been adopted under oath;
 - 9.4. a private statement and evidence capable of being placed before a court, public authority or other decision-maker; and
 - 9.5. an allegation and evidence carrying the solemn consequences of perjury.
10. The draft Regulations appear not to appreciate that distinction.
11. They substantially reproduce the existing Regulations, modernise their terminology and then insert a sweeping electronic-commissioning regime without prescribing the technological, evidential, territorial, identity-verification and document-integrity safeguards which such a fundamentally different regime necessarily requires.
12. The effect is not modernisation of the existing safeguards.

13. It is their dilution.

B. LFN'S PRINCIPAL OBJECTION

14. LFN's principal submission may be stated simply:

If electronic commissioning is to provide a lawful substitute for physical commissioning, the electronic procedure must provide at least the same evidential assurance concerning identity, voluntariness, location, contemporaneity, signature, document integrity and administration of the oath as physical appearance presently provides.

15. The draft Regulations demonstrably fail that test.
16. This is particularly serious because the Supreme Court of Appeal has already identified precisely that standard.
17. In *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Constitutional Development (1018/2024) [2025] ZASCA 181 (01 December 2025)*, the Supreme Court of Appeal dealt directly with the proposed electronic commissioning of affidavits.
18. The Court recorded that the present requirement of being "in the presence of" the commissioner means **physical presence**, and recognised the existing line of authority to that effect.

19. More importantly for present purposes, the Supreme Court of Appeal held that any alternative system would have to serve the same purpose and provide **the same guarantee to the court** as an oath administered in the physical presence of the commissioner.
20. The Court expressly identified the danger of allowing unidentified audio-visual platforms where there was no evidence of their safeguards, or lack thereof, and held that reform necessarily requires consideration of policy, technical and practical matters.
21. That judgment was delivered approximately eight months before the publication of the present draft Regulations.
22. Yet regulation 5 now proposes precisely what the Supreme Court of Appeal warned cannot responsibly occur without proper safeguards: a generic authorisation of electronic commissioning through an —

“online portal or any other legitimate electronic platform”.
23. Neither “online portal”, “legitimate electronic platform” nor “audio-visual communication” is defined.
24. No technical standard is prescribed.
25. No accreditation is required.
26. No identity-verification standard is prescribed.
27. No liveness verification is required.

28. No audit trail is required.
29. No transaction identifier is required.
30. No electronic timestamp is required.
31. No cryptographic protection of the completed affidavit is required.
32. No requirement exists that the commissioner and male or female deponent view precisely the same version of the document.
33. No protection exists against alteration of the document after the oath.
34. No minimum quality for the audiovisual connection is prescribed.
35. No procedure exists where communication is interrupted.
36. No procedure exists to detect or exclude third-party assistance, coercion or impersonation.
37. No requirement exists to establish where the male or female deponent physically is.
38. No requirement exists to determine whether the male or female deponent is within the Republic.
39. No provision deals with the retention of evidence proving that an electronic commissioning actually occurred.

40. The proposed regime therefore fails at the very point which the Supreme Court of Appeal identified as indispensable.

C. FIRST FUNDAMENTAL DEFECT: THE WRONG STATUTORY FUNCTIONARY

41. Before addressing electronic commissioning itself, LFN raises a preliminary defect which appears on the face of the proposed instrument.

42. The draft Regulations state:

*“**The President has**, in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963), made the regulations in the Schedule.”*

43. That statement appears incompatible with section 10 of the *Act*.

44. Section 10(1) expressly provides that —

*“**The Minister** may make regulations ...”*

45. It is therefore **the Minister**, and not the President, upon whom Parliament has conferred the regulation-making power presently appearing from the *Act*.

46. This is not merely semantic.

47. Public power must be exercised by the functionary upon whom the empowering statute confers it.

48. The draft curiously compounds the difficulty because regulation 1 itself defines “Minister” as the Cabinet member responsible for the administration of justice, notwithstanding that the introductory promulgating formula attributes the exercise of section 10 power to the President.
49. The existing *1972 Regulations* referred to the “State President”, reflecting the historic form of the instrument.
50. The present section 10, however, reflects the subsequent statutory allocation of power to the Minister.
51. It consequently appears that an historical promulgating formula may simply have been carried over into a twenty-first-century draft without proper reconciliation with the current enabling *Act*.
52. If that is merely a drafting error, it must be corrected before promulgation.
53. If it reflects an intention that the President actually make the Regulations, the Department is requested to identify the specific lawful source of the President’s power to do so.
54. Absent such lawful authority, promulgation by the incorrect functionary would render the resulting subordinate legislation vulnerable to being declared invalid *ab initio*.
55. LFN further records its concern that an instrument which is still undergoing public consultation states that the President “**has ... made**” the Regulations.

56. Public participation must precede final decision-making and cannot rationally amount to consultation over an instrument already treated as having been made.
57. The final *Gazette* should therefore unambiguously distinguish the **draft** instrument from the instrument ultimately made after consideration of public submissions.

D. SECTION 10 DOES NOT PROVIDE A BLANK CHEQUE

58. Section 10(1)(b) empowers the Minister to prescribe —

“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”.

59. Section 10 additionally permits regulations generally for the better carrying out of the objects and purposes of the *Act*.
60. The regulatory power is therefore broad but not unlimited.
61. Subordinate legislation must remain within the purpose and architecture of the empowering *Act*, must be rationally related to a legitimate statutory purpose, and cannot purport to amend primary legislation or legislation of equivalent status by regulation.
62. The Constitutional Court has repeatedly recognised that delegated regulatory power remains subject to the rule of law and legality, including rationality and the

boundaries of the empowering provision. See, *inter alia*, *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3.

63. Regulation-making has furthermore been subjected to administrative-law scrutiny in the *New Clicks* litigation. Whatever technical characterisation ultimately applies to a particular challenge, subordinate legislation remains reviewable at least under the constitutional principle of legality.
64. LFN accordingly expressly reserves the right, should the present defects remain in the final Regulations, to approach a competent court for appropriate declaratory, review, interdictory and consequential relief under the *Constitution*, the principle of legality and, insofar as applicable, the *Promotion of Administrative Justice Act, 2000*.

E. THE EXISTING REQUIREMENT OF PHYSICAL PRESENCE SERVES AN EVIDENTIAL PURPOSE

65. Regulation 3(1) of the existing *Regulations* presently provides:

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

66. Regulation 4 requires the commissioner thereafter to certify that the male or female deponent has acknowledged understanding the declaration and requires the commissioner to state the **manner, place and date** upon which it was taken.

67. Physical presence is therefore not an arbitrary inconvenience left over from 1972.
68. It provides immediate evidential safeguards.
69. The commissioner is able personally to observe —
 - 69.1. the natural person purporting to be the deponent;
 - 69.2. the person's physical appearance;
 - 69.3. the person's production of identification where identification is required;
 - 69.4. whether the person appears capable of understanding the process;
 - 69.5. whether another person is improperly directing or coercing the deponent;
 - 69.6. the document which is before the male or female deponent;
 - 69.7. the actual act of signing;
 - 69.8. whether alterations are made before signature;
 - 69.9. whether the affidavit contains all pages and annexures represented to form part thereof;
 - 69.10. the person's response to the prescribed questions; and
 - 69.11. the administration and acceptance of the oath or affirmation itself.
70. It is precisely because the court itself is absent when an affidavit is sworn that the commissioner performs this evidential function.

- 71. The Supreme Court of Appeal recognised this distinction in *LexisNexis*: unlike *viva voce* evidence, a court exercises no contemporaneous oversight when an affidavit is sworn outside court. The commissioning process therefore provides the court with the necessary guarantee concerning the oath and the human deponent.
- 72. An electronic alternative must reproduce that assurance by other reliable means.
- 73. Regulation 5 does not do so.

F. “LEGITIMATE ELECTRONIC PLATFORM” IS IMPERMISSIBLY VAGUE

- 74. Regulation 5(1) permits electronic commissioning through —

“the online portal or any other legitimate electronic platform”.
- 75. This provision poses numerous unanswered questions.
- 76. What makes a platform “legitimate”?
- 77. Who decides whether it is legitimate?
- 78. Must it be operated by the State?
- 79. May it be operated commercially?
- 80. Is WhatsApp legitimate?
- 81. Is Microsoft Teams legitimate?

82. Is Zoom legitimate?
83. Is an ordinary browser-to-browser video call legitimate?
84. What security protocol is required?
85. Must the platform maintain an audit trail?
86. What evidence must it produce if commissioning is later disputed?
87. Must its servers be located within South Africa?
88. What happens if it is compromised?
89. What minimum audio and visual quality is required?
90. What happens if the connection freezes at the exact moment when the oath or signature supposedly occurs?
91. The draft answers none of these questions.
92. The resulting legal uncertainty is particularly extraordinary after the Supreme Court of Appeal expressly warned against permitting unspecified audio-visual platforms without evidence of the safeguards which they provide.
93. The provision should not be promulgated in this form.

G. NO ADEQUATE IDENTIFICATION OF THE DEPONENT

94. Regulation 5(2)(a) provides that where a document has already been signed, the commissioner must “ascertain” whether the deponent is the person who signed it.
95. The Regulation does not state **how** that ascertainment must occur.
96. There is no requirement —
 - 96.1. to inspect an original identity document;
 - 96.2. to inspect a passport;
 - 96.3. to confirm the deponent’s gender, either male or female, compared to the official identification;
 - 96.4. to compare the person’s face with official identification;
 - 96.5. to authenticate the identification document;
 - 96.6. to conduct an electronic identity check;
 - 96.7. to perform a liveness check;
 - 96.8. to record what form of identification was relied upon; or
 - 96.9. to record any identifying particulars in the commissioner’s certificate.
97. The result is an evidential standard which effectively says:

“The commissioner must ascertain identity, but the law will neither prescribe how it must be done nor require any record of how it was done.”

98. That is manifestly inadequate for remote commissioning.
99. Electronic communication creates greater, not lesser, need for a reliable identity protocol.
100. LFN accordingly proposes that if electronic commissioning is retained, identification must be independently prescribed, including at minimum —
 - 100.1. production and verification of recognised identification;
 - 100.2. real-time comparison of the deponent with that identification;
 - 100.3. a reliable liveness process appropriate to the technology used;
 - 100.4. recording in the commissioner’s certificate of the form of identification and method of verification; and
 - 100.5. an auditable electronic transaction record that should be retained for a minimum period.

H. ABSA BANK LTD v BOTHA NO: THE DEPONENT IS A PARTICULAR NATURAL PERSON, NOT AN ABSTRACT NEUTRAL ENTITY

101. The decision in *Absa Bank Ltd v Botha NO and Others* (39228/12) [2013] ZAGPPHC 163; 2013 (5) SA 563 (GNP) assumes particular significance when the

deliberate changes in terminology introduced by the draft Regulations are considered.

102. The importance of *Botha* extends considerably beyond an incorrect pronoun appearing in a commissioner's certificate.
103. The case concerned the more fundamental question whether the commissioner's certification provided reliable evidence that the actual natural person identified as the deponent had personally appeared before the commissioner, taken the oath and signed the affidavit in the commissioner's presence.
104. The deponent in *Botha* expressly described herself in the affidavit as a female. The commissioner nevertheless certified that the deponent was male by recording that "he" knew and understood the contents of the affidavit.
105. The plaintiff attempted to overcome that discrepancy by relying upon section 6(a) of the *Interpretation Act, 1957 (Act No. 33 of 1957)*, which provides that, unless a contrary intention appears, words importing the masculine gender in legislation include females. That statutory provision remains part of South African law.
106. The Court expressly rejected the proposition that section 6(a) rendered the distinction between the actual male or female deponent immaterial.
107. The Court explained, in substance, that section 6(a) means that where legislation employs the masculine form it includes the feminine for purposes of statutory interpretation. It does not mean that a commissioner of oaths may incorrectly

identify the actual person appearing before the commissioner as male when that person is female, or *vice versa*.

108. The distinction is fundamental.

109. There is a material difference between —

109.1. a legislative provision using the masculine form as a generic grammatical expression which, by operation of the *Interpretation Act*, includes females; and

109.2. a commissioner of oaths making a factual certification concerning the **particular human being who actually appeared before that commissioner.**

110. The latter is not an exercise in legislative interpretation.

111. It is an evidential certification of fact.

112. The Court in *Botha* consequently held that, where the affidavit itself demonstrated that the deponent was female but the commissioner certified the person appearing before the commissioner as male, the Court could not simply assume that the discrepancy was an inconsequential administrative error.

113. The Court considered the discrepancy sufficiently material to cast doubt upon whether the person who purportedly signed the affidavit in the commissioner's presence was in fact the identified deponent.

114. Of particular importance, the Court held that it should not be placed in a position where it had to speculate as to the gender of the deponent and, more importantly, whether the deponent had actually sworn to and signed the affidavit in the presence of the commissioner of oaths.
115. The Court accordingly declined to afford the commissioner's certification the ordinary presumption of regularity and ultimately found that the purported verifying affidavit did not constitute an affidavit for purposes of the summary-judgment proceedings.
116. That finding exposes a serious difficulty in the present draft Regulations.
117. The existing *Regulations* repeatedly employ the masculine pronoun "he" when dealing with the deponent, subject, of course, to section 6(a) of the *Interpretation Act*, which causes that statutory formulation to include females.
118. The proposed Regulations deliberately remove those formulations and repeatedly substitute the entirely neutral expression "*the deponent*".
119. The draft furthermore contains no definition whatsoever of "deponent", despite that expression becoming one of the most important operative terms in the proposed Regulations.
120. LFN objects to this change, not as an exercise in semantics, but because of its **evidential consequences.**
121. A deponent is not an abstract juridical concept.

122. A deponent to an affidavit is necessarily a **specific natural person** who —
- 122.1. possesses an ascertainable identity;
 - 122.2. personally adopts the contents of the declaration;
 - 122.3. personally answers the commissioner's prescribed questions;
 - 122.4. personally takes the oath or affirmation;
 - 122.5. personally signs or otherwise authenticates the declaration; and
 - 122.6. personally assumes the legal consequences, including the potential consequences of perjury, flowing from the sworn statement.
123. The very purpose of the commissioner's certificate is therefore to connect the affidavit with that particular natural human being.
124. The importance of *Botha* is that an identifying inconsistency which might superficially appear insignificant was capable of revealing that the commissioner may not actually have identified or witnessed the person who purportedly deposed to the affidavit.
125. Sex was therefore not irrelevant in *Botha*.
126. It operated as a **corroborative identifying characteristic** against which the commissioner's factual certification could be tested.

127. Had the certificate contained nothing more than the generic words “the deponent”, the very inconsistency which exposed the potential defect in the commissioning process would have disappeared from the face of the document.
128. That does not necessarily mean that the commissioning would have become more reliable.
129. It would merely have become more difficult to detect that something may have gone wrong.
130. That distinction is critical.
131. Legislation should not cure detectable defects in affidavits by drafting future certificates in a manner which makes the same defects incapable of detection.
132. Yet that is precisely the danger created by replacing all sex-specific references with a generic “deponent”, while simultaneously introducing remote commissioning and substantially weakening the traditional safeguard of physical presence.
133. The combined effect is particularly troubling:
 - 133.1. the commissioner need no longer be physically present with the deponent;
 - 133.2. the male or female deponent may have signed the document before the commissioner becomes involved;
 - 133.3. a typed name or surname may purportedly constitute the deponent’s signature;

- 133.4. no prescribed identification procedure exists;
 - 133.5. no identifying particulars of the deponent are required to appear in the commissioner's certificate; and
 - 133.6. the Regulations deliberately remove the male or female descriptor which, in *Botha*, operated as an objectively testable indicator of whether the commissioner had actually identified the person concerned.
134. These changes cannot rationally be considered in isolation from one another.
135. They cumulatively reduce the number of independent indicators by which a court or other person may subsequently determine whether the person who allegedly took the oath was actually the person identified in the affidavit.
136. LFN records expressly that its objection does not concern the worth, dignity or equality of any human being.
137. Every person is entitled to equal protection and benefit of the law.
138. That principle does not, however, require an evidential certification process to become deliberately identity-neutral where the very purpose of that process is to establish which natural person appeared, spoke, swore and signed.
139. Nor should a general legislative preference for gender-neutral drafting be permitted to override the special evidential function performed by a commissioner's certificate.

140. There is nothing discriminatory about requiring a commissioner accurately to record material identifying characteristics of the person actually appearing before that commissioner.
141. On the contrary, accuracy protects every deponent equally.
142. A male deponent should not be certified as female.
143. A female deponent should not be certified as male.
144. By retaining an obligation upon the commissioner to correctly record the sex of the person appearing before the commissioner, the certification preserves an additional and immediately observable identifying characteristic capable of independently corroborating whether the person actually appearing was the person identified as the deponent. Removing that characteristic does not improve the accuracy of commissioning; it removes one of the very indicators by which an incorrect, careless or potentially fraudulent certification may later be exposed.
145. And a statutory template should not solve that problem merely by ensuring that the commissioner is no longer required to record anything from which such an identification error could ever become apparent.
146. That would confuse neutrality of drafting with reliability of evidence.
147. LFN accordingly objects to the wholesale replacement of sex-specific terminology by the bare expression “deponent” unless the Regulations simultaneously establish a materially stronger personal-identification mechanism.

148. At minimum, the Regulations should expressly define “deponent” as the **identified natural person, being male or female, who personally makes the oath or affirmation and whose identity, including the person’s sex, has been verified by the commissioner in the prescribed manner.**
149. To this end, a person’s subjective gender identity or personal gender association cannot, for the specific evidential purpose of commissioning an affidavit, displace the objective identifying particulars lawfully and officially recorded for that person at the time of commissioning. The commissioner’s function is one of factual identification and certification, not the determination or accommodation of questions of personal gender identity. Gender-neutral drafting should accordingly not be employed in a manner which removes an objectively verifiable identifying characteristic and thereby diminishes the evidential safeguards inherent in the commissioning process.
150. The Regulations should furthermore require the commissioner to record sufficient identifying particulars to demonstrate that the commissioner did not merely commission a document, but actually identified the particular natural person who made it.
151. LFN further proposes that, where the commissioner's certificate employs a personal pronoun or sex descriptor, that descriptor must correspond with the person actually identified and, where appropriate, the identifying information presented to the commissioner.

152. Alternatively, if the Department intends deliberately to eliminate male and female descriptors from the commissioning process altogether, it is requested to explain —
- 152.1. what evidential or policy defect in the existing *Regulations* requires their removal;
 - 152.2. whether *Absa Bank Ltd v Botha NO and Others* was considered when this drafting choice was made;
 - 152.3. how the Department reconciles that choice with the Court's finding that an incorrect male/female certification was capable of casting doubt upon the identity and personal presence of the deponent;
 - 152.4. what replacement identifying safeguard is intended to perform the corroborative function which was demonstrated in *Botha*;
 - 152.5. why no such safeguard presently appears in the draft Regulations; and
 - 152.6. whether any legal, evidential or policy assessment was undertaken concerning the consequences of replacing sex-specific identification with an entirely generic description of the person concerned.
153. The Department cannot properly answer *Botha* by drafting around the factual discrepancy which exposed the defective affidavit in that case.

154. The appropriate regulatory response is to make the identification of the deponent more reliable, more particularised and more capable of subsequent verification — not less so.
155. This becomes even more imperative if the Department intends simultaneously to remove the centuries-old safeguard of physical presence.
156. LFN therefore requests that the proposed terminology and certification requirements be reconsidered before promulgation.

I. REGULATION 5(2)(a): A DOCUMENT MAY HAVE BEEN SIGNED BEFORE THE COMMISSIONER BECAME INVOLVED

157. Regulation 5(2)(a) introduces an especially serious departure from existing principle.
158. It expressly contemplates that a document may already have been signed **before** the oath or affirmation is administered.
159. The commissioner thereafter merely ascertains whether the person appearing remotely is the person who previously signed it.
160. The existing *Regulations* require the deponent to sign **in the presence of** the commissioner.
161. In *Botha*, the High Court described signature in the commissioner's presence as a basic requirement of an affidavit.

162. *Firststrand Bank Ltd v Briedenhann* similarly recognised physical presence as the ordinary meaning of the present requirement.
163. The new provision changes the commissioner's function from witnessing an act into retrospectively accepting a person's assertion that he or she performed the act previously.
164. This gives rise to obvious questions.
165. When was the document signed?
166. Where was it signed?
167. Was the document in exactly the same form when it was signed?
168. Who was present?
169. Was the signature placed there by that person?
170. Were pages substituted afterwards?
171. Were annexures subsequently altered?
172. Did the deponent sign freely?
173. The commissioner witnessed none of these matters.
174. If electronic commissioning is permitted, the male or female deponent should ordinarily be required to execute the electronic signature **during the live**

commissioning transaction, after identification and while both the commissioner and deponent have access to the final, immutable document.

175. A pre-signed document should not become the norm.

J. A TYPED NAME OR SURNAME IS NOT A SUFFICIENT SECURITY STANDARD

176. Regulation 5(2)(b) provides that a —

“mark or typed name or surname of the deponent at the space provided for the deponent’s signature”

must be treated as the deponent’s signature.

177. This is one of the most concerning provisions in the draft.

178. A typed surname appearing at the bottom of a PDF proves virtually nothing by itself about who placed it there.

179. It may have been inserted by —

179.1. the deponent;

179.2. an attorney;

179.3. a secretary;

179.4. another litigant;

- 179.5. an automated document-management platform; or
- 179.6. any person possessing access to the editable document.
- 180. The provision furthermore sits uneasily alongside the *Electronic Communications and Transactions Act, 2002* (“ECTA”).
- 181. Section 13(1) of *ECTA* provides that where a signature is required by law and the relevant law does not specify the type of signature, the requirement in relation to a data message is met through an advanced electronic signature.
- 182. The Supreme Court of Appeal itself reproduced this provision in *LexisNexis*.
- 183. The draft Regulations appear deliberately to prescribe a radically lower standard by deeming a mere typed name or surname to constitute a signature.
- 184. If that is intended, the Department should explain —
 - 184.1. why an advanced or reliably authenticated electronic signature is considered unnecessary for sworn evidence;
 - 184.2. what fraud assessment was undertaken;
 - 184.3. what evidential assurance a typed surname supposedly provides; and
 - 184.4. why sworn evidence deserves a weaker signature-verification standard than transactions for which advanced electronic authentication is otherwise required.
- 185. Regulation 5(2)(b) should be deleted.

K. DOCUMENT INTEGRITY IS ENTIRELY UNREGULATED

186. The draft Regulations do not require the commissioner to verify that the electronic document ultimately filed or used is the precise document which was before the deponent when the oath was administered.
187. No requirement exists that —
- 187.1. every page be visible to the deponent and commissioner;
 - 187.2. the number of pages be recorded;
 - 187.3. annexures be identified;
 - 187.4. the completed document be digitally locked;
 - 187.5. an immutable cryptographic hash be generated;
 - 187.6. alterations following commissioning invalidate the electronic certification;
 - 187.7. the commissioner electronically signs the final version;
 - 187.8. the deponent and commissioner signatures be linked to the same document version; or
 - 187.9. an electronic audit certificate be created.
188. Consequently, nothing in regulation 5 prevents the electronic file from being altered after the audiovisual call.

- 189. That omission attacks the very purpose of commissioning.
- 190. A commissioner must not merely verify that **some document** was sworn to.
- 191. The commissioner must authenticate that **this document**, in this form, was adopted by this deponent under oath or affirmation.

L. REGULATION 7(b): THE COMMISSIONER IS DISCOURAGED FROM READING THE VERY DOCUMENT BEING COMMISSIONED

- 192. Proposed regulation 7(b) provides that a commissioner —

“may not peruse the declaration to be commissioned, unless it is necessary to do so for whatever reason that the commissioner deems necessary”.
- 193. LFN objects to this provision in its entirety.
- 194. It is both conceptually unsound and internally contradictory.
- 195. It first prohibits perusal.
- 196. It then creates an exception whenever the commissioner subjectively considers perusal necessary “for whatever reason”.
- 197. It therefore simultaneously creates a prohibition and an effectively unlimited discretion to disregard that prohibition.
- 198. More importantly, it misconceives the commissioner’s function.

199. A commissioner is plainly not required to adjudicate the truth or legal merits of the affidavit.
200. But there is a fundamental difference between **assessing the merits** of a document and **examining the document sufficiently to establish what document is actually being sworn to**.
201. Particularly where electronic commissioning is involved, the commissioner must be able to verify —
 - 201.1. the document's title or identity;
 - 201.2. that the document is complete;
 - 201.3. the number of pages;
 - 201.4. the existence and identification of annexures;
 - 201.5. whether spaces have been left blank;
 - 201.6. whether alterations are apparent;
 - 201.7. whether the person is signing the document actually before the commissioner; and
 - 201.8. whether the electronic document certified afterwards is the same document.
202. Regulation 7(b) actively works against those safeguards.

203. It should be deleted and replaced by a provision expressly distinguishing between

—

203.1. the commissioner having no obligation to assess the substantive truth or legal merit of the declaration; and

203.2. the commissioner's obligation to inspect the document sufficiently to perform the commissioning function properly.

M. PLACE, TERRITORIAL JURISDICTION AND THE ACTUAL LOCATION OF THE DEPONENT

204. Proposed regulation 6(1) retains the requirement that the commissioner state the “manner, place and date” of taking the declaration.

205. That requirement becomes fundamentally ambiguous once the deponent and commissioner may be thousands of kilometres apart.

206. If a commissioner is sitting in Pretoria and the deponent is physically in London, what is the “place” where the declaration was taken?

207. Pretoria?

208. London?

209. Both?

210. Cyberspace?

211. This is not an academic question.
212. Section 7 of the *Act* confers powers upon commissioners within the area for which they are commissioners.
213. Section 8 separately and expressly deals with powers concerning oaths **outside the Republic**, including persons holding specified offices abroad and authentication of affidavits or declarations made outside the Republic.
214. The statutory distinction between oaths within and outside the Republic therefore matters.
215. Proposed regulation 5 nevertheless appears to allow a commissioner sitting anywhere in South Africa to administer an oath to a person physically situated anywhere in the world without dealing with section 8 at all.
216. It is consequently possible under the draft for a deponent who is physically outside the Republic to appear electronically before a South African commissioner, with the resulting certificate potentially recording only the commissioner's South African location.
217. That could create the false appearance that the affidavit was taken within South Africa.
218. Where evidence is to be used in litigation, a further difficulty arises under *Uniform Rule 63*, which specifically governs authentication of documents executed outside the Republic.

219. South African courts have expressly dealt with the intersection between affidavits executed abroad, virtual commissioning and Rule 63.
220. The later decision in *Africas Best Foods (Pty) Ltd v ED Food S.R.L* likewise dealt with affidavits involving deponents in Italy and a commissioner situated in South Africa, illustrating precisely the conflict which the draft ought to resolve rather than ignore.
221. Regulation 5 therefore requires substantial revision to state expressly —
 - 221.1. the physical location of the deponent;
 - 221.2. the physical location of the commissioner;
 - 221.3. which location constitutes the place of taking the oath;
 - 221.4. whether the electronic procedure is available where the deponent is outside South Africa;
 - 221.5. how section 8 of the *Act* is to operate;
 - 221.6. that nothing in the Regulations displaces Rule 63 or any other law governing foreign execution or authentication; and
 - 221.7. that electronic communication does not fictionally relocate a deponent from one country into another.

**N. THE DRAFT DEFINITION OF “AFFIDAVIT” MAY EXCEED THE PERMISSIBLE
FUNCTION OF SUBORDINATE LEGISLATION**

222. Regulation 1 proposes to define an “affidavit” as —

“a written statement made voluntarily under oath or upon affirmation before a commissioner, whether in the physical presence of each other or not”.

223. The words —

“whether in the physical presence of each other or not”

do more than define terminology.

224. They purport to determine as a matter of law that physical absence is compatible with the legal character of an affidavit.

225. This raises an important *ultra vires* question.

226. Section 10 empowers the Minister to prescribe the form and manner of administering oaths and taking declarations.

227. It does not necessarily follow that subordinate legislation may conclusively redefine the legal meaning and evidential status of an “affidavit” wherever that expression occurs in other legislation, Rules of Court or the common law.

228. The definition should therefore, at minimum, expressly be confined to the operation of these Regulations and subject to any contrary requirement prescribed by another law.

229. This is particularly necessary because section 10(1)(b) itself recognises that its regulation-making power applies where the matter is “**not prescribed by any other law**”.

**O. REGULATION 5(3) PURPORTS TO DECLARE REMOTE COMMISSIONING VALID
“IN ALL RESPECTS”**

230. Regulation 5(3) states that an oath administered where the deponent is not physically present —

“is in all respects valid as if it was administered in the physical presence of the commissioner”.

231. The breadth of these words is objectionable.
232. The provision appears to elevate regulatory compliance into conclusive legal validity.
233. A Regulation cannot prevent a court from determining —
- 233.1. whether the prescribed process actually occurred;
 - 233.2. whether identity was established;
 - 233.3. whether fraud occurred;
 - 233.4. whether another Rule of Court applies;

- 233.5. whether the document was altered;
 - 233.6. whether a foreign-execution requirement applies;
 - 233.7. whether the purported commissioner possessed jurisdiction or authority;
or
 - 233.8. whether the document before the court is in fact the document sworn to.
234. Regulation 5(3) should therefore be reformulated, if retained at all, merely to provide that compliance with a properly prescribed electronic process satisfies the **presence requirement under these Regulations**, expressly subject to other applicable law and the inherent and statutory powers of a court to determine admissibility, authenticity and compliance.

P. NO TIME OF COMMISSIONING IS REQUIRED

235. The Regulations require a date and place but not the exact time at which commissioning occurred.
236. That omission assumes greater importance under an electronic regime.
237. There are circumstances in litigation, commercial transactions, insolvency, warrants, statutory deadlines and urgent proceedings where the sequence of events on the same calendar day may be material.
238. An electronic transaction inherently permits accurate timestamping.

239. There is therefore no rational reason why an electronic commissioner's certificate should not record —
- 239.1. the date;
 - 239.2. the exact time;
 - 239.3. the applicable time zone; and
 - 239.4. the transaction identifier.
240. Such information would materially strengthen the evidential reliability of electronic commissioning.

Q. IMPERSONATION, SYNTHETIC REPRESENTATION AND THIRD-PARTY INTERFERENCE

241. Physical presence permits the commissioner to observe the person directly.
242. A video image is different.
243. It is an electronic representation transmitted to the commissioner through hardware, software and a communications network.
244. The draft contains no safeguard against —
- 244.1. impersonation;
 - 244.2. manipulated audiovisual input;

- 244.3. prerecorded material;
 - 244.4. another person operating outside the camera's field of vision;
 - 244.5. third-party prompting;
 - 244.6. coercion occurring outside the visible frame; or
 - 244.7. substitution of the participant during the transaction.
245. This does not mean that electronic verification can never be secure.
246. It means precisely the opposite: **if physical observation is to be replaced by technology, the technology must itself be regulated as an evidential safeguard.**
247. The draft does not do so.

R. NO AUDIT TRAIL OR PRESERVATION OF PROOF

248. If a conventional affidavit is challenged, the commissioner may testify that the deponent appeared physically before him or her and signed the document.
249. In an electronic environment, the existence of objective technological evidence provides an opportunity for even stronger verification.
250. Surprisingly, the draft requires none.
251. No electronic commissioning record need be retained.

- 252. No system log is required.
- 253. No digital transaction certificate is required.
- 254. No document hash is required.
- 255. No confirmation of the audiovisual session is required.
- 256. No record of the identification process is required.
- 257. No retention period is specified.
- 258. A dispute arising five years later may accordingly reduce to —

“The commissioner says a video call occurred; the purported deponent says it did not.”

- 259. That would represent technological regression rather than progress.

S. PRIVACY AND PERSONAL-INFORMATION CONSEQUENCES HAVE NOT BEEN ADDRESSED

- 260. Any credible remote identity-verification system necessarily involves the processing of personal information.
- 261. Depending upon the system employed, this may include identification documents, images, signatures, audiovisual information, contact information and potentially biometric information.

262. The draft is completely silent concerning —

262.1. information security;

262.2. retention;

262.3. access;

262.4. disclosure;

262.5. data minimisation;

262.6. storage by commercial platform providers; and

262.7. deletion.

263. These are precisely the “policy”, “technical” and “practical” matters which the Supreme Court of Appeal said must be considered when designing a new electronic commissioning dispensation.

264. The absence of any visible treatment of these matters reinforces LFN’s concern that regulation 5 has been drafted at the level of concept rather than after completion of the regulatory work necessary to make the concept safe.

T. CERTIFICATION OF TRUE COPIES

265. Commissioners of oaths are routinely relied upon by public authorities and private institutions to certify copies of original documents, and the Department itself

publicly describes commissioners as persons capable of certifying copies of original documents.

266. LFN accordingly requests that the final Regulations expressly clarify that any authorisation for remote oath-taking **does not of itself authorise remote certification of a copy as a true copy of a physical original.**
267. The function of certifying a true copy depends upon comparison of the copy with the original source document.
268. A photograph, scan or electronic image transmitted to a commissioner does not by itself prove what the physical original contains or whether the supposed original shown through a camera is authentic.
269. If electronic certification of original electronic records is contemplated, that subject requires its own carefully defined rules concerning the authoritative electronic source and its verification.
270. It should not arise accidentally through an expansive interpretation of regulation 5.

U. THE DRAFT DOES NOT SOLVE AN IDENTIFIED GENERAL FAILURE OF THE EXISTING SYSTEM

271. The Department has not, with the draft Regulations, published an explanatory memorandum identifying —

271.1. the empirical problem requiring electronic commissioning;

- 271.2. the number of persons unable reasonably to access commissioners;
 - 271.3. the incidence of fraud under the existing system;
 - 271.4. the expected incidence of fraud under the proposed system;
 - 271.5. the alternatives considered;
 - 271.6. any comparative study;
 - 271.7. the technical standard evaluated;
 - 271.8. a privacy-impact assessment;
 - 271.9. an implementation plan; or
 - 271.10. the reasons for choosing the extremely broad language of regulation 5.
272. Commissioners of oaths are deliberately designated across numerous professions, offices and public institutions precisely so that the service is broadly accessible.
273. The Department itself explains that commissioners may be appointed personally or designated *ex officio* in numerous capacities.
274. This does not mean that no person ever experiences difficulty obtaining a commissioner.
275. It does mean that a national evidential safeguard should not be weakened for every affidavit in the Republic merely to solve an undefined accessibility problem affecting an unidentified proportion of users.

276. If there are genuine exceptional cases in which physical attendance creates serious difficulty, the rational response would be an appropriately safeguarded **alternative procedure**, not the wholesale equivalence created by regulation 5(3).

V. THE DEPARTMENT HAS NOT PROVIDED THE MATERIAL NECESSARY FOR MEANINGFUL COMMENT ON THE ELECTRONIC SYSTEM

277. The Department seeks public comment on a proposed electronic commissioning regime.
278. Yet the public has not been provided with —
- 278.1. the proposed technical specifications;
 - 278.2. the contemplated Government portal, if any;
 - 278.3. minimum requirements for third-party platforms;
 - 278.4. cybersecurity standards;
 - 278.5. identity-verification standards;
 - 278.6. record-retention standards;
 - 278.7. privacy safeguards;
 - 278.8. standards for electronic signatures;
 - 278.9. cross-border rules; or

- 278.10. an explanatory memorandum addressing the Supreme Court of Appeal's judgment in *LexisNexis*.
279. Meaningful public participation in the technical merits of the proposed electronic process is exceedingly difficult where the technical process itself has not been formulated.
280. LFN accordingly submits that the Department should withdraw regulation 5 in its existing form, formulate a complete technical and legal framework and republish the revised proposal for further public comment.

W. MINIMUM SAFEGUARDS IF ELECTRONIC COMMISSIONING IS RETAINED

281. Without conceding that electronic commissioning should be introduced under the present enabling framework and without abandoning any objection *supra*, LFN submits that **at the absolute minimum** any future electronic procedure should require the following:
- 281.1. **Physical presence must remain the default rule.**
- 281.2. Electronic commissioning must constitute an alternative procedure subject to strict compliance with additional safeguards.
- 281.3. "Electronic commissioning", "real-time audiovisual communication", "approved electronic platform", "deponent" and "electronic commissioning record" must be defined.

- 281.4. The male or female deponent and commissioner must participate through a live and simultaneous audiovisual connection.
- 281.5. The physical location of **both** persons must be established and recorded.
- 281.6. The Regulations must expressly address whether a person situated outside South Africa may use the procedure and how section 8 and Uniform Rule 63 apply.
- 281.7. The commissioner must verify the deponent's identity and gender by a prescribed reliable method.
- 281.8. The identification method must be recorded.
- 281.9. Suitable liveness or equivalent anti-impersonation safeguards must apply.
- 281.10. The commissioner must be able to see and hear the deponent continuously while the prescribed questions, oath or affirmation and signature are completed.
- 281.11. The deponent should sign during the electronic session and not before it, save for specifically regulated exceptional circumstances supported by an independently verifiable electronic signature.
- 281.12. A mere typed name or surname must not constitute sufficient authentication.
- 281.13. The electronic signature used must comply with an expressly prescribed level of reliability compatible with *ECTA*.

- 281.14. The deponent and commissioner must have access to precisely the same final document.
- 281.15. The document, including every annexure forming part of it, must be electronically sealed against subsequent alteration.
- 281.16. A unique electronic transaction identifier must be created.
- 281.17. A trusted electronic date-and-time stamp must be created.
- 281.18. The exact local time and time zone must appear from the commissioning record.
- 281.19. The electronic system must create an immutable audit trail.
- 281.20. The commissioner's electronic signature must be cryptographically associated with the exact completed document.
- 281.21. The commissioner must certify whether the declaration was taken (a) physically; or (b) electronically.
- 281.22. If electronically, the certificate must additionally record —
 - 281.22.1. the platform used;
 - 281.22.2. the physical location of the commissioner;
 - 281.22.3. the physical location of the deponent;
 - 281.22.4. the method of identification;

281.22.5. the date;

281.22.6. the exact time and time zone;

281.22.7. the electronic transaction number; and

281.22.8. the method of electronic signature.

281.23. Appropriate evidence of the transaction must be retained for a prescribed period subject to applicable privacy legislation.

281.24. A procedure must be prescribed for a connection failure or interruption.

281.25. The Regulations must expressly provide that electronic commissioning does not authorise electronic certification of a true copy of a physical original merely by displaying that alleged original on camera.

281.26. No provision should prevent a commissioner from perusing the document sufficiently to discharge the commissioner's duties.

281.27. The Regulations must expressly preserve any stricter requirement imposed by another statute, Rule of Court or other law.

X. SPECIFIC DRAFTING AMENDMENTS REQUESTED

282. LFN requests that the Department, at minimum —

Regulation 1

283. Delete or reconsider the words —

“whether in the physical presence of each other or not”

from the definition of “affidavit”, alternatively expressly confine their effect to properly conducted electronic commissioning under a detailed regulation.

284. Define “deponent”.

285. Define the proposed electronic processes and platforms.

Regulation 4

286. Retain physical signature in the commissioner’s presence as the ordinary rule.

287. Create a separately regulated electronic procedure rather than allowing regulation 5 to override the safeguard generically.

Regulation 5

288. Withdraw and redraft regulation 5 in its entirety.

289. Delete regulation 5(2)(b)’s deeming of an ordinary typed name or surname as a sufficient signature.

290. Delete the blanket declaration in regulation 5(3) that remote commissioning is “in all respects valid”.

Regulation 6

291. Prescribe separate certificate wording for —

291.1. physical commissioning; and

291.2. electronic commissioning.

292. Require identification information, both physical locations, exact time and the electronic audit identifier.

Regulation 7(b)

293. Delete the prohibition against perusing the declaration.

294. Replace it with a provision clarifying that the commissioner does not certify the substantive truth of the contents but remains entitled and obliged to inspect the declaration sufficiently to perform the commissioner’s statutory function.

Cross-border execution

295. Insert an express provision preserving —

- 295.1. section 8 of the *Act*;
- 295.2. *Uniform Rule* 63;
- 295.3. any applicable Magistrates' Courts provisions; and
- 295.4. any other statutory authentication requirement.

Certification of copies

- 296. Expressly state that regulation 5 does not authorise remote certification of a physical document as a true copy of an original.

Y. REQUEST FOR THE REGULATORY RECORD AND SUPPORTING MATERIAL

- 297. Given the seriousness of the proposed alteration, LFN requests that the Department make publicly available, before the Regulations are finalised —
 - 297.1. the explanatory memorandum underlying the proposed amendments;
 - 297.2. the policy document motivating electronic commissioning;
 - 297.3. any legal opinion concerning the compatibility of regulation 5 with sections 7, 8 and 10 of the *Act*;
 - 297.4. any legal opinion concerning *ECTA*;

- 297.5. any assessment of *Uniform Rule* 63 and foreign affidavits;
 - 297.6. any fraud-risk assessment;
 - 297.7. any cybersecurity assessment;
 - 297.8. any privacy or personal-information impact assessment;
 - 297.9. technical specifications for electronic platforms;
 - 297.10. correspondence or submissions relating to *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Constitutional Development*;
 - 297.11. any comparative-law research relied upon;
 - 297.12. records explaining the proposed prohibition in regulation 7(b); and
 - 297.13. the reason why the draft purports to identify the President as the functionary exercising the power under section 10.
298. These documents are directly relevant to determining whether the proposed scheme was formulated after proper consideration of the technical and practical matters expressly identified by the Supreme Court of Appeal.

Z. CONCLUSION

299. The importance of the commissioning process should not be underestimated.

- 300. A commissioner of oaths is not merely a person who adds a stamp to the last page of a document.
- 301. The commissioner provides an independent evidential bridge between the natural person making the statement and the court, authority or institution later called upon to rely upon that statement as sworn evidence.
- 302. Physical presence presently supplies several safeguards simultaneously: identity, observation, contemporaneity, location, signature, voluntariness and documentary continuity.
- 303. Technology may conceivably reproduce or even improve upon those safeguards.
- 304. But technology does not accomplish that merely because a camera has been switched on.
- 305. That is the fundamental defect in regulation 5.
- 306. It substitutes the concept of electronic communication for an actual regulatory system of electronic verification.
- 307. It provides convenience without equivalently providing assurance.
- 308. It authorises platforms without defining their standards.
- 309. It permits signatures without adequately authenticating them.
- 310. It permits documents to be signed before the commissioner participates.
- 311. It fails to secure the document against subsequent alteration.

312. It fails to distinguish the physical location of the commissioner from that of the deponent.
313. It fails properly to address persons outside the Republic.
314. It fails to reconcile the proposed regime with section 8 of the *Act* and the Rules of Court governing foreign documents.
315. It discourages commissioners from perusing the very documents they are required to commission.
316. It fails to prescribe an auditable evidential record.
317. Most significantly, it fails to meet the benchmark identified by the Supreme Court of Appeal in *LexisNexis*: an alternative procedure must provide the same guarantee as the physical commissioning process which it seeks to replace.
318. LFN therefore formally requests that —
 - 318.1. **the draft Regulations not be promulgated in their present form;**
 - 318.2. regulation 5 be withdrawn and comprehensively reconsidered;
 - 318.3. regulation 7(b) be deleted or fundamentally redrafted;
 - 318.4. the incorrect attribution of section 10 regulatory power to the President be corrected and explained;
 - 318.5. the Department publish the policy, technical, security and legal material underlying the proposed electronic regime;

- 318.6. a revised draft containing meaningful evidential and technological safeguards be published for a fresh period of public comment; and
- 318.7. the Department expressly respond to the material objections contained in this submission before any final Regulations are promulgated.
319. LFN records that it supports genuine technological advancement which improves access to justice **without sacrificing the integrity of sworn evidence**.
320. It cannot, however, support subordinate legislation which seeks to solve the inconvenience of physical presence by removing the very safeguards which explain why presence was required in the first place.
321. Should substantially the same provisions nevertheless be promulgated without the defects identified herein being properly addressed, LFN expressly reserves its rights to challenge the lawfulness and constitutional validity of the final Regulations before a competent court, including on the grounds of *ultra vires* action, irrationality, vagueness, failure to consider material relevant considerations, inconsistency with the empowering *Act* and incompatibility with other applicable law.
322. Nothing contained herein constitutes an exhaustive statement of LFN's objections or prospective grounds of review.
323. All LFN's rights remain reserved *in toto*.

LIBERTY FIGHTERS NETWORK

Per: Reyno De Beer

