



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1018/2024

In the matter between:

LEXISNEXIS SOUTH AFRICA (PTY) LTD

APPELLANT

and

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

RESPONDENT

Neutral citation: *LexisNexis South Africa (Pty) Ltd v The Minister of Justice and
Constitutional Development* (1018/2024) ZASCA 181
(01 December 2025)

Coram: MEYER, KGOELE and KEIGHTLEY JJA and DAWOOD and CHILI
AJJA

Heard: 20 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 01 December 2025.

Summary: Law of Civil Procedure – Superior Courts Act 10 of 2013 – declaratory relief under s 21(1)(c) – Justices of the Peace and Commissioners of Oaths Act 16 of 1963 – Regulations Governing the Administering of an Oath or Affirmation – regulation 3 – application for declarator that ‘in the presence of’ be interpreted to include administration of an oath via audio-visual platforms – applicant not satisfying requirements for grant of declaratory relief – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Swanepoel J):
The appeal is dismissed.

JUDGMENT

**Keightley JA (Meyer and Kgoele JJA and Dawood and Chilli AJJA
concurring):**

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (the high court) dismissing an application by the appellant, LexisNexis South Africa (Pty) Ltd (LNSA), for declaratory relief. The respondent is the Minister of Justice and Correctional Services (the Minister) who, while initially entering an appearance to oppose the application, subsequently filed a notice to abide. The high court refused LNSA's application for leave to appeal against the dismissal of its application. The matter comes before this Court with our leave.

[2] The subject matter of the declaratory relief sought by LNSA is regulation 3 of the Regulations Governing the Administering of an Oath or Affirmation¹ (the Regulations), promulgated under s 10 of the Justices of the Peace and

¹ Regulations Governing the Administering of an Oath or Affirmation, GN R1258 GG 3619, 21 July 1972.

Commissioners of Oaths Act 16 of 1963 (the Act). Section 10(1)(b) confers upon the Minister the power to make regulations prescribing the form and manner in which an oath or affirmation shall be administered, and a solemn or attested declaration shall be taken. Regulation 3 provides:

- ‘(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.’

[3] Before the high court, the LNSA sought two declaratory orders reading, in relevant part, as follows:

‘(1) That it be and hereby is declared that the words “in the presence of” as contained in Regulation 3 [...] is to be broadly interpreted and shall include the administration of an oath or affirmation, including the signing of a written declaration, by means of live electronic communication, consisting of simultaneous audio-and-visual components.

(2) That it be and hereby is declared that Regulation 3 [...] does not create a requirement for the use of an Advanced Electronic Signature, as contemplated by Section 13² of the Electronic Communications and Transactions Act 25 of 2002.’

[4] The purpose of the application, according to the founding affidavit, was to bring what LNSA calls the antiquated regulations, promulgated in 1972, in line with the modern era of technology. LNSA disclosed that there was no live dispute involving the issues raised in its relief. However, it contended, recent decisions emanating from different high court divisions, had highlighted the need for certainty as to the correct interpretation of regulation 3.

² Section 13(1) of the Electronic Communications and Transactions Act provides:

‘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.’

[5] In particular, LNSA took issue in its founding affidavit with the interpretation accorded to regulation 3 in *Briedenhann*, a decision of the Eastern Cape Division of the High Court, Gqeberha.³ The court in *Briedenhann* determined that ‘in the presence of’ in regulation 3 means ‘in the physical presence or proximity of the commissioner.’⁴ This interpretation excludes the commissioning of affidavits over platforms supported by information technology. LNSA contended that the court in *Briedenhann* erred in that its interpretation does not accord with the prevailing interpretive approach and leads to absurd results. What LNSA sought in its application was for the high court to undertake an alternative ‘purposive’ interpretive exercise which, LNSA argued, would support and confirm its preferred interpretation encapsulated in the declaratory relief.

[6] LNSA explained in its founding affidavit that it is a global provider of legal, regulatory, and business information with clients in, among others, the legal sector. It has developed a secure, web-based platform, LexisSign (LS system), facilitating the electronic signature of a variety of documents. The LS system is offered as a subscription service to LNSA’s clients. One of its features is to facilitate the signing of documents via a log-in and hyperlink method between the deponent and commissioner of oaths, captured in an audit trail. The process offers an alternative to doing so in the physical presence of the commissioner of oaths.

[7] According to LNSA, in the post-COVID era, it has marketed the LS system and encouraged its use as a viable alternative to, among others, the commissioning of affidavits in the presence of the commissioner. LNSA has advised its customers of the implications of the *Briedenhann* judgment, and they have ‘expressed a keen desire to continue utilizing the (LS system) if greater clarity can be obtained as to

³ *Firstrand Bank Ltd v Briedenhann* [2022] ZAECQBHC 6; 2022 (5) SA 215 (ECGq).

⁴ *Ibid* para 25.

the legal validity thereof'. LNSA asserted that it has a duty to obtain that clarity and that, even in the absence of a live dispute, it was an appropriate matter for the high court to exercise its discretion to consider and grant the declaratory orders sought.

[8] The matter was enrolled on the unopposed motion court roll. In its judgment, the high court noted that it was unfortunate that it did not have the advantage of the Minister's perspective on the issues raised in the application. It had invited three law bodies to participate as amici curiae but had received no response from any of them. Consequently, the application was limited to LNSA's founding papers and submissions.

[9] The high court rejected LNSA's interpretation of regulation 3. It agreed with the interpretation adopted in *Briedenhann*, finding that the wording did not admit of an alternative interpretation. It found:

'However, to find for the applicant would require me to ignore the clear meaning of the words in the Regulations. In so doing I would be "crossing the divide between interpretation and legislation", as Wallis JA warned of in *Endumeni*. It is not for a Court to impose its view of what would be sensible or businesslike where the wording of the document is clear.'

[10] Before this Court, LNSA persists with its submission that the *Briedenhann* interpretation is unsustainable and that the high court erred in following it. LNSA contends that to interpret 'in the presence of' in regulation 3 as meaning 'in the physical presence of' results in an arbitrary differentiation between administering the oath for purposes of viva voce evidence, on the one hand, and for affidavit purposes, on the other. This is so, it is argued, because technological developments have made it possible for courts to conduct trials via audio-visual platforms. In those instances, the oath is taken by a witness on the platform rather than in the presence of the commissioner of oaths. If this is acceptable, contends LNSA, there is no reason

why regulation 3 should not also be interpreted to permit the administering of the oath for affidavit purposes via an audio-visual link. LNSA further submits that the meaning of words is an evolutionary process; it changes over time, and in the modern technological age there is no longer a need to interpret ‘in the presence of’ as meaning ‘in the physical presence of’.

[11] An important element of LNSA’s application, which appears to have been overlooked by the high court, is that it was an application for declaratory relief. The power of superior courts to grant declaratory relief is circumscribed. The limits and nature of the power are regulated by s 21(1)(c) of the Superior Courts Act 10 of 2013. This section provides that a court has the power ‘in its discretion, and at the instance of any interested person, to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.’

[12] The exercise of this power requires a two-stage approach:

‘During the first leg of the inquiry the Court must be satisfied that the applicant has an interest in an “existing, future or contingent right or obligation”. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court’s discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry.’⁵

[13] The high court embarked on the interpretive exercise of what is meant by ‘in the presence of’ without undertaking this antecedent inquiry. It did not consider and determine whether LNSA had established the interest in an existing, future or contingent right or obligation necessary to engage the high court’s jurisdiction to

⁵ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) (*Cordiant Trading*) para 18.

grant the declaratory relief. As I have indicated, this is not a case where the parties are involved in a legal dispute. While this does not preclude a court from exercising its discretion to grant declaratory relief,⁶ it is incumbent on the court first to satisfy itself that it has the necessary power to do so. Consequently, the primary question that arises for consideration in this appeal is whether LNSA established the requisite interest to engage the high court's jurisdiction to consider the declaratory relief sought.

[14] It is trite that it is not the role of courts to provide legal advice.⁷ For this reason, it is not competent for a court to consider an application for declaratory relief in respect of a matter that is abstract or of academic interest. They must satisfy the court that their interest pertains to the legal right or obligation to which the order will relate.⁸

[15] LNSA claims to have an interest in its preferred alternative interpretation of regulation 3 because its product, the LS system, is compatible with that interpretation. However, simply because LNSA is interested in a broader interpretation of regulation 3 does not mean that it has the type of interest necessary to render the declaratory relief competent. The critical question is what right or obligation of LNSA is implicated? LNSA is not facing a legal challenge from its customers based on the interpretation adopted in *Briedenhann*. It contends no more than that its customers desire greater legal certainty, and that the required certainty would also be beneficial for litigants in general. It claims, too, that it would free up court resources if a wider interpretation were to be adopted, as courts would no

⁶ *Cordiant Trading* para 16.

⁷ *Ex Parte Nell* 1963 (1) SA 754 (A) at 760B.

⁸ *Preston v Vredendal Co-operative Winery Ltd and Another* 2001 (1) SA 244 (ECD) at 249 A-D and the cases cited therein.

longer be saddled with disputes over whether affidavits were properly commissioned.

[16] There are difficulties with this approach. As matters stand, there is legal certainty: *Briedenhann* interpreted ‘in the presence of’ to mean in the physical presence of the commissioner of oaths. This interpretation is compatible with the approach adopted in other high court judgments: *Knuttel N. O. v Bhana*,⁹ and *E D Foods SRL v Africa’s Best (Pty) Ltd*.¹⁰ In these cases, it has been held that while regulation 3 requires physical presence, the requirement may be satisfied if there is substantial compliance. What LNSA wants to achieve is not legal certainty, which already exists, but rather a different legal certainty. Essentially, the application for declaratory relief is an attempt at a back-door appeal against *Briedenhann*, in circumstances where LNSA was not a party to that dispute. This is not a permissible basis on which to engage a court’s power to grant declaratory relief.

[17] In addition, the application is an attempt to achieve a legislative purpose through the guise of interpretation. It may well be that the continued requirement for a deponent to a written declaration to be in the physical presence of the commissioner of oaths when she signs it is out of step with modern technology. However, this does not mean that it would be competent for a court to harness its power to grant declaratory relief to achieve the proposed change by deliberating on the relief sought by LNSA.

[18] This is particularly so given the very broad terms of the declaratory relief sought. If granted, the effect of the order would be to usher in a dispensation for the administration of oaths under regulation 3 entirely different from that envisaged

⁹*Knuttel N.O. v Bhana* [2021] ZAGPJHC 874; 2022 JDR 0190 (GJ).

¹⁰*E D Food SRL v Africa’s Best (Pty) Ltd* [2024] ZAGPJHC 1619; [2024] JOL 63714 (GJ).

when the regulation was enacted. The default position would be that the oath administered by way of any form of real-time audio-and-visual system is valid, unless challenged and declared invalid.

[19] LNSA accepts that one of the purposes of regulation 3 is to guard against abuse. After all, an affidavit stands as evidence before a court. It follows that compliance with regulation 3 acts as a guarantee to a court that the oath was understood and accepted by the deponent.¹¹ The court will know that the deponent has understood that she has confirmed that the contents of the affidavit are true. Unlike the case with the administration of the oath for viva voce purposes, the court has no oversight function at the time that a deponent to an affidavit takes the oath.

[20] Any alternative method of administering the oath for affidavit purposes would have to serve the same purpose: it would have to offer the same guarantee to the court as an oath administered in the presence of the commissioner of oaths. There is nothing before this Court to show how this purpose would be achieved if the broad relief sought were to be granted. It would open the door to any number of unidentified audio-visual platforms being used to administer the oath, with no evidence (save for the details provided for the LS system) of the safeguards, or lack thereof, involved.

[21] What this demonstrates is that the suggested changes must be effected through a legislative, and not judicial process. Section 10(1)(b) of the Act confers regulatory power on the Minister. It is for her to consider and, if she regards it necessary or appropriate, to make new regulations governing the taking of the oath and signature of written declarations. Of necessity, this would involve policy as well as technical and practical considerations. It would be wholly inappropriate for a court to usurp

¹¹ *Briedenhann* para 25.

the Minister's powers by deciding, in a vacuum, that it should include all forms of live electronic communication involving simultaneous audio and visual components. That would be to blur the line between judicial and executive powers.

[22] It is a well-established and uniformly observed policy that courts should not exercise their discretionary power to grant declaratory relief in favour of deciding points that are merely academic, abstract, or hypothetical. A claim for declaratory relief does not oblige a court to respond to the question posed, even when that looks like being capable of a ready answer.¹² The relief sought by LNSA in this case is hypothetical as it is not tied to any factual scenario. LNSA does not seek an order declaring that its LS system, when utilised, would constitute substantial compliance with regulation 3. On the contrary, LNSA expressly submitted that the purpose of the application was not to obtain the court's endorsement of its LS system. Nor is the question posed by LNSA capable of a ready answer in the form of the declarator sought. That answer lies with the Minister, and not the courts.

[23] For all these reasons, I find that the LNSA failed to establish that its application engaged the high court's jurisdiction to grant declaratory relief. Even if the high court had the power to do so, this is not an appropriate case in which it would have been proper to grant the declarations sought.

[24] I make the following order:

The appeal is dismissed.

¹² *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1996 (12) BCLR 1599; 1997 (3) SA 514 at 525A-B.

R M KEIGHTLEY
JUDGE OF APPEAL

Appearances

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