



home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

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LAWYERS FOR HUMAN RIGHT
By Email: Patricia@lhr.org.za

LAWYERS FOR HUMAN RIGHT / MINISTER OF HOME AFFAIRS AND OTHERS

Herewith an amended answering affidavit for the Second and Fifth Respondents.

Please note that para's 2, 7, 8, 9, 15 and 22 have been amended to properly reflect our instructions.

We apologise for the inconvenience caused.

We also apologise for communicating directly with you as the State Attorney tasked with this matter, is currently unavailable.

Yours faithfully

pp **DIRECTOR-GENERAL**
DATE: 22.06.2015

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 44151/2015

In the matter between:

LAWYERS FOR HUMAN RIGHTS

Applicant

and

MINISTER IN THE PRESIDENCY

First Respondent

MINISTER OF HOME AFFAIRS

Second Respondent

MINISTER OF DEFENCE

Third Respondent

MINISTER OF POLICE

Fourth Respondent

DIRECTOR-GENERAL OF HOME AFFAIRS

Fifth Respondent

NATIONAL COMMISSIONER OF POLICE

Sixth Respondent

**PROVINCIAL COMMISSIONER OF POLICE:
GAUTENG PROVINCE**

Seventh Respondent

**CHIEF OF THE SOUTH AFRICAN NATIONAL
DEFENCE FORCE**

Eighth Respondent

SECOND AND FIFTH RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

MODIRI MATTHEWS



M.M.

do hereby make oath and say:


1.

I am a major male person in the employ of the Department of Home Affairs in my capacity as Chief Director: Inspectorate. The facts deposed hereinafter fall within my personal knowledge unless appearing to the contrary, and are true and correct. I am duly authorised to depose to this affidavit on behalf of the Second and Fifth Respondents. Before dealing with the allegations contained in the founding affidavit, insofar as they pertain to the Second and Fifth Respondents, a brief overview of the functions of the Department of Home Affairs, insofar as they relate to crime prevention operations, ought to be placed before the Honourable Court.

2.

BACKGROUND

For a number of years now, the Department of Home Affairs has been called upon to participate in law enforcement operations with the South African Police Services whenever the latter embarks upon crime prevention operations in various parts of the Republic of South Africa.



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3.

It does not warrant any explanation as to why such crime prevention operations take place from time to time, as the necessity for such speaks for itself.

4.


By the very nature thereof, these crime prevention operations are inclined to take place in areas which are most vulnerable to crime related activities, often in residential areas located within larger metropolitan urban structures.

5.

These operations have been ongoing for a number of years.

6.

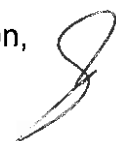
It has been the experience of the South African Police Services that during these crime prevention operations, a number of persons are confronted who are unable to provide proof of their entitlement to reside in the Republic of South Africa.



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7.

- 7.1 During these operations the immigration related services of the Department of Home Affairs, include the Department of Home Affairs making use of Section 41 of the Immigration Act no 13 of 2002 ("the Immigration Act") to verify or establish a person's entitlement to be in the Republic of South Africa as and when such persons are brought to Departmental officials by South African Police Services during such operations or detected by Home Affairs officials.
- 7.2 This verification/assistance, by its very nature, is incapable of taking place at the very spot where the crime prevention operations are taking place as a result of which such persons who are identified by members of the South African Police Services as being persons who are either unable to produce any documentation in support of their entitlement to be in the Republic of South Africa, alternatively, are in possession of expired documentation, are referred to Home Affairs officials so that the latter may, in turn, exercise those obligations which appear in Regulation 37, read together with Sections 34(1)(b) and 41 of the Immigration Act.
- 7.3 This, in turn, entails having to, as a first step, interview such persons, where such persons are not in possession of any documentation,



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alternatively, where such persons have expired permits, to obtain verification that such permits do exist and/or that such permits have in fact expired. Immediately thereafter, the information and documentation obtained during such interviews, is then collated at the various Immigration Refugee offices of the Department of Home Affairs, located throughout the country, whereupon it is then determined whether or not persons who have been detained under Section 41 of the Immigration Act are illegal foreigners and should thereafter be dealt with further in terms of Section 34 thereof, namely, initiating the deportation process thereafter as is provided for in Section 34 of the Immigration Act.

8.

It needs to be emphasised, from the outset, that Immigration officials are not trained to deal with crime prevention activities at all and neither do they have any powers in terms of the Criminal Procedure Act. Accordingly, and in every situation where a crime prevention operation is taking place, officials of the Department of Home Affairs are requested to verify and check allegations made by persons who may not be in possession of any documentation / have expired documentation in their possession. This is the



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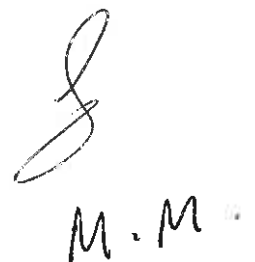
Department's obligation both in terms of Section 41 of the Immigration Act as well as Regulation 37 thereof.

9.

The Department of Home Affairs' role was to identify persons illegally in the country and those persons who were eventually earmarked for deportation, were persons who, after verification, were found to be illegal foreigners and were persons to whom whatever rights they may have been entitled to, were explained to them and notifications of deportation were handed to them for their signature and completion. This also applies to review/appeal rights provided for in Section 8 of the Immigration Act.

10.

By virtue of the fact that most illegal foreigners will have been confronted and initially interviewed (and verified) throughout various parts of the country, such persons are then transported to the Lindela Repatriation Facility, through which all forced deportations take place. Officials assigned to that facility are then also required to

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ensure that the necessary documentation which is required to be completed and handed to the detained persons before their transfer to Lindela, is in fact done.

- 10.1 To the extent that such may not have been done, or in some instances, have been incorrectly completed, such Immigration officials are then required to, upon a detained person's admission to the facility, to rectify the shortcomings.
- 10.2 In those instances where the individuals have been found to be illegal foreigners but who have indicated a desire to voluntarily depart from the Republic of South Africa by themselves, and also, in those instances where the individuals concerned have already cast roots in the Republic of South Africa in the sense of having had children here or in the sense of having established businesses or owning immovable property here, such individuals will be handed a Notification to Depart which, in turn, will ensure that such individual is not detained pending his deportation, and, simultaneously, it will afford such individual the opportunity to regularise his affairs prior to his departure from the Republic of South Africa.



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11.

AD URGENCY

11.1 This application is brought by the Applicant with such great haste, that it constitutes an abuse of the process of court.

11.2 Furthermore, the relief sought against the Second and Fifth Respondents is inappropriate and cannot be sought.

11.3 Argument in respect of both matters will be forthcoming during the hearing hereof.

12.

I now deal with those portions of the founding affidavit insofar as they pertain to the Second and Fifth Respondents.

13.

AD PARAGRAPHS 1 AND 2 THEREOF:

The allegations herein contained are admitted.


M. M.

14.

AD PARAGRAPH 4 THEREOF:

As shall appear more fully herein later, not all the allegations contained in the founding affidavit are true and correct. The allegation to this effect, accordingly, is denied.

15.


AD PARAGRAPH 13 THEREOF:

Insofar as the relief sought by the Applicant, relates to all the Respondents, such relief is categorically rejected, insofar as it concerns the Department of Home Affairs. It is denied that the Applicant is entitled to any relief vis-à-vis the Second and Fifth Respondents. The Applicant's attempt to link these two Respondents to all the other Respondents is therefore rejected.

16.

AD PARAGRAPH 10 THEREOF:

The allegations herein contained, insofar as they attempt to create the


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impression that LHR are bringing "near weekly cases of unlawful Immigration" is contemptuously and categorically rejected.

17.


AD PARAGRAPH 17 THEREOF:

The allegations herein contained are noted. This interest, however, cannot extend to that of the Department of Home Affairs and further argument in this regard shall be forthcoming during the hearing of this application.

18.

AD PARAGRAPH 18 THEREOF:

The allegations herein contained, insofar as they pertain to the deportation of persons who have been found, during crime prevention operations, to be without any entitlement to be in the Republic of South Africa, are once again categorically denied. All persons who are found to be without documentation or to be in possession of expired documentation, are dealt with in terms of the Immigration Act, and the provisions therein contained.


M.M.

19.

AD PARAGRAPHS 21, 22 and 23 THEREOF:

19.1 The allegations herein contained are noted.

19.2 The Applicant, however, selectively quotes the passages of the speech in which the country's President is, by way of strong innuendo, portrayed as being dishonest. This selective quoting of passages is repeated further in the founding affidavit.


20.

AD PARAGRAPH 24 THEREOF:

The allegations herein contained are admitted. It is, however, to be noted that the employment of SANDF personnel, was limited to border posts only, that is, ports of entry. Nothing more.

21.

AD PARAGRAPH 28 THEREOF:


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21.1 The allegations herein contained are admitted.

21.2 It is, however, telling that of the 10 issues which were to be targeted by crime prevention operations, only one thereof relates to immigration, namely, those persons who may have been found to be undocumented migrants. The remaining listed crimes are serious crimes and impact upon the safety of all communities, irrespective of the make-up of such communities.

22.

AD PARAGRAPH 29 THEREOF:

The allegations herein contained are denied, in the light of what has already been stated above. As pointed out above, crime prevention operations, in which the Department of Home Affairs' officials participate, do so in the role that has already been explained above. In any event, and, as importantly, such crime prevention operations have been going on for a number of years and in all parts of the Republic of South Africa. Operation Fiela was thus not a reaction to xenophobic violence. On the contrary, xenophobic violence emphasised the urgency with which to step up crime prevention operations of the type that had already been going on for a number of years.


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23.

AD PARAGRAPH 31.2 THEREOF:

The allegations herein contained are also categorically denied. Contrary to the Applicant's allegations to the effect that the operations of 7th May 2015 in Bellville "targeted" foreign owned shops, the authorisation relief upon by the South African Police Services (annexure "TP1" to annexure "FA16") clearly spells out the ambit of the authorisation given to Colonel H J Olivier and members of the South African Police Services under his command, namely, that the purpose of the crime prevention exercise was:

- "1. *Without a warrant search persons, premises, vehicles, receptacles or objects of whatsoever nature, in order to seize illegal firearms, ammunition and explosives and any object referred to in Section 20 of the Criminal Procedure Act, 1997 (Act no. 51 of 1977), in this area;*
2. *Seize any article referred to above and deal with it in terms of the Criminal Procedure Act, 1977 (Act no. 51 of 1977), or any other applicable legislation;*
3. *and any counterfeit products as pointed (sic) by brand representatives;*


- M. M. -

4.,

5.”

24.

AD PARAGRAPH 33 THEREOF:

The allegations herein contained are denied, insofar as they pertain to the Department of Home Affairs' involvement in these crime prevention exercises. I have already explained the nature of the Department of Home Affairs' officials presence during such operations.

25.

AD PARAGRAPH 49 THEREOF:

The allegations herein contained are noted. The presence of DHA officials at Police Stations is not unusual as the interviewing process in terms of Section 41 of the Immigration Act often takes place at such locations.

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26.

AD PARAGRAPH 50 THEREOF:

The Second and Fifth Respondents are unable to respond to the allegations herein contained, in the absence of any identity of the alleged Immigration officials involved. The allegations are accordingly denied.

27.


AD PARAGRAPH 56 THEREOF:

The allegations herein contained are categorically denied. It is only after admission to the Lindela Repatriation Facility, that deportation processes are initiated for the first time. Accordingly, allegations to the effect that a deportation was scheduled for a particular day, even before such persons were taken up at Lindela, are disingenuous and misleading.

28.

AD PARAGRAPH 65 THEREOF:

The allegations herein contained are denied. Paragraph 2 of the order of 12th May 2015 made it clear that the Second and Fifth Respondents (*in casu*)


M. M.

were interdicted from deporting detainees for a period of two weeks. There is nothing contained therein which entitles the Applicant to have consulted for a two week period. This is simply misleading.

29.

AD PARAGRAPH 76.4 THEREOF:

The content of the first sentence herein contained, is noted. The fact that SAPS officials or SANDF officers, as a first question, asked residents whether any of them had firearms, is confirmation of the fact that the intended purpose of the crime combating operation, was exactly that – to combat crime.

30.

AD PARAGRAPH 76.6 THEREOF:

The allegations herein confirm that DHA officials were not and are never involved in crime prevention operations. Their role is simply peripheral, namely, to check documentation in respect of persons who SAPS officers may have identified as possibly being illegal foreigners.



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31.


AD PARAGRAPH 76.10 THEREOF:

The allegations contained in the first sentence, are noted. This confirms that once the verification process is complete and it is established that persons who were initially suspected of not having any entitlement to being in the Republic of South Africa, are released upon verification or establishment of any status which they may rely upon. It is not only persons with South African identity documents that would have been released. It would also include people whose Immigration/Refugee Act permits were valid and were properly issued.

32.

AD PARAGRAPH 80.2 THEREOF:

It is denied that DHA officials would have been involved in the crime combatting operations which took place at the Central Methodist Church. They were merely present at such operation.


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33.

AD PARAGRAPH 80.3 THEREOF:

There is no such thing as "an immigration raid". The allegations herein contained are therefore denied.

34.

AD PARAGRAPH 81 THEREOF:

The allegations herein contained are categorically denied. I say so for the following reasons:

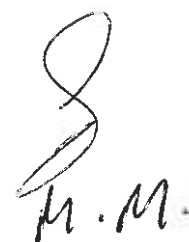
34.1 In terms of Section 21 of the Refugees Act no 130 of 1998, an application for asylum "...must be made in person ...at any Refugee Office".

34.2 Furthermore, and also in terms of Section 21 of the Refugees Act as aforesaid, an applicant, when making an application for asylum (i.e. at the Refugee Reception Office, and in person) "... must have his/her fingerprints taken and every applicant who is 16 years or older must furnish two recent photographs of himself/herself ...".



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- 34.3 The need to apply in person is repeated in the wording of Regulation 2(1)(a) of the Regulations to the Refugees Act, which provides that an application for asylum in terms of Section 21 of the Act (the process referred to above) "*...must be lodged by the applicant in person at a designated Refugee Reception Office ...*".
- 34.4 Furthermore, any extensions to all permits issued in terms of the Refugees Act, may only take place by way of a personal attendance by the holder of the permit at the Refugee Reception Office which initially issued the permits.
- 34.5 Regard being had to the foregoing, it would never have been Departmental officials who would have collected photographs and fingerprints. In any event, security considerations absolutely prohibit the taking of fingerprints outside an environment which would otherwise be strictly controlled. Not to do so, would severely compromise the entire refugee/asylum regime.
- 34.6 It is also noteworthy that a number of these persons were already illegal foreigners by virtue of the fact that their asylum seeking permits had expired, as is clearly evident from the wording of the paragraph under reply.

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35.

AD PARAGRAPH 82 THEREOF:

The allegations herein contained are denied and, regard being had to the foregoing, are simply disingenuous.

36.

AD PARAGRAPH 83 THEREOF:

To the extent that these allegations may be correct (which cannot be tested in the absence of the identity of the persons concerned), the Applicant is reminded of the obligations of the Minister of Home Affairs in terms of Section 32(2) of the Immigration Act, namely, that all illegal foreigners are required to be reported. There is no discretion in this regard.

37.

AD PARAGRAPH 89 THEREOF:

The allegations herein contained are denied. The Department has never denied access by legal representatives to detained persons. However, for



M. M.

logistical reasons, the Department has always requested that appointments be timeously made and that consultations take place in an orderly manner. The Applicant, however, simply refuses to abide by this reasonable request.

38.


AD PARAGRAPH 96 THEREOF:

The allegations herein contained, insofar as they pertain to the reasons for the list not being made available, are not understood. Further argument in this regard shall be made during the hearing of the application.

39.

AD PARAGRAPH 99 THEREOF:

The allegations herein contained are denied and have a bearing on the lack of urgency in this matter and the self inflicted "urgency" of the Applicant having brought the application. It was not necessary to have consulted with all the persons who were on the list, before lodging the application.


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40.

AD PARAGRAPHS 100.2 and 100.3 THEREOF:

These applications were postponed to 18th June 2015 due to the incapacity of the Honourable Judge to whom these two applications were allocated. The outcome of these applications will be conveyed to the Honourable Court.

41.


AD PARAGRAPHS 100.4 and 100.5 THEREOF:

The allegations herein contained are the subject matter of pending litigation and are not responded to herein.

42.

AD PARAGRAPH 102 THEREOF:

The allegations herein contained are denied. Annexure "FA17" consists of a letter of demand dated 2nd June 2015 and not 25 May 2015 as alleged.


M. M.

43.

AD PARAGRAPH 104 THEREOF:

The Department of Home Affairs is unaware of South African citizens having been arrested simply by virtue of them living with foreigners. However, the Applicant is reminded of Section 49(2) of the Immigration Act which makes it an offence for anyone to knowingly assist a person to enter, remain or depart from the Republic of South Africa in contravention of the Immigration Act and which is punishable by a fine or imprisonment not exceeding 5 (five) years. Therefore, in the event of South Africans living with foreigners being found to be possibly contravening such section of the Immigration Act, it is perfectly within the rights of the South African Police Services or anyone else for that matter, to arrest and to lay charges against such South African citizens.

44.

AD PARAGRAPHS 105 and 106 THEREOF:

The allegations herein contained are categorically denied. To afford, effectively, less than 2 working days within which to file comprehensive responses to a substantive urgent application, is nothing short of an abuse of process.



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45.

AD PARAGRAPH 108 THEREOF:

The allegations herein contained, insofar as they pertain to deportation, are categorically denied insofar as they pertain to the Department of Home Affairs.

46.

AD PARAGRAPH 109 THEREOF:

The allegations herein contained are noted. It is telling, however, that the Applicant, being donor funded, still calls for costs.

47.

AD PARAGRAPH 140 THEREOF:

47.1 The allegations herein contained are noted. Again, the Applicant is reminded of the fact that in terms of Section 49(1)(a) of the Immigration Act, it is an offence for anyone to enter into, remain or depart from the Republic of South Africa in contravention of the Act and is liable to a fine or imprisonment not exceeding 2 (two) years.




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47.2 Accordingly, where a person is confronted under circumstances which may render him/her to be a foreigner, it is perfectly within the entitlement of the South African Police Services, during a general crime prevention operation, to request such person to identify himself/herself in terms of his/her entitlement to be in the Republic of South Africa. This much is also provided for in terms of Section 41 of the Immigration Act where a Police official has the same rights as that of an Immigration officer to request anyone to identify himself/herself as a citizen, permanent resident or a foreigner with some or other form of entitlement to be in the Republic of South Africa.

48.

AD PARAGRAPH 141 THEREOF:

The allegations herein contained are denied. As already pointed out, and also in the version given by the Applicant itself, the presence of the South African Police at all times, was primarily and exclusively aimed at a general crime prevention exercise (of which being an illegal foreigner was simply one of the issues which were being pursued, as and when circumstances warranted such). Furthermore, only Immigration officers of the Department


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of Home Affairs are entitled to act in terms of Section 33(5) and 33(6) of the Immigration Act.

49.

AD PARAGRAPH 142 THEREOF:

There has never been any need for such an explanation regard having been had to the general crime prevention exercise of the South African Police Services.

50.

AD PARAGRAPH 146 THEREOF:

The allegations herein contained do not make sense. It simply does not make sense that people would be sent away from their residences, to thereafter be "intercepted" by the Department of Home Affairs officials. Furthermore, it is also clear from the allegations herein contained, that DHA officials were not in the premises of the persons concerned and were simply present in a peripheral capacity and in the sense which has already been described above. This paragraph is accordingly denied.



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51.

AD PARAGRAPH 147 THEREOF:

The allegations herein contained are categorically denied. Not one example of a failure to comply with the 48 hour period provided for in terms of Section 34 of the Immigration Act has been set forth in these papers and, accordingly, such sweeping statements must be rejected.

52.

AD PARAGRAPH 148 THEREOF:

The allegations herein contained are also categorically denied. Once again, the Applicant fails and/or refuses to comprehend the scope and ambit of Section 41 of the Immigration Act.

53.

AD PARAGRAPH 149 THEREOF:

The allegations herein contained are denied as they, once again, constitute sweeping, bold statements devoid of any factual basis therefore.

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54.

AD PARAGRAPHS 150 and 151 THEREOF:

I have already dealt with the attempts by the Applicant to make out a case to the effect that persons suspected, during general crime prevention exercises, of being illegal foreigners are expected to have their status verified immediately upon them being confronted. This simply raises the question, in the event of the Applicant's interpretation of the relevant provisions being correct, that there seems to be no purpose served by having inserted a 48 hour period in the same provisions.

55.

AD PARAGRAPH 152 THEREOF:

The allegations herein contained are denied, and constitute another unsubstantiated sweeping statement.

56.

AD PARAGRAPHS 154, 155 and 156 THEREOF:

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The allegations herein contained are denied. A number of people, who were able to satisfy SAPS or DHA officials of their entitlement to sojourn in the Republic of South Africa, were immediately released upon such verification having taken place.

57.

AD PARAGRAPH 159 THEREOF:

The allegations herein contained are partially correct as it is impossible for Immigration officials, at the time when persons with expired permits are confronted with such, to establish whether or not there is still a pending asylum claim. In any event, the statement herein does not take cognisance of the fact that a large number of persons are presently in the Republic of South Africa without any documentation whatsoever, let alone a Section 22 temporary asylum seeker permit.

58.

AD PARAGRAPH 160 THEREOF:

The allegations herein contained are denied. I have already dealt with this aspect.


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59.

AD PARAGRAPHS 161 and 162 THEREOF:

Once again, without the identity of the persons referred to herein being disclosed, it is impossible to respond to these allegations. In the premises aforesaid, such are denied.

60.

AD PARAGRAPH 163 THEREOF:

The allegations herein contained, insofar as these pertain to DHA officials, are denied.

61.

AD PARAGRAPH 166 THEREOF:

The allegations herein contained are once again denied in the absence of any identity of the persons referred to herein.

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62.

AD PARAGRAPH 169 THEREOF:

The allegations herein contained are once again, insofar as they pertain to the DHA officials, denied.

63.

Having regard to the foregoing, your deponent humbly requests that the application, insofar as it pertains to Second and Fifth Respondents, be dismissed with costs.

Markus Matthews

DEPONENT

I certify that the Deponent acknowledged that he/she knows and understands the contents of this affidavit, that he/she has no objection to the making of the prescribed oath and that he/she considers this oath to be binding on his/her conscience. I also certify that this affidavit was signed in my presence at PRETORIA on this 22nd day of JUNE



2015 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.



COMMISSIONER OF OATHS

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