IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 46054/2018

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: NO

19 May 2023

..... ……
SIGNATURE DATE

CASE NO.: **2022/1538**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Applicant

and

MAKAULA, BONKE SIGNORA First Respondent

CHIDI, BOITUMELO Second Respondent

Neutral Citation: *The Standard Bank of South Africa Ltd v Makaula & Another* (Case No: 2022/1538) [2023] ZAGPJHC 519 (19 May 2023)

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 February 2023.

JUDGMENT

VAN NIEUWENHUIZEN AJ:

[1] Sitting in the unopposed motion court in two weeks during February 2023, I was faced with various applications for default judgment where the Applicants were banks and the affidavits in support of such applications were commissioned by attorneys of firms of attorneys who acted for such banks in other applications for default judgment. In other words, it would transpire that XYZ attorneys would be the attorneys of record of ABC Bank in one matter and then in another application for default judgment they would be the commissioner of oaths of the very same bank.

[2] I had raised my concerns as to whether affidavits commissioned by attorneys under these circumstances (who were clearly on the panel of the banks and thus commissioning the affidavits of their clients, albeit not in the same matters in which they represented them) complied with the peremptory provisions of Regulation 7(1) (see **Royal Hotel, Dundee, and Others v Liquor Licensing Board, Area No 26; Durnacol Recreation Club v Liquor Licensing Board Area, No 26** 1966 (2) SA 661 (N) ("**Royal Hotel**") at 670E – G) of the Regulations governing the administering of an oath or affirmation

made in terms of Section 10 of the Justices of the Peace and Commissioner of Oaths Act 16 of 1963 and published under GN R12258 in GG3619 of 21 July 1972, as amended ("the regulations"), which provides that:

> *"A commissioner of oaths shall not administer an oath or affirmation relating to matter in which he has interest."*

[3] I expressed my *prima facie* view that I did not believe that they did. Many of the applications were removed from the roll, but on 23 February 2023 in the above matter, pursuant to taking an instruction, the Applicant persisted in seeking an order for default judgment in circumstances where the founding affidavit was commissioned by an attorney who practised at a firm of attorneys who is on the panel of the Applicant. The matter was stood down to the following day for argument and to allow Ms Latif, who appeared most ably for the Applicant, to prepare heads of argument. Ms Latif referred me to a decision by Daffue J in **Nedbank Limited v Hattingh and Others** (4136/2020) [2022] ZAFSHC 44 (7 March 2022) ("**Hattingh**") where in an application for summary judgment the same point was taken and rejected as follows at paragraph 16:

> *"The mere fact that the two firms of attorneys featuring herein may be on the plaintiff's panel of attorneys, cannot be used in support of a responsible submission that they are not functioning totally independent from each other. In fact, there can be no doubt that they are completely*

> *independent from each other. I cannot see on what conceivable basis could it be held that attorney Steensma has an interest in the present litigation, or that she would want to, or could have influenced the deponent in regard to the issue at hand. Notwithstanding my request, the 4th defendant's counsel could not provide me with any authorities in support of her submissions. The facts in Radue and authorities relied upon are clearly distinguishable from the facts in casu and consequently, I am not bound to follow any of these judgments."*

[4] As is thus not quite apparent from the judgment of **Hattingh** itself, to what extent, if any, the learned judge was referred to **Royal Hotel** [or the other decisions to which I shall refer to later herein – albeit that these decisions were referred to in **Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers** 1998 (3) SA 677 (E) ("**Radue**") and **Radue** itself] being authority for the proposition that the commissioner of oaths was not entirely independent and unbiased in the outcome of the summary judgment application of her client (albeit not her matter for that client).

[5] After argument and a very constructive debate with Ms Latif, I permitted her to provide me with supplementary heads of argument, which was provided to me on 14 March 2023, and I express my gratitude to her therefor. I had sought to be addressed on the following authorities:

(a) **Radue**;

(b) **Bondev Midrand (Pty) Limited v Ndlangamandla NO and Others** (38331/2015) [2016] ZAGPPHC 939 (11 November 2016) ("**Bondev**");

(c) **Ferreira and Another v Nedbank Limited and Another** (45240/16) [2017] ZAGPJHC 357 (24 November 2017) ("**Ferreira**");

(d) **Ida Oosthuizen Immigration Practitioner CC & Others v DG of the Dept. of Home Affairs & Another** (84727/2017) [2018] ZAGPPHC 204 (10 April 2018) ("**Ida Oosthuizen**");

(e) **NB Developments & Others v Cargo Loading Solutions (Pty) Ltd & Others** (26823/2018) [2018] ZAGLDJHC (6 August 2018) ("**NB Developments**"); and

(f) with particular emphasis on the decision of **Royal Hotel**.

[6] In **Bondev**, albeit in my view by virtue of *obiter* dictum, Prinsloo J held a similar view as that of Daffue J. In **Ferreira** Pather AJ held as follows at paragraph 29:

> *"Turning to the defences raised in the founding affidavit, these can only be described as bald and fictitious. Regulation 7(1) in respect of commissioners of oaths provides that a commissioner of oaths "shall not administer an oath or affirmation relating to a matter in*

> *which he/she has an interest". To suggest that the attorney who commissioned the first respondent's affidavit and who is employed by the firm of attorneys who are part of the first respondent's panel of attorneys/conveyancers, has an interest in the matter against the applicants, is far-fetched. In the course of their legal work for the first respondent, the firm probably deals with many such matters in a day. And it is not known whether the commissioner of oaths is one of the conveyancers who works in that department. This is similar to the first applicant's spurious attack on the attorney acting on behalf of the first respondent's, blaming her for his poor handling of his "urgent" application."*

[7] By reason of the conclusion to which I come to in this judgment, it is not necessary for me to specifically deal with **Ida Oosthuizen** or **NB Developments** but suffice it to state that those decisions were in line with **Royal Hotel** and **Radue**. My concern with the judgments in **Hattingh**, **Bondev**, and **Ferreira** is that none of them dealt with the very persuasive reasoning of the full bench decision in **Royal Hotel**.

[8] In **Royal Hotel** Caney J (writing on behalf of the full bench) held that *"… a commissioner of oaths is required to be impartial and unbiased in relation to the subject matter of the affidavit and that, if he is otherwise, he has an interest in the matter."* and that *"That the interest hit at by the regulations is not only a pecuniary or proprietary one is indicated by The Master v Benjamin, N.O., 1955 (4) SA 14 (T), in which an affidavit by the*

Master was held to contravene reg. 1 (i) because it had been attested by the Assistant Master." (at 659G – H).

[9] The interest that an attorney may have in a matter of a client where that attorney was not the attorney of record was cogently explained by Caney J as follows at 668H – 670A:

> *"Mr. Hunt urged on us the case of S v van Schalkwyk, 1966 (1) SA 172 (T). In that case HILL, J., said that the question whether the attorney functioning as commissioner of oaths had an interest in the subject matter was a question of fact to be decided in the light of the relevant circumstances. With respect, I agree with this, but when an attorney so functions in a matter in which he is acting on behalf of his client, that fact requires the question to be answered in the affirmative because, for reasons which I shall state, the attorney's interest is closely associated with his client's interest. The facts of the case abovementioned were that an attorney, a member of a firm of attorneys generally acting for a company which owned a newspaper and which contemplated publishing in it the contents of a certain affidavit, examined the deponent on the contents of the affidavit he was about to swear and informed him that his purpose in doing so was to ensure that the allegations in it were correct, with a view to protecting the newspaper against any infringement of the Prisons Act; he translated portions of the affidavit into Afrikaans for the deponent and made certain amendments where required by the latter. He then attested the affidavit when the deponent executed and swore to it before him. HILL, J., took the view that the only interest the attorney had in the affidavit was*

> *'to ensure as far as possible that the deponent understood the contents and that the allegations were true'*

and this type of interest, he held, did not invalidate the affidavit. BOSHOFF, J., took the view that from the fact that the attorney had a professional and pecuniary interest in performing his mandate in respect of the affidavit itself, it did not follow that the affidavit related to a matter in which he had an interest. It appears to me, however, with respect to the members of the Court who decided that case, that the attorney attested an affidavit relating to a matter in which his client had an interest, namely the publication of information, and his interest was to protect his client in that matter; the continuance of the relationship of attorney and client, and, therefore, his income from that relationship, depended upon his protecting his client's interests in the matters he handled on its behalf. (The question is not whether the commissioner of oaths has an interest in the affidavit he attests, but whether he has an interest in the matter to which the affidavit relates). If, on the other hand, the attorney was not acting for the proprietor, the decision does not touch the present case. Coming to answer the first question, whether an attorney acting for the party in a matter has an interest in that matter which precludes him from functioning as commissioner of oaths to attest an affidavit, it appears to me that, approaching the matter upon a realistic basis, it is not possible to hold that he has not an interest in the matter. An attorney practises his profession for gain; he carries on his practice to make a living, albeit he submits to and is bound by professional rules of conduct. In the course of carrying on his practice, he has an interest to earn fees and in each matter to which he gives attention, that is an interest attributable to him. In addition, and even where he acts pro Deo or pro amico, he has an interest to improve, increase and consolidate his goodwill, which is a valuable thing; it is to his interest in this respect to bring his client's affairs, whether litigious or otherwise, to a successful conclusion - 'success breeds success'. Not

only, consequently, has he these financial interests in any matter in which he is acting, but, because it is to his interest to bring his client's affairs to a successful conclusion, he cannot be impartial and unbiased; if he functions as a commissioner of oaths in the matter, he is not independent. Those selfsame considerations, which operate in the evidential rule against his functioning, operate equally under the regulations."

[10] With great respect to the learned judges in the **Bondev, Ferreira** and **Hattingh** matters, the reasoning put forward for their conclusions is unconvincing, especially when juxtaposed to the reasoning of the Full Bench in **Royal Hotel**, which was subsequently also followed by Marais J (as he then was) in **Papenfus v Transvaal Board for the Development of Peri-Urban Areas** 1969 (2) SA 66 (T) ("**Papenfus**") at 70 to 71 and **Ida Oosthuizen** and **NB Developments**. I align myself fully with such reasoning and cannot find any fault therein. For example, should attorney X act for Mr A in his divorce, may he commission Mr A's affidavits in commercial litigation where Mr A is claiming a large some of money against a third party, but is represented by attorney Y therein, or *vice versa*? I do not believe that the attorneys would be impartial and unbiased under such circumstances, and why should this differ from an attorney on the panel of a bank? Any advice or changes that may be notionally suggested by the commissioner of oaths may well impress the bank and that attorney may stand to obtain more work from the bank, even at the expense of the attorney of record. This, with respect, answers the criticisms in **Bondev**, **Ferreira**, and **Hattingh**.

[11] Whilst there is much to be said for the statement of Daffue J at paragraph 17 of **Hattingh** that *"In my view, courts should ensure that disputes are dealt with on their merits and technical defences that merely cause delay and nothing else should be frowned upon and dismissed."* I cannot disagree with what was said by Marais J in **Papenfus** at 70H:

> *"The fact that compliance with the prescribed procedure is often of a sketchy nature is no reason why our Courts should relax their watchfulness in this respect. Slackness on the part of commissioners of oaths should rather tend to encourage judicial strictness."*

The peremptory requirement of Regulation 7(1) is a matter for the legislature and executive (who is empowered to promulgate regulations) and should not be encroached upon by the courts.

[12] However, despite my unhesitating view as to the correctness of the decisions in **Royal Hotel** and **Radue**, I was reminded when considering the judgment of Caney J that I am nonetheless constrained to find to the contrary. This is so as Caney J referred to the matter of **S v Van Schalkwyk** 1966 (1) SA 172 (T) ("**Van Schalkwyk**") where the Full Bench of the Transvaal Provincial Division (as it then was) found that the *"interest"* referenced in Regulation 7(1) necessitated a pecuniary interest or an interest in a proprietary right or an interest by which the legal rights or liabilities of the commissioner of oaths were affected (at 175F – 176F and 180C).

[13] Sitting as a single judge, I am bound by a previous decision of a full bench of this division (see **North Vaal Mineral Co Ltd v Lovasz** 1961 (3) SA 604 (T) 607G). This is so due to the doctrine of *stare decisis* – even if I am of the view that the decision of a full bench in another division is the one that ought to be preferred (see ***Ex parte* Hetzler** 1969 (3) SA 90 (T) 94 A – B). This constraint is a fundamental important one of the doctrine of judicial precedent as a matter of the rule of law, and even if the decision is clearly wrong, it must be followed. See **Potgieter v Olivier and Another** 2016 (6) SA 272 (GP)) where Unterhalter AJ (as he then was) said the following at paragraph 27 (footnote omitted):

> *"Residually it was argued by Mr Ferreira that I might nevertheless escape the binding authority of Friend on the basis that it is fundamentally flawed, and in any event, it is not a case that has yet been reported in the law reports. I do not consider myself to enjoy such liberty. The Constitutional Court has recently affirmed the fundamental importance of adherence to precedent as an attribute of the rule of law. A binding decision, even if judged wrong, must be followed."*

[14] Thus, whilst **Van Schalkwyk** seems at odds with the decision of by **The Master v Benjamin, N.O.** 1955 (4) SA 14 (T) (relied upon by Caney J *op cit*) the latter was a judgment of a single judge and was a least drawn to the court's attention in **Van Schalkwyk** and thus it cannot be said that **Van Schalkwyk** was decided *per incuriam*. **Van Schalkwyk** has not been

overturned and in fact seemingly referred to with approval in **Kouwenhoven v Minister of Police and Others** (888/2020) [2021] ZASCA 119 (22 September 2021) at paragraph 32 (fn 23). In this judgment the Supreme Court of Appeal also criticised **Papenfus** insofar as it had invoked and extended the old evidentiary rules of England but does not appear to have overruled the principles as enunciated in **Royal Hotel** and then applied in **Papenfus** insofar as the regulations are concerned.

[15] In the circumstances I conclude that I am bound by the decision of **Van Schalkwyk** to the effect that the interest of an attorney (acting as commissioner of oaths) of a client in litigation where that commissioner of oaths is not the attorney of record in the matter in which the affidavit is commissioned, does not have pecuniary interest or an interest in a proprietary right or an interest by which the legal rights or liabilities of the commissioner of oaths were affected and accordingly I grant default judgment against the First and Second Defendants, jointly and severally, the one paying the other to be absolved as follows:

a) Payment of the amount of R1 110 950.94;

b) Interest on the amount referred to immediately above at the rate of 7.99**%** per annum from 14 DECEMBER 2021 to date of payment,

both dates inclusive;

c) That the immovable property described as: **A UNIT CONSISTING - SECTION NUMBER 15 AS SHOWN AND MORE FULLY DESCRIBED ON SECTIONAL PLAN NO. SS269/2012 IN THE SCHEME KNOWN AS MARSH ROSE IN RESPECT OF THE LAND AND BUILDING OR BUILDINGS SITUATE AT COUNTRY VIEW EXTENSION 1 TOWNSHIP, LOCAL AUTHORITY: CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY OF WHICH SECTION THE FLOOR AREA, ACCORDING TO THE SAID SECTIONAL PLAN, IS 171 (ONE HUNDRED AND SEVENTY ONE) SQUARE METRES IN EXTENT; AND AN UNDIVIDED SHARE IN THE COMMON PROPERTY IN THE SCHEME APPORTIONED TO THE SAID SECTION IN ACCORDANCE WITH THE PARTICIPATION QUOTA AS ENDORSED ON THE SAID SECTIONAL PLAN HELD BY DEED OF TRANSFER NUMBER ST44766/2012**, is declared executable for the aforesaid amounts;

d) The issuing of a writ of execution in terms of Rule 46 as read with 46A for the attachment of the Property is authorised;

e) A reserve price is set for the sale of the property, at the sale in

execution, at R1 016 507.46;

f) The Defendants are to be advised through service of this order that the provisions of Section 129 (3) and (4) of the National Credit Act 34 of 2005 applied to the Default Judgment granted in favour of the Plaintiff. The Defendants may prevent the sale of the property described above, if they pay the Plaintiff all of the arrear amounts owing by them to the Plaintiff, together with the Plaintiff's permitted default charges and reasonable costs of enforcing the Agreement up to the time of reinstatement;

g) The arrear amount and enforcement costs referred to in paragraph (f) above may be obtained from the Plaintiff. The Defendants are to be advised through service of this order advised that the arrear amount is not the full amounts of the judgment debt, but the amounts owing by the Defendants to the Plaintiff, without reference to the accelerated amounts;

h) Cost of suit on the attorney and client scale.

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H P VAN NIEUWENHUIZEN AJ
Acting Judge of the High Court
Gauteng Division
Johannesburg

Date heard : 24 February 2023

Judgment delivered : 19 May 2023

Appearances:

Counsel for Applicant:	Adv N Latif
Instructed by:	Stupel & Berman Inc