

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 021145/2023

1. REPORTABLE: NO  
2. OF INTEREST TO OTHER JUDGES: NO  
3. REVISED: NO  
DATE: 2 November 2023

In the matter between:

**SA M... obo BHG M... and BKA B...**

**Applicant**

and

**ROAD ACCIDENT FUND**

**Respondent**

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**JUDGMENT**

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 02 NOVEMBER 2023**

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**K STRYDOM, AJ**

- 1) This unopposed application for the appointment of a curator ad litem to assist two minors in their loss of support claims against the Respondent, was set down on the unopposed roll of the 2<sup>nd</sup> of October 2023. Sadly, on the 14<sup>th</sup> of July 2021 their mother died following a motor vehicle collision.

- 2) The “founding affidavit” attached to the notice of motion was deposed to by Mrs SA M....<sup>1</sup> on the 24<sup>th</sup> of March 2023 (“the March affidavit”). This “affidavit” was not initialled on each page by either the deponent or the commissioner. It also did not indicate what the relationship between the minors and Mrs SA M was and as such, it was unclear as to on what basis she had personal knowledge of the circumstances of the minor children which would entitle her to depose to such an affidavit.
- 3) During argument it was indicated that she was the grandmother of the minors. Given that the March affidavit was defective and would have to be deposed to again before a commissioner of oaths, and in the best interest of the minors, I granted the Applicant the indulgence of standing the matter down to the 6<sup>th</sup> of October 2023. This afforded the applicant an opportunity to amend the March affidavit and to ensure that it is properly commissioned.
- 4) On the 5<sup>th</sup> of October 2023, the Applicant uploaded a supplementary affidavit (“the first supplementary affidavit”). It was seemingly uploaded again the 6<sup>th</sup> of October 2023. Whilst I was satisfied that the deponent was the grandmother of the children, that they resided with her and that her illiteracy prohibited her from assisting them in litigation, this affidavit suffered from the same defect as the March affidavit. It was not initialled by commissioner and deponent on each page. The second last page indicated that it was dated at Pretoria on the 2<sup>nd</sup> of October 2023. The last page, containing the commissioner’s affirmation and deponent’s signature, contains the date of the 3<sup>rd</sup> of October 2023 and indicates being signed at Polokwane. Notably, there is a manuscript amendment to the year as typed to amend it from “2022” to “2023”.<sup>2</sup>
- 5) On the 6<sup>th</sup> of October 2023, I therefore indicated to counsel that this affidavit does not comply with the general requirements for affidavits as contained in the Regulations<sup>3</sup> (“the Regulations”) promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 (“Justices of the Peace and Commissioners of Oaths Act”).
- 6) Counsel requested that the matter stand down to obtain a supplementary affidavit. I granted the indulgence. The matter was later recalled and my attention was drawn to a supplementary affidavit that had been uploaded (“the second supplementary affidavit”)<sup>4</sup> From the second last and last page it was evident that it was, in fact, the first supplementary affidavit with just the initials of the deponent (only) inserted on each page. It was still dated the 2<sup>nd</sup> and 3<sup>rd</sup> of October 2023 and was still indicated as having been performed at Pretoria and Polokwane.<sup>5</sup>

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<sup>1</sup> A6

<sup>2</sup> J9 and J10

<sup>3</sup> Promulgated in *Government Gazette* 3619, Government Notice R1258 of 21 July 1972 as amended by Government Notice R1648 of 19 August 1977, Government Notice R1428 of 11 July 1980 and Government Notice R774 of 23 April 1983

<sup>4</sup> K1 – K5

<sup>5</sup> K4 and K5

- 7) Clearly, the second supplementary affidavit had not been signed after administration of the oath and in the presence of the Commissioner. I indicated to counsel that the second supplementary affidavit also does not comply. However, once again in the interest of the minor children, I allowed the matter to stand down to enable the applicant to obtain a compliant affidavit. I indicated that the matter will not be placed on the roll, but that, if I was satisfied with the affidavit, an order as per the draft order would be made at that time.
- 8) On the 9<sup>th</sup> of October 2023, the Applicant uploaded another supplementary affidavit (“the third supplementary affidavit”).<sup>6</sup> This time it was initialled on each page by both the commissioner and the deponent. However, as with the second supplementary affidavit, this affidavit was in fact the first supplementary affidavit (down to the manuscript amendment of the year on the last page) – just initialled by both this time.

### Legal principles

- 9) For clarity, I restate the process to be followed in commissioning an affidavit:
- a) In terms of the Regulations the oath or affirmation is administered by a commissioner of oaths.<sup>7</sup> Before a commissioner of oaths administers the prescribed oath or affirmation, the commissioner of oaths is required to ask the deponent:
    - 1. Whether he knows and understands the contents of the declaration;
    - 2. Whether he has any objection to taking the prescribed oath; and
    - 3. Whether he considers the prescribed oath to be binding on his conscience<sup>8</sup>.
  - b) If the deponent answers these questions in the affirmative, the commissioner of oaths must administer the oath<sup>9</sup>. Crucially, the deponent is required to sign the statement in the presence of the commissioner of oaths<sup>10</sup>
  - c) In terms of Regulation 4 (1) the commissioner of oaths is required to certify that the deponent has acknowledged that he or she knows and understands the contents of the declaration. Regulation 4(1) reads as follows:

*“Below the deponent’s signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration.”* [Underlining my own]

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<sup>6</sup> M1 to M5

<sup>7</sup> Regulations 1(1) and 1(2)

<sup>8</sup> Regulation 2(1)

<sup>9</sup> If the deponent merely confirms the contents of his or her declaration, but objects to taking the oath or does not consider the oath to be binding on his or her conscience, the commissioner of oaths administers the affirmation.

<sup>10</sup> Regulation 3(1)

d) The commissioner of oaths is, thereafter, required to sign the declaration, print his full name and business address below his signature, and state his designation and the area for which he holds his appointment or his office if he has been appointed *ex officio*.

10) Failure to adhere to the Regulations is not necessarily fatal to the acceptance of evidence contained in a defective affidavit. After a comprehensive evaluation of relevant caselaw, Goosen J in *Briedenhann*<sup>11</sup> concluded that: “(t)he authorities referred to earlier make it plain that the Regulations, save where couched in negative terms, are directory. Accordingly, where those regulations have not been followed and adhered to, a Court has a discretion whether or not to admit the affidavit. In such circumstances the court will determine whether there has been substantial compliance with the regulations. That determination is one of fact having regard to the circumstances of the case.”<sup>12</sup>

11) However, the Court can only exercise its discretion when presented with the facts proving substantial compliance. All the authorities relied on by Goosen J, for instance, had some proof or contextual evidence to be considered in determining substantial compliance.

### Finding

12) The first supplementary affidavit was deficient in that it was not initialled on each page. The need for such, in an electronic era where documents can easily be collated, is obvious. The discrepancies in the dates and place of commissioning could have been explained. However, the combination of the two rendered it impossible to be accepted as a validly commissioned affidavit.

13) The fact that the second and third supplementary affidavits were merely the first supplementary affidavit with amendments made *ex post facto*, escalated the problem. They were clearly not deposed to in the presence of the commissioner of oaths and/or after the deponent was questioned by the commissioner and/or before the oath was administered.

14) There are, at present, no facts before me to consider whether there was substantial compliance.

15) It should be noted that this judgment in no shape or form imputes the *bona fides* of the deponent, the legal representatives or the commissioner of oaths. Where one is dealing with the rights of children, an *ex abundante cautela* approach should be preferred. Concomitantly, the children should not be prejudiced by a delay caused by a (probable) formalistic error.

### Order

16) As a result I make the following order:

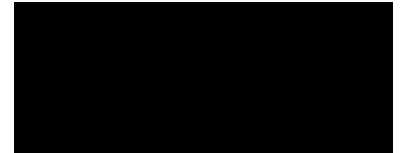
1. The matter is removed from the roll;

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<sup>11</sup> *Firststrand Bank Limited v Briedenhann* (3690/2021) [2022] ZAECQBHC 6; 2022 (5) SA 215 (ECGq) (5 May 2022)

<sup>12</sup> *Briedenhann* at para 48

2. The applicant is to file a valid, commissioned, supplementary affidavit in support of the application for the appointment of the curator ad litem.
3. Alternatively to paragraph 2, the applicant is to file an affidavit deposed to by the commissioner of oaths, MP Ramaloko, explaining the oversight in initialing every page and in which it is confirmed that the first supplementary affidavit was signed in his presence by the deponent and that she confirmed the content, her understanding the content and the binding nature thereof, before administering the oath.
4. The costs of the application shall be costs in the main action.



**K STRYDOM**

**ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**Date of hearing:**

2 October 2023

**Date of filing of requested affidavit:**

9 October 2023

**Judgment delivered:**

2 November 2023

**Appearances:**

For the Applicant:

Counsel: Adv Timmy Makhene

Oxford chambers, Sandton.

0605185512

Attorney: NKP Manamela attorneys inc.