



- (1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: 2026-124268

In the matter between:

BULLDOG ABRASIVES SOUTHERN AFRICA (PTY) LTD

Applicant

and

SCHALK JUSTIN BOTHA

First Respondent

MODPOT CC t/a UNITED POWER PURCHASING

Second Respondent

Heard: 22 July 2026

Decided: 22 July 2026

Reasons delivered: 01 September 2026

REASONS FOR ORDER

PHEHANE, J

Introduction

- [1] The applicant launched this application on 29 May 2026 to enforce restraint and confidentiality undertakings by the first respondent in its favour.

- [2] The application is opposed by the respondents.
- [3] The respondents raised a preliminary point in their fourth affidavit,¹ which was delivered on 25 June 2026. The applicant opposes this preliminary point.
- [4] The parties' heads of argument² set out their respective submissions and argument on the preliminary point, as well as their submissions on urgency and the merits.
- [5] After hearing oral argument on the preliminary point, this Court issued an order upholding the preliminary point, declaring the founding and replying affidavits inadmissible and striking the application off the roll with costs.
- [6] Brief reasons for the order follow below.

Preliminary point

- [7] The applicant's founding and replying affidavits have been commissioned by Ms. JC Oliphant (Ms. Oliphant) who is a registered practicing attorney with the Legal Practice Council. Ms Oliphant is the applicant's company secretary and holds the title of its "*in-house legal counsel*". Ms. Olifant authored the letter addressed to the respondents' attorney of record on 15 May 2026.³
- [8] This letter reads:

'BULLDOG ABRASIVES SOUTHERN AFRICA (PTY) LTD ("BULLDOG")
CONTRACT OF EMPLOYMENT RESTRAINT OF TRADE AND
CONFIDENTIALITY: SCHALK JUSTIN BOTHA AND MODPOT CC T/A
UNITED POWER PURCHASING (PTY) LTD ("UPP")

Dear Sir

we confirm receipt of your communication dated 15 May 2026 and replied thereto as more fully set out herein below

¹ See: fourth affidavit at paras 5 to 10 on pp 005-7 to 005-8.

² The applicant's heads of argument were delivered on 6 July 2026 and the respondents' on 7 July 2026. The applicant filed supplementary heads of argument on 21 July 2026, an hour before the commencement of the hearing.

³ Annexure "FA11" to the founding affidavit at pp 002-114 to 002-115.

our failure to respond to each and every allegation, view, submission and/or opinion expressed in your communication under reply is not to be construed as a waiver nor novation of our right to do so, and neither is such failure to be construed as an admission of the correctness or accuracy of any on the content of your seed communication. Our right to reply more fully at the appropriate time and in the appropriate forum is reserved without any limitations or restrictions.

As you correctly noted, your client ("UPP") was called upon to provide specific undertakings, namely, to withdraw any offer of employment made to Mr Botha or, if employment had already commenced, to terminate such employment. We note that these undertakings have not been provided.

Your confirmation that Mr Botha is now employed by UPP, one of our direct competitors, constitutes a material breach of his Contract of Employment, including his restraint and confidentiality obligations.

Since your client was formally notified of these obligations and has nonetheless elected to persist with the employment, such conduct constitutes intentional unlawful interference in Mr Botha's contractual relationship with ourselves.

We note your client's contention that the restraint is unenforceable and contrary to public policy. This is denied.

However, you have requested copies of the agreements signed by Mr Botha. We attach here with copies.

These documents expressly detail the restraint and confidentiality undertakings Mr Botha provided. As you are aware in terms of our law, these agreements are presumed valid and enforceable. The onus to prove otherwise rests entirely upon your client and Mr Botha.

It is common cause that your client is one of our direct competitors. As such we do not intend to litigate the nuances of our respective product lines or market strategies in this correspondence. However, we record that by virtue of Mr Botha's senior role as National Sales Manager, his transition to a "*sales representative*" at a direct competitor is not distinguishable in its effect on our

proprietary interests, regardless of how the position may be characterized or disguised.

Without waiving our right to initiate legal proceedings, we hereby invite your client to provide us with a copy of Mr Botha's contract of employment concluded with your client.

Please further advise whether your firm is also mandated to act on behalf of Mr Botha, as we note your confirmation that any legal process is to be served on your office.

We await the requested copy of Mr Botha's contract of employment and your response by no later than 12h00 on Monday 18 May 2026.

Our rights remain reserved.

Yours faithfully

JC OLIPHANT

IN HOUSE LEGAL COUNSEL

BULLDOG ABRASIVES SOUTHERN AFRICA (PTY) LTD'.

[9] The respondents submit that regulation 7(1) of the Regulations Governing the Administration of an Oath or Affirmation⁴ (the Regulations) stipulates that a Commissioner of Oaths shall not administer an oath or affirmation relating to a matter in which they have an interest.

[10] Regulation 7 (1) and (2) of the Regulations read as follows:

- '(1) A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.
- (2) Subregulation (1) shall not apply to an affidavit or a declaration mentioned in the Schedule.'

[11] The Schedule makes provision for declarations exempted from the provisions of regulation 7(1) and reads thus:

⁴ Published in terms of section 10 of the Justices of the Peace and Commissioner of Oaths Act 16 of 1963.

- ‘1. A declaration taken by an attorney which—
- (a) is required for the obtaining of registration in a deeds registry referred to in section 1(1) of the Deeds Registries Act, 1937 (Act 47 of 1937);
 - (b) should be furnished to a Minister or an administrator or an officer in the service of the State (including a provincial administration, the South African Railways and Harbours and the Department of Posts and Telecommunications), or to someone who is an officer or employee of the Government Service referred to in section 2 of the Government Service Act, 1980 (Act 2 of 1980), of the National Assembly of South-West Africa.
2. A declaration taken by a commissioner of oaths who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty.’

(Own emphasis).

[13] The respondents rely on the decision in *Royal Hotel, Dundee and Others v Liquor Licensing Board, Area No 26; Durnacol Recreation Club v Liquor Licensing Board Area, No 26 (Royal Hotel)*⁵ where the Court determined that an attorney representing a party in a case has a vested interest in the matter, which disqualifies him or her from serving as a commissioner of oaths to attest an affidavit utilised in that litigation.

[14] The Court in *Royal Hotel* went further and held:

‘... a commissioner of oaths is required to be impartial and unbiased in relation to the subject matter of the affidavit [that he or she commissions] and that, if he is otherwise, he has an interest in the matter.’⁶

[15] The respondents also rely on the decision in *Joubert v Drotsky*⁷ (*Joubert*) where the Court repeated the sentiments held in *Royal Hotel* when it stated as

⁵ 1966 (2) SA 661 (N).

⁶ *Royal Hotel*, *supra*, at p. 668 G.

⁷ (AR9/2023) [2024] ZAKZPHC 72 (30 August 2024) at para 35.

follows in respect to a commissioner of oaths who attests to an affidavit for his client:

'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'.

(Own emphasis).

[16] The Court in *Joubert* warned practitioners who are not aware of the content of the regulations to familiarize themselves with them.⁸

[17] By penning the letter of 15 May 2026, as quoted above, the respondents contend that Ms Oliphant clearly has an interest in this application. She is employed by the applicant, and it is in her interest to bring her employer's affairs to a successful conclusion. In the circumstances, they contend that she cannot be impartial and unbiased as she is directly involved in the matter, as is evident from the aforesaid correspondence penned by her. Given her title as in-house counsel and considering that she is a practicing attorney, the respondents contend that Ms Oliphant acted as her employer's legal representative. Therefore, when attesting the applicant's founding and replying affidavits in such circumstances, she was not independent and she was in the same position as a commissioner of oaths in *Joubert*.

[18] To drive the point home, the respondents contend that the deponent to the founding and replying affidavits who is the director of the applicant, avers in both affidavits that he has:

'either been the author of the communication to the Respondents or was privy to and/or issued instructions to [the applicant's] in-house legal counsel in respect of such communications, regarding the breach of the First Respondent's restraint obligations, prior to instituting these proceedings'.

[19] In the circumstances, the respondents contend that the applicant's affidavits do not comply with the provisions of regulation 7(1) and therefore, they are

⁸ *Joubert* (ibid) at para 37.

inadmissible and not properly before the court. Consequently, the application falls to be struck off the roll.

- [20] Having confirmed receipt of the fourth affidavit on 25 June 2026,⁹ the applicant did nothing to file its reply to the preliminary point raised by the respondents until a day before the proceedings commenced on the urgent roll on 22 July 2026, when supplementary heads of argument were filed. In its supplementary heads of argument, the applicant complains that the respondents failed to raise their preliminary point in their answering affidavit and take issue with it being raised in the fourth affidavit on the basis that the applicant has been denied the opportunity to reply. The applicant submits, therefore, that it had no choice but to seek leave to file a further affidavit, and if leave is denied, it requests this Court to strike out the point *in limine* with costs.¹⁰
- [21] The applicant, however, addresses the point in limine in its supplementary heads and submits that the decisions relied upon by the respondents as the basis of their point in limine have been taken out of context.¹¹
- [22] The applicant goes further than this and simply, without bringing an application for leave to file further affidavits, files two further affidavits, presuming that leave will be granted, and goes even further by filing re-attested founding and replying affidavits without the leave of the Court.
- [23] I enquired from the applicant's counsel why an application for leave to file these further affidavits was not filed by the applicant. Counsel for the applicant submitted that the application was not filed as these are urgent Court proceedings. I found this submission difficult to comprehend, as the fourth affidavit was filed on 25 June 2025 and the preliminary point was not addressed in the applicant's heads of argument filed on 6 July 2026. Counsel for the applicant proceeded in submitting that upon becoming aware of the preliminary point in the fourth affidavit, the applicant decided to "*wait*" for the respondents' heads of argument to see if they persist with the preliminary

⁹ p 005-62.

¹⁰ Applicant's supplementary heads of argument at paras 1.1.3 to 1.1.5 at pp 014-35 to 014-36.

¹¹ *Ibid* at para 1.1.6.

point. When the heads of argument were filed by the respondents on 7 July 2026, the applicant realised that they persisted with the point. The applicant took the stance that the respondents misapplied the *Royal Hotel* decision and the only way to reply would be through filing the supplementary heads of argument.

[24] I find this submission worrisome. The applicant approached this Court on an urgent basis but decided to “wait to see” if the respondents’ preliminary point would be pursued, instead of bringing an application in a timely manner for leave to file further affidavits. It took two additional weeks before the supplementary heads of argument were delivered to this Court. No valid reason has been provided by the applicant for his failure to file the aforesaid application timeously. Simply filing four further affidavits without seeking the leave of the Court shows disregard for the Court, as the applicant seems to be of the view that it could be lackadaisical and place undue pressure on this Court to admit its four affidavits. Such conduct warrants censure that is appropriately met with a costs order. Even more worrisome was the submission that this Court should postpone the urgent application to afford the applicant the opportunity to respond to the point *in limine* when it has already done so in its supplementary heads of argument filed one day before the hearing.

[25] The applicant submits that the Court in *The Standard Bank of South Africa Ltd v Makaula and another*¹² the Court was constrained to differ with the correctness of the decision in *Royal Hotel* and *Radue Weir Holdings Ltd/t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers*¹³ and followed the decision in *S v Van Scalkwyk*¹⁴ where the Court found that “*interest*” in regulation 7(1) necessitates 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. The applicant contends that Ms Oliphant holds no such interest and thus is not precluded from commissioning the applicant’s affidavits. This begs the question why two re-attested affidavits

¹² (2022/1538) [2023] ZAGPJHC 519 (19 May 2023).

¹³ 1998 (3) SA 677 (E).

¹⁴ 1966 (1) SA 172 (T).

were filed and without explanation properly placed before the Court in the form of an application for their admission.

[26] The applicant also relies on the decision in *Breda NO v The Master of the High Court, Kimberley*¹⁵ (*Breda*) where the Supreme Court of Appeal (SCA) held that due to the repeal of the Liquor Act,¹⁶ the decision in *Royal Hotel* has been repealed.

[27] What the SCA held in *Breda*, as quoted in the applicant's supplementary heads of argument, is that with the repeal of the Liquor Act, it is necessary to consider subsequent decisions before determining the validity of an affidavit that is said to contravene the provisions of regulation 7(1).

[28] One such subsequent decision is *Swat SOS 247 (Pty) Ltd t/a SOS SA and Others v Lucinda Jones*¹⁷ (*Swat v Jones*) where the Court held as follows regarding the objective of regulation 7(1):

[18] It is trite that a commissioner of oaths who attests affidavits is required to be impartial, unbiased and entirely independent of the office where the affidavit is drawn. Such interest is not only pecuniary or proprietary. The principle is also linked to the evidentiary rule that an affidavit is inadmissible if attested by an attorney who is the attorney for a litigant whose affidavit is to be used in the litigation. The rule has been extended to exclude not only the attorney of record but also partners and candidate attorneys in the firm of attorneys and attorneys who act in association with the attorney of record of the litigant.

[19] The object for the rule in practice is:

“to prevent an attorney from drawing up a petition and putting, as it were, the words of the petition in the mouth of a client, and then himself taking the oath of the petitioner to that petition. The reason for the rule appears to me to be that a person attesting an affidavit is required to be unbiased and impartial in relation to the subject-matter of the affidavit. If his position is such that this qualification is prima

¹⁵ (20537/2014) [2015] ZASCA 166 (26 November 2015).

¹⁶ Act 87 of 1977.

¹⁷ (Case No: 2023-027536) [2023] ZAGPJHC 323 (18 April 2023) at paras 18 and 19.

facie absent there is a danger that he may have influenced the deponent in relation to the subject matter of the affidavit”.’

(Footnotes omitted)

[29] With the afore-going in mind, it follows that what is taken into consideration in determining whether the provisions of regulation 7(1) have been flouted, is that the commissioner who attests the affidavit is required to be independent of the office where the affidavit is drawn and must not have an interest in the litigation – such interest is not only pecuniary. Further the rule is extended to an attorney who acts in association with the attorney of record of the litigant. Ms Oliphant’s letter demonstrates, by its mere wording of references to “we”, and “our”, that she has such an interest.

[30] Therefore, the founding and replying affidavits are inadmissible and fall to be struck out. It follows that the application falls to be struck out in such circumstances.

Costs

[31] Section 162(2) of the Labour Relations Act¹⁸ provides that this Court can consider the conduct of the party during the proceedings when making a determination regarding the payment of costs.

[32] The conduct of the applicant as aforesaid, in placing four affidavits before this Court without the leave of the Court one day before the hearing can be best described as an ambush, which is not the manner in which to litigate, and in circumstances where the applicant elected to wait and do nothing.

[33] It is for the aforementioned reasons that the aforesaid order was made.

M T M Phehane

Judge of the Labour Court of South Africa

¹⁸ Act 66 of 1995, as amended.

Appearances:

For the Applicant: KA Slabbert

Instructed by: Darran Ledden INC

For the Respondent: H Gerber SC

Instructed WWB Attorneys