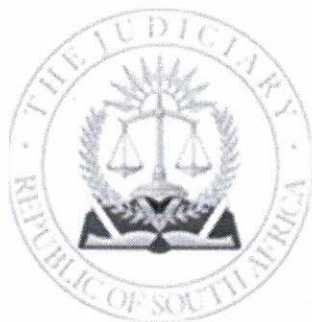


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 2022-39227

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

09/12/2022

In the matter between:

THAKA FREDERICK SEBOKA

First Applicant

STEPHANUS JOHANNES VAN WYK

Second Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

First Respondent

SOUTH AFRICAN BOARD FOR SHERRIFFS

Second Respondent

ANDRE LESIBA SHABALALA

Third Respondent

NKWADI SIMON MAREMANE

Fourth Respondent

JUDGMENT

van der Westhuizen, J

- [1] This matter is reminiscent of the tale of a Series of Unfortunate events.¹ The parties have been at logger heads in a number of jurisdictions, this jurisdiction probably not being the last.
- [2] The saga commenced in the Western Cape Division during March this year. The applicants brought an urgent application before Ally, J., wherein certain relief was sought against the South African Board for Sheriffs. An order was granted on that application and the reasons therefor were reserved. When the Board for Sheriffs did not comply timeously with that order, a second urgent application was launched during April this year before van Wyk, AJ. Again the reasons for that order by van Wyk, AJ., were reserved. Subsequently, the reserved reasons in both matters were delivered. The Board for Sheriffs applied for leave to appeal both orders, and leave to appeal in both instances were granted to the Full Court of that Division. Those appeals are presently pending.
- [3] Not being satisfied with those orders, the Board for Sheriffs launched an application, by way of an urgent application, in this Division against the first applicant. That application was launched during September this year and was enrolled in the urgent court before Strijdom, AJ., who struck that application from the roll for want of urgency. The applicants sought reasons for the striking off of the matter before Strijdom, AJ. The reasons were subsequently delivered. Nothing turns thereon and that application is presently pending. Also during September this year, the Board of Sheriffs launched a further urgent application against the second applicant in the North West Division which was heard by Hendricks, JP. The relief granted was *inter alia* an interdict against the second applicant prohibiting him from practising as an acting sheriff. Hendricks, JP., granted the order and reserved the reasons for that order. Subsequently, the reasons were delivered. The second applicant applied for leave to

¹ By Daniel Handler under the pen name, Lemony Snicket

appeal, which application was refused. The second applicant thereafter petitioned the Supreme Court of Appeal for special leave to appeal. That petition is pending.

- [4] The applicants retaliated by launching this application during October this year. A special hearing thereof was granted by the Office of the Deputy Judge President of this Division and the application was set down before me on an urgent basis.
- [5] Although the effect of the various orders granted were divergent, the underlying issue in all the matters related to the continuous serving of the applicants as acting sheriffs in the jurisdictions of Pretoria and Potchefstroom respectively.
- [6] Both the applicants have reached the compulsory retirement age of 65 years. However, on attaining the age of retirement, they were re-appointed, from time to time, as acting sheriffs as provided for in the Act. The latest re-appointment occurred during the earlier part of 2022, and was to endure until 28 February 2023. The Board for Sheriffs was of the view that the further extension of their appointments as acting sheriffs was not warranted under the particular circumstances and consequently refused to issue the required Fidelity Fund Certificates. In that regard, various correspondence was exchanged between the applicants, their attorneys, the Deputy Minister of Justice and Correctional Services and the Board for Sheriffs. That correspondence, although relevant in the pending matters, has no relevance in the present proceedings.
- [7] In view thereof that the matters in the Western Cape Division, the North West Division and this Division, as recorded earlier, were pending, I am prohibited from commenting thereon or indicating any *prima facie* view in relation thereto. I am only to consider and adjudicate upon the present application before me. Despite the fact that the matters in the Western Cape Division, the North West Division and the pending application in this Division have no bearing on this matter, as those were pending

before other courts, the applicants have placed all the papers in those matters before me. Those papers are irrelevant to these proceedings. It resulted in an unnecessary burdening of the present application. This application stands to be adjudicated upon its own merits and the documentation directly relevant thereto.

- [8] The present proceedings only relate to the alleged conduct of the first and second respondents that led to the removal of the applicants as acting sheriffs. Much of the content of the founding affidavit by the first applicant related to what led to the launching of urgent applications in the Western Cape Division as recorded earlier. In similar vein, the second applicant's supporting, or founding affidavit, contained much of the history before the Western Cape Division. That content is irrelevant to this matter, as it forms the subject of pending appeals.
- [9] In terms of the Sheriffs Act, Act 90 of 1986 (the Act), the appointment of sheriffs, and consequently their removal, are entrusted to the Minister of Justice and Correctional Services. That duty was delegated to the Deputy Minister of Justice and Correctional Services.² During the course of the aforementioned litigation, and in particular those in the Western Cape Division, the Deputy Minister requested the Minister to be relieved from that task. The reasons for such request are not relevant in the present application. The Minister resumed the power of the appointment and removal of sheriffs as provided for in the Act.
- [10] This application was launched due to the fact that the Minister of Justice and Correctional Services has recalled the acting appointments of the applicants and subsequently appointed two other persons (the third and fourth respondents) as acting sheriffs in the respective areas of jurisdiction.

² Section 63 of the Act

- [11] The relief sought by the applicants in the Notice of Motion in the present application has a Part I and a Part II element. Only Part II was placed before me. That relief reads as follows:

“Take Notice that on such condition as the court may determine, and at a time to be arranged with the registrar, the applicants intend to bring under review the decisions of the 1st respondent to:

- remove the 1st applicant as the Acting Sheriff Pretoria Higher and Lower Courts;*
- remove the 2nd applicant as the Acting Sheriff Tlokwe (Potchefstroom) Higher and Lower Courts”*

- [12] This application purports to be a review application in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

- [13] The first respondent is the Minister of Justice and Correctional Services and the second respondent is the South African Board for Sheriffs. The applicants have joined the third and fourth respondents, although no relief is sought against them as could be gleaned from the relief sought as recorded above.

- [14] From the notice of motion of this application, and in particular with reference to Part II thereof, the applicants required the first respondent to show cause why his decision should not be reviewed and corrected or set aside. The first respondent was required to provide to the Registrar of this Division with the record of proceedings sought to be corrected or set aside, together with such reasons as he is by law required to do.

- [15] From the papers filed in this application, it could not be discerned whether that record of proceedings were provided. It appeared not to have been provided. None of the parties commented thereupon and appeared to be nonplussed. This application stood to be determined on the specific documents which the respective parties relied upon in their papers in this application.
- [16] In the applicants' heads of argument it was clearly indicated that they relied upon a specific document in respect of each applicant. Those documents constituted the respective notices of removal of the applicants as acting sheriffs which led to the launching of these proceedings. That decision by the first respondent purports to be the "unlawful" administrative action that was the subject of the review sought.
- [17] The applicants have taken a point *in limine*, namely that the answering affidavit filed on behalf of the first respondent constituted hearsay evidence and contained inadmissible allegations. The premises for that point related to the fact that the first respondent did not personally depose to the answering affidavit filed on his behalf, although a confirmatory affidavit by him was subsequently filed. The first respondent gave reasons why he did not initially depose to the allegations. It is trite that hearsay evidence can be admitted provisionally, and that the evidentiary value thereof would be decided at a later stage in the proceedings. It was submitted on behalf of the first respondent that the applicants have not indicated any allegation that was allegedly within the exclusive knowledge of the first respondent, and thus constituted hearsay.
- [18] A number of points *in limine* were taken on behalf of the respondents. Those included: mootness of issues raised; urgency; costs; non-joinder; and alleged incompetent relief. On the issues of mootness, urgency and non-joinder, nothing turns thereon and required no further consideration. The issue of non-joinder related to the fact that the Deputy Minister was

not joined. That issue became moot when he was released from his task to attend to the appointment and removal of Sheriffs as recorded earlier. Furthermore, the decisions that form the basis of the review application were taken by the Minister himself and not by the Deputy Minister. The latter was clearly not part of the decision taking under scrutiny. The issues of costs no longer applies as the parties reached an agreement in that regard. The alleged incompetent relief was not pursued in the respondents' heads of argument nor during oral argument and likewise required no further consideration.

- [19] The saga apparently commenced when the second respondent refused to issue Fidelity Fund Certificates to the first and second applicants for the year 2022/2023.
- [20] In terms of the provisions of the Act, the second respondent is empowered to issue Fidelity Fund Certificates to appointed sheriffs.³ In terms of the definition of "sheriff" in the Act, an acting sheriff is included. It was submitted on behalf of the applicants that acting sheriffs required no Fidelity Fund Certificates to act as sheriffs. Reliance was placed on the term "or" appearing in section 30(1)(c) of the Act. There is no merit in that submission. It is trite that the term "or" in legislation, or other document, may have the meaning of the term "and". It depends on the context in which it appears. It is clear from a purposive reading of the Act as a whole that the term "or" in section 30(1)(c) of the Act has the meaning of the term "and".⁴ To hold otherwise would render the requirement in section 30(1)(c)(i) nugatory. Further, in the context of the Act read as a whole, it would make no sense not to require an acting sheriff to hold a Fidelity Fund Certificate. It is to be recorded that the applicants have since their various appointments as acting sheriffs, annually applied for the issuing of Fidelity Fund Certificates. That conduct clearly indicated that they were obliged as acting sheriffs to hold

³ Section 32 of the Act.

⁴ See for example sections 30(3), 31 read with the definition of "sheriff", 32(3) of the Act

Fidelity Fund Certificates. Furthermore, the respective letters of appointment as acting sheriffs obliged the applicants to hold Fidelity Fund Certificates.

[21] The decision by the second respondent to refuse to issue a Fidelity Fund Certificate in itself is an administrative decision which stands until set aside by a competent court.⁵ The applicants have not pled that the decision by the second respondent to refuse to issue the Fidelity Fund Certificates did not constitute an administrative action, and further has not pled that that decision has been reviewed and set aside. It would follow that that decision still stands.

[22] In terms of the definitions of PAJA, an administrative action is defined as follows:

“administrative action” means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) ...

(b) A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –

(aa) ...”

None of the exclusions listed in the subsection find application.

⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town et al* 2004(6) SA 222 (SCA)

[23] The definition of a “decision” contained in PAJA reads as follows:

“‘decision’ means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

(a) ...

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) ...”

[24] An “empowering provision” is defined in PAJA as follows:

“‘empowering provision’ means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken”

[25] The second respondent was created and established in terms of the provisions of section 7 of the Act. That section further provides that the second respondent is a juristic person.

[26] It follows that PAJA applies in respect of any administrative action taken by the second respondent. Such action would include, as per definition in PAJA, the issuing or refusing to issue a Fidelity Fund Certificate. As recorded earlier, the decision by the second respondent not to issue Fidelity Fund Certificates stands.

[27] The primary point of criticism against the first respondent’s decision to remove the applicants as acting sheriffs, related to the alleged “dictates” by the second respondent to the first respondent and the first

respondent's doing the "bidding" of the applicants. That criticism smacks of alleged puppetry of the first respondent. It implied that the first respondent only acts on what he is told to do, in particular by the second respondent. No supporting evidence for that criticism was placed before the court. It is opportunistic and disrespectful to the office of the first respondent and wholly unwarranted.

[28] In terms of the provisions of section 4 of the Act, a sheriff may be removed from office under certain circumstances. The Act further provides that a sheriff may be removed from office where the sheriff was found guilty of improper conduct.⁶

[29] Although the documentation provided by the applicants to support their application for review were limited, it could be gleaned from the papers that the second respondent addressed a request to the first respondent for the suspension or removal of the applicants as acting sheriffs. That much is gleaned from the letter, dated 22 September 2022, by the first respondent to the applicants.

[30] The letter by the first respondent reads as follows:

"I refer to your appointment as Acting Sheriff for Pretoria Central Higher and Lower Courts made pursuant to section 5 of the Sheriffs Act, 1986 (Act no 90 of 1986) effective from 01 April to 28 February 2023.

Your appointment is subject to, amongst others, the following conditions:

- *You are not charged with improper conduct by the South African Board for Sheriffs (SABFS) during your period of appointment; and that*

⁶ Section 49(5) of the Act

- *You are in compliance with the necessary requirements to be issued with a Fidelity Found Certificate by the SABFS.*

The SABFS has written to me and advised me that you are in breach of your appointment letter, specifically that you are not in compliance with the necessary requirements to be issued with a Fidelity Fund Certificate and that you have been charged with improper conduct.

The SABFS has further advised me that you are presently performing the functions of a Sheriff without a Fidelity Fund Certificate and that this poses a danger to the public and the Fidelity Fund. The Board has requested your suspension or removal as an acting Sheriff.

Kindly provide me with reasons on or before the close of business on Wednesday, 28 September 2022 as to why I should not remove you as the Sheriff for Pretoria Central Higher and Lower Courts.

I await your urgent response.”

- [31] A similar letter was addressed to the second applicant, referencing the area of jurisdiction as Potchefstroom.
- [32] It is gleaned from the above quoted letter that the second respondent approached the first respondent for either the suspension or the removal of the applicants as acting sheriffs. The first respondent of his own accord sought reasons to be supplied in respect of why the applicants should not be removed, as opposed to a mere suspension. There is glaringly no indication of any “*unauthorised or unwarranted dictates of the Chairperson*” of the second respondent or its “bidding” as alleged by the applicants.

[33] Both the applicants, through their attorneys, responded to the aforesaid. Despite their respective responses, that appear to be echoing each other, the first respondent addressed a second letter, dated 10 October 2022 wherein the applicants were advised that they were removed as acting sheriffs with immediate effect. These letters form the basis for the review. They read identical, except for the area of jurisdiction, and read as follows:

"I refer to my letter of 22 September 2022 wherein I requested you to provide reasons as to why I should not remove you as the acting Sheriff for Pretoria Central Higher and Lower Courts, and your responses thereto.

I have in addition to your responses considered the following documents:

- *Your appointment letter dated 1 April 2022;*
- *The request for suspension or removal by the South African Board for Sheriffs (SABFS) dated 19 September 2022;*
- *The applications in the Gauteng Division of the High Court (Case no: 020856/2022) and the North West Division of the High Court (Case no: UM 169/2022)*
- *The court order of Hendricks JP dated 15 September 2022 in case number (UM169/2022) concerning the acting Sheriff of Potchefstroom (Tlokwe); and*

- *The reasons of Hendricks JP dated 20 September 2022 in case number (UM 169/2022) concerning the acting Sheriff of Potchefstroom (Tlokwe).*

I have taken into consideration that you have not complied with a condition of your appointment as imposed in terms of section 5(1B)(b) of the Sheriffs Act 90 of 1986 (Act), in that you are not in compliance with the necessary requirements to be issued with a Fidelity Fund Certificate (FFC) by the SABFS.

I have further taken into account that the reason for your failure to comply with the abovementioned condition of your appointment is that you have refused to provide additional particulars to the SABFS as mandated by section 31(3) of the Act.

Part of my functions in terms of the Act is to maintain effective and reliable service to the courts and the public. After consultation with the SABFS as per the provisions of section 4(3) of the Act and having considered the above-mentioned documents, I am of the opinion that your performance of the functions for a Sheriff without a FFC and outside the abovementioned condition of your appointment poses a risk to the public at large and the administration of justice. This is not in the interest of the maintenance of effective and reliable service to the courts and the public.

For the above reasons, I have decided to remove you as acting Sheriff of Pretoria Central Higher and Lower Courts effectively immediately.

Your attention is drawn to Regulation 2F(4) read with Regulation 10 of the Regulations to the Act, in terms of which the acting Sheriff, when he or she vacates office, shall hand all court processes and other documents which were in his or her possession to the Director-General of the Department of Justice and Constitutional Development delegated to the Court Managers.

You are hereby directed to forthwith hand over all court process and other documents in your possession to the Court Manager for the Pretoria Magistrates Court who will thereafter schedule a hand-over meeting with yourself and a representative of the SABFS.”

- [34] I have quoted the relevant letters in full as the contents thereof are particularly relevant to a determination of whether or not the particular administrative action taken by the first respondent warranted a review as prayed for by the applicants.
- [35] The applicants clamour that the first respondent simply “ignored” their reasons advanced in response to the letter dated 22 September 2022, is without merit. Their unhappiness stems from the fact that they were simply not vitiated as they demand to be.
- [36] The grounds for the review sought were stated as follows:
- (a) The decision by the Minister was taken because of the unauthorised or unwarranted dictates of the Chairperson of the SABFS;
 - (b) There are several facts which indicated that the Minister did not apply his mind when he took the decision to remove the applicants and simply did the bidding of the SABFS. Those included the appointment of the third and fourth respondents who were *inter alia* “outside” respective areas of jurisdiction.
 - (c) That the reason for the second respondent’s “refusal” to issue Fidelity Fund Certificates to the applicants was due to the alleged intention of the second respondent to have their “own people” appointed in the areas.
 - (d) That the first respondent’s letter contained factual inaccuracies.

- (e) That the action taken by the first respondent was materially influenced by an error of law. That error related allegedly to the fact that the applicants were performing the functions of acting sheriffs without Fidelity Fund Certificates and that that posed a danger to the public and the Fidelity Fund.
 - (f) The first respondent allegedly did not consider the provisions of the law when he took the decision to remove the applicants as acting sheriffs.
 - (g) That the first respondent did not take into consideration that two judges had found that the SABFS's refusal to issue the Fidelity Fund Certificates were unlawful. A view allegedly shared by the Deputy Minister and other views of the Deputy Minister.
 - (h) That the first respondent had failed to consider that the judgments of the Western Cape Division and the North West Division were pending appeals and a petition for leave to appeal and that accordingly, his decision pre-empted those pending issues.
- [37] I have already dealt in substance with the ground relating to the alleged "dictates" and "bidding" of the second respondent. There is no merit in those grounds for what is recorded above in that regard.
- [38] The issue of the appointment of the third and fourth respondents is equally unmerited and totally irrelevant to the present proceedings. That decision is an independent and unrelated decision by the first respondent. It follows that there is no merit either in that ground of review.
- [39] There is likewise no merit in the ground that the second respondent's refusal to issue Fidelity Fund Certificates was due to an intention to appoint its "own people" in the respective areas. The applicants

approved and reprobated on the issue of the refusal to issue Fidelity Fund Certificates. On the one hand they allege that acting sheriffs require no Fidelity Fund Certificates to function as sheriffs, and on the other that they allege that that they are obliged and entitled to be issued with Fidelity Fund Certificates. It is to be noted that their respective letters of appointment as acting sheriffs obliged them to hold Fidelity Fund Certificates. For what has been recorded above in respect of the obligatory holding of a Fidelity Fund Certificate, there is no merit in the grounds for review listed above that relate to the holding of an issued Fidelity Fund Certificate.

- [40] I have already recorded that the matters in the Western Cape Division and in the North West Division were irrelevant to these proceedings and accordingly those grounds for review are unmerited and irrelevant.
- [41] The letters of 22 September 2022 to the applicants respectively are clear. The applicants were specifically directed to the specific issues raised therein to which they were invited to respond to. Their attention was specifically drawn to the conditions of their appointment.
- [42] The first respondent clearly spelt out in his letter of 10 October 2022 the reasons for the decision to remove the applicants as acting sheriffs.
- [43] In this regard the following is gleaned from the said letter:
- (a) The particular documents that were considered were clearly stipulated;
 - (b) The applicants' non-compliance with the conditions stipulated in their respective letters of appointment, in particular the condition imposed by section 5(1B)(b) of the Act, namely, obtaining a Fidelity Fund Certificate;

- (c) The applicants' reasons why they did not comply with the second respondent's request for additional particulars as mandated by section 31(3) of the Act;
- (d) Compliance by the first respondent of his obligation to maintain the effective and reliable service to the courts and public as mandated by the Act;
- (e) The undertaking of the prescribed consultation with the second respondent as required by section 4(3) of the Act.

[44] From the foregoing it is clear that the first respondent did not summarily take a decision to remove the applicants as acting sheriffs. He followed a process before coming to a conclusion and subsequent decision.

[45] The applicants' approbation and reprobation that they, as acting sheriffs, were not obliged to obtain a Fidelity Fund Certificate, is telling. The fact of the matter is that they did not comply with that condition of their letters of appointment as acting sheriffs. Furthermore, the decision by the second respondent not to issue them with Fidelity Fund Certificates stands. The applicants were clearly in breach of their obligations as contained in their respective letters of appointment as acting sheriffs.

[46] Furthermore, as set out in their letters of appointment as acting sheriffs, they were not to be charged with improper conduct during their term of appointment as acting sheriffs. It is common cause that the applicants were so charged, despite their protestations to the contrary that the charges were "bogus" and that no inquiry has taken place until now. However, from the reasons provided by the first respondent in respect of his decision to remove the applicants as acting sheriffs, it is clear that this issue was not considered by him. Their protestations in that regard in their respective affidavits are much ado about nothing.

- [47] From the letters of removal as acting sheriffs, the primary concern of the first respondent related to the non-compliance with the first condition imposed on them, namely to obtain and hold a Fidelity Fund Certificate. That appears to be the overbearing reason for the decision to remove the applicants as acting sheriffs. This is borne out by the first respondent's reference to his obligations in terms of the Act, to maintain effective and reliable service to the courts and the public.
- [48] In view of all the foregoing, the first respondent cannot be found to have taken an "unlawful" or "illegal" decision to remove the applicants as acting sheriffs thereby taking a decision that is reviewable in terms of PAJA. As recorded, the decision to remove the applicants as acting sheriffs was primarily premised upon their non-compliance of the condition and obligation to obtain and hold a Fidelity Fund Certificate. That premise is unassailable. The first respondent's decision in that regard was not shown to have been arbitrary, unlawfully, illegally or irrationally taken.
- [49] It follows that the application for review cannot be upheld and stands to be dismissed.
- [50] During argument, it was submitted that the appointments of the third and fourth respondents as acting sheriffs in the stead of the applicants in the respective jurisdictions, should equally be reviewed and set aside. No such relief was sought in Part II of the Notice of Motion. It is recorded earlier that that decision of the first respondent was independently taken and was a separate decision. It has no bearing on the present proceedings. Different considerations and requirements apply in that regard.
- [51] It follows that the applicants' relief sought in that regard cannot be considered and cannot be granted. The joinder of the third and fourth respondents were unwarranted, unnecessary and resulted in the incursion of unnecessary costs.

[52] The issue of costs remains. The applicants have unnecessarily burdened the papers in this application as recorded above. Furthermore, the applicants have unwarrantedly and unnecessarily joined the third and fourth respondents to these proceedings. The applicants have changed the course of this application in mid-stream - from an interim interdict as sought in Part I of the Notice of Motion - to a review application as sought in Part II of the Notice of Motion, and consequently curtailing the time periods relating thereto. Further in this regard, the procedure relating to a full and proper review on the specific record of proceedings to be reviewed could not be attained. In my view, all the foregoing warrant an appropriate and punitive costs order.

I grant the following order:

1. The application is refused;
2. The applicants are ordered to pay the costs on the scale of attorney and client, such costs to include any reserved costs and to include the costs consequent on the employ of two counsel, where so employed.


C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Heard on:

21 November 2022

On behalf of Applicants:

A Vorster
S J van Wyk
Moolman & Pienaar Inc.

Instructed by:

On behalf of First Respondent:

Ms N Stein
Ms M S Manganye
The State Attorney

Instructed by:

On behalf of the Second Respondent:

T V Mabuda

Instructed by:

Herold Gie Attorneys

On behalf of the Third and Fourth Respondents: K Naidoo

Instructed by:

Vezi De Beer Attorneys

Judgment delivered on:

9 December 2022