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1]IN THE HIGH COURT OF SOUTH AFRICA

2](CAPE OF GOOD HOPE PROVINCIAL DIVISION)

3]Case No A962/01

4]In the matter between:

5]THE BOARD FOR SHERIFFS First Appellant

6]THE EXECUTIVE COMMITTEE OF THE BOARD FOR SHERIFFS Second Appellant

7]and

8]BENJAMIN JEREMIA KOEN Respondent

9]

10]JUDGMENT: DELIVERED 16 AUGUST 2002

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GRIESEL J:

12]This is an appeal against a costs order, granted in favour of the present respondent by MJOLI AJ in the court *a quo*. It arises from an urgent application brought by the respondent (as applicant) against the Minister of Justice (first respondent), the Board for Sheriffs (second respondent) and the Executive

Committee of the Board for Sheriffs (third respondent). For the sake of convenience I refer to the present appellants herein as *'the Board'* and *'the Executive Committee'* respectively and to the respondent as *'the applicant'*. The Minister does not play any role in this appeal.

13]The application was aimed, in essence, at redressing the refusal by the Board (alternatively the Executive Committee) to issue the applicant with a fidelity fund certificate for the year 2000, as required by **sec 30(1)(a)** of the Sheriffs Act 90 of 1986 (*the Act*).

14]At the time of the hearing before MJOLI AJ, more than year after the launch of the application, all issues between the parties had been resolved, save for the question of costs. Having heard argument on the matter, the learned Judge awarded the costs of the application to the applicant, hence this appeal, which comes before us with leave granted by HLOPHE JP.

Factual Background

15]The applicant had been the sheriff for the district of Mitchell's Plain since 1994. As such, his office is regulated by the provisions of the Act. In terms of **sec 22(1)** of the Act every sheriff must open and keep a separate trust account with a financial institution, into which any money held or received by the sheriff on account of any person must be deposited. A sheriff is required to keep separate records of monies deposited or invested by him in, and payments made by him out of, the said trust account, which records must be audited by an auditor at least once annually.[1]

16]Each sheriff is obliged at all times to be the holder of a fidelity fund certificate and may not act in any manner as a sheriff unless he or she is the holder of such a certificate.[2] A sheriff may apply on the *'prescribed form'* to the Board for a fidelity fund certificate,[3] which remains valid until 31 December of the year in respect of which it has been issued.[4]

17]In terms of the applicable Regulations, 31 July of any particular year has been determined as the deadline for submission by a sheriff to the Board of an annual audit report, as contemplated by **secs 23(1)(b)** and **23(2)** of the Act. Levies and interest payable to the Board and the Fidelity Fund are due on the same date. Applications for renewal of fidelity fund certificates, on the *'prescribed form'* and accompanied by the *'prescribed contribution'*,[5] signed before a commissioner of oaths, are due by 31 October of each year.

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1 sec 23(1)

2 sec 30(1)(a)

3 sec 31(1)

4 sec 32(2)

5 as contemplated by sec 32(1) and (2)

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18]It is not disputed that the applicant was aware of these requirements and the respective deadlines in respect thereof. When he failed to comply with the July deadline, he was reminded by officials of the Board of the afore-mentioned requirements on more than one occasion. At a meeting with the Board's Messrs Stemmet and Greyling during August or September 1999, it was pointed out to the applicant that a fidelity fund certificate could not be issued to him for the following year unless he complied with all the statutory requirements. A written reminder to the same effect was sent to the applicant on 11 October 1999.

19]On 19 November 1999 the applicant eventually filed his application for a fidelity fund certificate for the year 2000. However, the application was incomplete. Certain questions were simply left unanswered. Moreover, the all-important audit report remained outstanding.

20]In a letter addressed to the Board, dated 14 December 1999, the applicant's office manager, one Booysen, undertook on behalf of the applicant that an auditor's report with all relevant supplementary documentation would be delivered to the Board's offices by 20 December 1999.

21]On 17 December 1999, instead of the promised auditor's report, the Board received a letter from the applicant's auditors to the effect that they had been unable to establish the trust balances *'aangesien geen rekords gehou is van trustgelde ontvang en uitbetaal nie'*. In the circumstances the auditors refrained from expressing an opinion concerning the trust audit.

22]This development prompted Stemmet on behalf of the Board to address two letters to the applicant on 22 December 1999. In the first letter, the applicant was informed that the Board had decided to appoint an inspector in terms of **sec 56(1)(b)** of the Act to inspect his office and to report to the Board.

23]In the second letter the applicant's attention was drawn to various short-comings in his application, viz —

- he had failed to comply with the requirement of **sec 23(1)(b)** of the Act to have his records audited annually;

- he had failed to comply with various regulations, *inter alia* by failing to pay interest on his trust account to the Board, accompanied by a certificate from an auditor;

- he had failed to obtain compulsory professional indemnity insurance, as required by **sec 30(1)(b)**;

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- he had not paid over the prescribed levy to the Board, which failure or omission constituted an offence.

The letter concluded by pointing out that, in terms of **sec 33(1)(i)** and **(m)** of the Act, the Board could not issue a fidelity fund certificate to the applicant for the year 2000. It was also pointed out that, by virtue of the provisions of **sec 30(1)(a)**, the applicant was not allowed to perform any functions assigned to a sheriff without being the holder of a fidelity fund certificate. It is common cause that Booysen received this letter on the same day (ie 22 December 1999) at the applicant's office. The applicant had in the meantime left for New Zealand on vacation.

24]It was against this background that an urgent special meeting of the Board (in the form of a telephonic conference) was convened for 24 December 1999.[6] After discussion, the Board unanimously resolved that a fidelity fund certificate for the year 2000 would not be issued to the applicant. This was the primary resolution which the applicant sought to set aside in the review.

25]By notice dated 4 January 2000, the Deputy Minister of Justice removed the applicant from the office of sheriff in terms of **sec 4(3)(a)** of the Act,

6 The original unedited minutes of the meeting indicated that it had been a meeting of the Executive Committee. This prompted the applicant to take the point that the decision was formally defective, inasmuch as it had been taken by the incorrect functionary. However, as pointed out on behalf of the Board, the required quorum of Board members had been present. In the result, nothing turns on this issue.

appointing one of his deputies as acting sheriff in his place. However, this decision was subsequently rescinded after the applicant's attorneys made representations to the Minister on his behalf in a letter dated 6 January 2000. The Minister afforded the applicant an opportunity until (31 January 2000) to place his case before the Board, failing which his removal from office would be reconsidered.

26]By letter dated 19 January 2000 the applicant's attorneys addressed representations to the Board, at the same time seeking to cure some of the defects pointed out in the Board's second letter of 22 December 1999.[7] The attorneys enclosed *inter alia* a belated audit report, dated 14 January 2000 from new auditors, Barends Knight, who had in the interim been appointed by the applicant. The report on the prescribed form, filed in purported compliance with the provisions of **sec 23** of the Act, states in unequivocal terms:

> *27]'In our opinion B J Koen (name of Sheriff) DID NOT COMPLY ~~complied~~ with sections 22 and 23(1)(a) of the Act during the year.'*

28]In the covering letter accompanying their report the auditors referred to an *'audit'* which revealed *'that certain accounting and administrative controls were not functioning or were non-existent during the period of our review'*. A list of six qualifications was annexed to the report, recording *inter alia* that:

7 See para [12] *supra*

a) no proper books of account had been kept or presented to them, with the result that it was not possible to reconstruct a trust creditors' ledger;

b) no monthly bank reconciliations had been prepared;

c) it was *'extremely difficult'* to ascertain the source of funds deposited into the trust bank account;

d) during the period from October 1998 to February 1999 certain funds amounting to some R29 000 had not been banked;

e) interest earned on trust monies was not paid over to the Board on a timely basis;

f) for a period of three weeks during November 1998 the trust account was in an overdraft position.

The auditors certified that interest in an amount of R306,22 had been earned on monies deposited in the applicant's trust account and a cheque in the same amount, drawn by the applicant on 18 January 2000, was enclosed with the attorneys' covering letter.

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29]A further cheque in an amount of R9 297,30, drawn on the same day, was enclosed with the attorneys' said letter, this amount being in respect of levies and contributions due to the Board in terms of **sec 31(2)**.

30]In further support of his representations, the applicant enclosed written submissions, one from his office manager, Booysen, expressing the view that the applicant *'had the stability and financial back up and expertise to make the Sheriff's office operate efficiently as well as effectively'*, and another from Barends Knight dated 18 January 2000, expressing a commitment to assist the applicant on a monthly basis while recording the applicant's acknowledgement *'that certain internal controls were lacking with regard to his trust account'*.

31]Curiously (especially in the light of the history of defaults outlined above), the letter concludes with an ultimatum by the attorneys, demanding that the Board issue a fidelity fund certificate for the year 2000 to the applicant on or before 21 January 2000 (ie within two days), failing which the applicant would proceed with an urgent court application.

32]Further correspondence followed, but was inconclusive. In the circumstances the present application was launched and set down for 3 February 2000.

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Relief claimed

33]In the Notice of Motion the applicant sought a *rule nisi*, having the effect of an interim interdict, in the following terms:

2.1 *Hersiening en tersydestelling van die besluit van die Derde Respondent* [the Executive Committee] *op 24 Desember 1999, om nie 'n getrouheidsfondssertifikaat aan Applikant uit te reik vir die jaar 2000, nie.*

2.2 *Hersiening en tersydestelling van die besluit van Tweede Respondent* [the Board] *en/of Derde Respondent, klaarblyklik op 22 Desember 1999, ingevolge waarvan 'n inspekteur aangestel was om 'n ondersoek rakende Applikant te doen en daarna aan Tweede en/of Derde Respondente te rapporteer.*

2.3 *Hersiening en tersydestelling van die besluit geneem namens Eerste Respondent* [the Minister] *op 4 Januarie 2000 deur die Agbare Adjunk-Minister, ingevolge waarvan Applikant onthef was uit sy posisie as Balju van die Hooggeregshof en laer-howe, met onmiddellike effek, welke besluit klaarblyklik deur die voormelde Adjunk-Minister teruggetrek is.*

2.4 'n Bevel ingevolge waarvan die Respondente, gesamentlik en/of afsonderlik, verbied word om enige administratiefregtelike besluit rakende Applikant te neem *in Applikant se afwesigheid en sonder dat Applikant voldoende geleentheid gebied was om sy kant van die saak aan enige van die Respondente, gesamentlik en/of afsonderlik, voor te lê, met of sonder die hulp en bystand van sy regsverteenwoordiger(s).*

2.5 'n Bevel ingevolge waarvan die Respondente gesamentlik en/of afsonderlik gebied word om onmiddellik by die vergadering van Tweede en/of Derde Respondent belê vir 3 Februarie 2000, 'n getrouheidsfondssertifikaat vir die jaar 2000 aan Applikant uit te reik, hangende afhandeling van die aangeleentheid, en in terme van Artikel 33(2) van die Wet op Balju's, Wet 90 van 1986, soos gewysig, en onderworpe aan gepaste en billike voorwaardes wat die Agbare Hof mag goeddink.

2.6 'n Bevel ingevolge waarvan Tweede en/of Derde Respondente gebied word om by die vergadering belê vir 3 Februarie 2000 te besin en te besluit oor die Applikant se getrouheidsfondssertifikaat, en om Applikant geleentheid te bied om teenwoordig te wees en vertoë te rig, indien nodig, tydens die vermelde vergadering.

34]The thrust of the applicant's complaint, as set out in his founding affidavit, was that decisions had been taken against him by the Board in his absence and without affording him an opportunity to state his case or to be heard. He relied in this regard on the right to procedurally fair administrative action, as

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enshrined in **sec 33(1)** of the Constitution, 1996, read with art 23(2) of Schedule 6 to the Constitution.[8]

35]When the matter came before court on 3 February 2000, it was by agreement postponed for a week, and a timetable for the filing of further papers was fixed. At the next appearance on 10 February 2000 the application was, again by agreement, postponed, this time *sine die*. It was further ordered by agreement:

> ***36]***‘*2. Tweede respondent [ie the Board] onderneem om die aansoek van Applikant om ’n getrouheidsfondssertifikaat in goeie trou op Dinsdag 15 Februarie 2000 te oorweeg.*
>
> ***37]***‘*3. Die Applikant en sy regsverteenwoordigers sal geregtig wees om die vergadering om 9h00 op 15 Februarie 2000 by te woon en mondelinge en/of skriftelike vertoë namens applikant te lewer …’*

Leave was granted to the applicant, should his application to the Board be unsuccessful, to approach the court on the same papers, duly amplified. By agreement, costs were ordered to stand over.

8 For the position since 30 November 2000, sec 3(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

Subsequent events

38]The meeting, envisaged in the aforesaid order, was duly held and was addressed on behalf of the applicant by his counsel, Adv *Moses*, who represented him throughout these proceedings. At the meeting counsel frankly conceded that *'the facts reflect that proper bookkeeping had not taken place'*. Nonetheless, Adv *Moses* submitted that the applicant was a *'suitable person'* and that *'he (ie applicant) has learnt now to appreciate the importance of proper bookkeeping…'* He accordingly exhorted the Board to give the applicant the chance to prove to them that he would address the problem.

39]In conclusion, Adv *Moses* conceded, in response to a question by the Chairman, that in view of the acknowledged deficiencies in the original application, the applicant was asking the Board *'in the interest of fairness please exercise your discretion in the favour of applicant (in terms of* ***sec 33(2)*** *of the Act)'*.

40]After lengthy deliberation, the Board decided, with two votes against and two abstentions, to issue a fidelity fund certificate to the applicant in the exercise of the discretion vested in them by virtue of the provisions of **sec 33(2)** of the Act. The decision was subject to the condition that audited financial statements be submitted by the applicant every month for a period of six

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months and further subject to the concurrence of the Minister.

41]Fortified, no doubt, by his perceived vindication before the Board, the applicant argued before the court *a quo* that he was entitled to recover the costs of the urgent application because he had been substantially successful. What is more, he claimed to be entitled to costs on an attorney and client scale.

42]Prior to the hearing before the court *a quo* the applicant, without any formality, purported to supplement the papers by simply filing a transcript of the complete proceedings before the Board on 15 February 2000. The permissibility of this step, and hence the admissibility of the transcript as evidence, was hotly contested on behalf of the Board, both before the court *a quo* and on appeal before us. In the view I take of the matter, however, it is not necessary to reach a final conclusion on the admissibility or otherwise of this document. I shall assume in favour of the applicant, without deciding, that the trial court was entitled to have regard to the events that took place at the meeting as reflected in such transcript and that it properly forms part of the record on appeal.

The judgment of the court a quo

43]At the hearing before Mjoli AJ it was argued on behalf of the applicant, with reference to the outcome of the meeting of 15 February 2000, that the applicant had been substantially successful inasmuch as the decisions complained of had all been reviewed and set aside by the Board at the said meeting.

44]It was further argued that in terms of the rules of natural justice, it was incumbent on the Board, before refusing to issue a fidelity fund certificate to the applicant, to give the applicant a hearing; that their failure to do so constituted a fatal irregularity and that by consenting to the order of 10 February 2000, the Board had by implication conceded that the procedure adopted by them had been irregular and in violation of the rules of natural justice.

45]These arguments found favour with the learned Judge, who held as follows:

> ***46]****'I am satisfied, therefore, that even without getting into the merits of the application, failure by the respondents to comply with the rules of natural justice in removing the applicant from the post of Sheriff and declining to issue a fidelity fund certificate was fatally defective and could have decided the whole issue. It is for this reason, therefore, that I*

am of the view that the applicant would have been successful.' [my underlining]

47]The Board and the Executive Committee (the present appellants) were accordingly ordered to pay the costs incurred by the applicant jointly and severally.

Approach to appeals against costs orders

48]The correct approach to an appeal against a costs order has been stated on many occasions, it is well settled and does not require citation of authority. It is trite law that the court of first instance has a judicial discretion as to costs. Such discretion, however, is not unlimited, and will be set aside on appeal where the court of appeal is satisfied that the exercise of the court's discretion is vitiated by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question.

49]The successful party should, as a general rule, be awarded its costs. Although this is not an inflexible rule, it should not be departed from except upon good grounds. Indeed, in an appeal against a costs order, the court's decision, in the absence of other relevant factors, would in the normal course be largely based on whether or not the appellant was or would have been successful on the merits.

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50]Where the merits of the case had been settled prior to the hearing, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must, with the material at its disposal, make a proper allocation as to costs. (*Gamlan Investments (Pty) Ltd & Another v Trilion Cape (Pty) Ltd & Another* 1996 (3) SA 692 (C) 700G — I).

Discussion

51]Where the learned Judge *a quo* purported to approach the matter on the basis that a decision on costs could be reached *'even without getting into the merits of the application'*, such approach would clearly run counter to the well-established authority referred to above. Reading the judgment as a whole, however, it seems that what was meant by the above-quoted extract, was that it was possible to come to a decision on the question of costs without considering the merits of the application before the Board. To put it differently: because the procedure followed by the Board was *'irregular'* (as found by the court *a quo*), it was irrelevant to enquire whether or not the decision reached by them was in the circumstances the correct one.

52]The crisp question for decision therefore is whether the court *a quo* was correct in finding that the procedure adopted by the Board at their meeting of

24 December 1999 was *'irregular'* or procedurally unfair due to their failure to comply with the *audi* rule.

53]In my view, the short answer is no. It is trite law that a fair administrative action depends on the circumstances of each case.[9] In the context of applications for the renewal of licences, permits and certificates (such as the fidelity fund certificate *in casu*), I accept that a hearing is ordinarily required before the licence or other similar benefits are revoked, varied, suspended or refused.[10] *De Smith et al* put it as follows:[11]

> ***54]****'Thus a strong presumption exists that a person whose licence is threatened with revocation should receive prior notice of that fact and an opportunity to be heard. The presumption should be especially strong where revocation causes deprivation of livelihood or serious pecuniary loss, or carries an implication of misconduct.'*

55]The following passage[12] by the same learned authors tends to lend further support to the applicant's argument in this regard:

> ***56]****'Non-renewal of an existing licence is usually a more serious matter than refusal to grant a licence in the first place. Unless the licensee has*

9 see now sec 3 of PAJA

10 De Smith Woolf & Jowell *Judicial Review of Administrative Action,* 5th ed, 8-023

11 *loc cit*

12 *op cit* 8-026

already been given to understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew irrespective of whether there is a legitimate expectation of renewal, even though no such duty is implied in the making of the original decision to grant or refuse the licence.'

57]On the other hand, there is authority in this Division to the effect that, if it should have been foreseen by an applicant that certain issues would be raised to the detriment of his or her application for a licence, then any neglect by the applicant to deal therewith cannot successfully be raised on review, despite the fact that the administrative tribunal failed to alert such applicant to it.[13] This principle could be applied especially, I suggest, in a situation where an application has to comply with certain statutory requirements and has to be in the *'prescribed form'*, as in the present matter.

58]Whichever approach one adopts in this matter, one arrives at the same conclusion. As I have shown in the summary above,[14] the applicant was well aware of the statutory requirements for an application to renew his fidelity fund certificate. Moreover, he was repeatedly reminded by officials of the Board, both orally and in writing, to comply with such requirements. In my

13 *Gentle Hooker Visserye Trust v The Minister of Environmental Affairs & Tourism* [2000] JOL 7325 (C) at p26 per Van Reenen J

14 paras [6] —[12] *supra*

view, he had ample opportunity to place his case before the Board. The fact that he chose to do so in a manner that was, to his knowledge, clearly flawed and defective cannot be blamed on the Board.

59]To sum up as far as this aspect is concerned, I am satisfied on the facts of this case there had been due compliance with the *audi* principle. In the result I am satisfied that the decision of the Board on 24 December 1999 not to renew the applicant's fidelity fund certificate was arrived at in a manner that was procedurally fair in all the circumstances. It follows that in my view the applicant would not have succeeded in obtaining any of the relief claimed before the court *a quo*.

60]But there was a second string to the applicant's bow. As a fall-back position, it was argued that, having found that the application was defective by reason of one or more of the factors mentioned in **sec 33(1)**, it was thereupon incumbent on the Board *mero motu* to consider whether or not to grant a fidelity fund certificate in the exercise of their discretion in terms of **sec 33(2)**.

61]I disagree. The Board is empowered in terms of **sec 33(2)** to issue a fidelity fund certificate to a sheriff who is subject to a disability *'when he applies therefor'*. The applicant did not apply for a certificate to be issued to him in terms of **sec 33(2)** until his attorneys addressed the letter dated 19 January

2000 to the Board. In the result, there was no need for the Board to have considered the provisions of this section at its meeting of 24 December 1999.

62]It was further argued that, by belatedly agreeing on 10 February 2000 to give the applicant a hearing, the Board was conceding by implication that they had been wrong not to give him a hearing in the first place.

63]In my view there is no merit in this argument. As I have shown above, the Board had not been called upon, prior to the meeting of 15 February 2000, to consider an application in terms of **sec 33(2)** of the Act. The facts and considerations before them on the second occasion were totally different from the facts and considerations before them on the first occasion. Whereas the Board was, at its meeting of 24 December 1999, precluded by the peremptory provisions of **sec 33(1)** from issuing a fidelity fund certificate to the applicant, the situation at the meeting of 15 February 2000 was totally different. At the second meeting the applicant approached the Board as supplicant on the basis of an acknowledgement that his original application had not been in order. On this second occasion, he thus threw himself upon the Board's mercy, as it were, exhorting them to exercise their discretion in his favour in terms of **sec 33(2)**. The fact that he managed, through his counsel, to persuade the Board to accede to this plea does not, in my view, entitle him to claim substantial success in the main application.

64]For the reasons set out above, I am of the view that the Board, and not the applicant, would have been the successful party, had the merits of the application been argued before the court *a quo*.

65]However, even if I were to have erred in coming to this conclusion and even if the applicant were to be regarded as the party who was substantially successful in the litigation, there are at least two further considerations that ought to have persuaded the court not to award costs in his favour.

a) In the first place, it is a well-recognised principle that where the decision of a statutory body or tribunal, such as the Board in this instance, is assailed, costs will not normally be awarded against such body where it acted reasonably and in good faith.[15] In my view, this is exactly what happened in this instance. The allegations to the contrary by the applicant in his founding affidavit where he labels the actions of the Board as *'bevooroordeeld, partydig en …kwelsugtig'* are not only unfounded; they are scurrilous and demonstrate his own lack of judgment. For this reason alone, the Board would, in my view, have been justified in opposing the application.[16]

15 See eg Cilliers *Law of Costs* §10.05 —10.08 and cases cited therein

16 Cf *Deedat v The Master & others* 1998 (1) SA 544 (N) 550B —C

b) Secondly, it is equally well-established that where a litigant applies to court for condonation of non-compliance with the provisions of a statute or the rules of court, the general rule is that such party should pay the costs of the application.[17] Such costs will ordinarily include the costs of reasonable opposition to the relief claimed.[18]

66]Neither of these principles was considered by the court *a quo*. Had they been considered, they would in all likelihood have led the court *a quo* to a different finding regarding costs.

67]For all these reasons, I conclude that the approach adopted by the court *a quo* in relation to costs was fundamentally flawed and amounts to a clear misdirection, entitling this court on appeal to interfere with the order granted.

Sec 21A of the Supreme Court Act 1959

68]One final aspect remains to be dealt with. As is evident from the above summary, the substantive issues between the parties have become academic, save for the question of costs. In the light of this fact, counsel were requested prior to the hearing of the appeal to submit supplementary heads of argument in relation to the applicability or otherwise of the provisions of **sec 21A(1),**

17 Cilliers *op cit* §2.33

18 Cilliers *op cit* §2.34

read with **sec 21A(3)** of the Supreme Court Act 59 of 1959 (as amended). Counsel have responded to this request and we are indebted to them for the full and helpful supplementary submissions that have been made.

69]Sec 21A(1) provides as follows:

> ***70]****'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'*

71]In terms of **s 21A(3)** the question whether or not the judgment or order sought would have no practical effect or result is, save under *'exceptional circumstances'*, to be determined without reference to consideration of costs.

72]Having reconsidered the matter, I am not persuaded that these provisions ought to be applied in the present case. In the first place, it cannot be held, in my view, that the judgment or order sought will have no practical effect or result in this instance. Apart from anything else, the judgment of the court *a quo* constitutes a binding precedent (until overruled), imposing certain onerous duties on the Board with regard to applications for fidelity fund certificates. The judgment of the court *a quo* requires the Board, in each case where an application for a fidelity fund certificate is defective by reason of one or more of the factors listed in **sec 33(1)** of the Act, *mero motu* to consider whether or not to issue such a fidelity fund certificate in terms of sec 33(2) <u>and</u> to afford the applicant an opportunity to be heard, before taking their decision. For the reasons set out above, I am satisfied that, in the circumstances of this case, no such duty rested upon them. The Board was therefore entitled to approach this court to challenge that finding by the court *a quo*.

73]Furthermore, the fact that there is of necessity an on-going relationship between the applicant, in his capacity as sheriff, and the Board as controlling statutory body, makes it desirable, in my view, to spell out to the parties what their respective rights, duties and obligations are. This is all the more necessary in view of the lamentable lack of insight and judgment displayed by the applicant in the conduct of this whole saga. To this day, the applicant appears to regard himself as the innocent victim of a harsh and unreasonable controlling body, rather than as the author of his own misfortune. Unfortunately the judgment of the court *a quo* added grist to his mill in that regard, in that the applicant apparently regards the judgment as vindication for his conduct and actions, and concomitantly, as a form of censure of the Board in relation to their actions. These misconceptions had to be rectified on appeal.

74]In any event, even where a the judgment or order sought will have no practical effect or result, that is not the end of the matter because, in terms of **sec 21A(3)**, considerations of costs may in exceptional circumstances be taken into account in considering whether the order sought will have no practical effect.

75]What constitutes exceptional circumstances must of course depend upon the facts of each individual case. I am satisfied that exceptional circumstances are indeed present in this case. In the first place, the costs were awarded (wrongly, as I have found) against a statutory body. Such costs, which one may assume are not inconsiderable, therefore would have to be paid from public funds. In these circumstances, I suggest, a court should be more inclined to have regard to considerations of costs than where the litigants are private individuals or corporations.

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76]Furthermore, the appeal relates to what has been found to be a misdirection on the part of the learned Judge *a quo* and a failure to exercise a judicial discretion. In *Logistic Technologies (Pty) Ltd v Coetzee & Others*[19] it was held that this consideration in itself would usually constitute '*exceptional circumstances'* which would satisfy the requirement set by **sec 21A(3).** I respectfully agree with those sentiments.

Conclusion

77]For the reasons set out above, I am of the view that the appeal ought to succeed. Although attorney and client costs were initially sought by the Board, Mr *Goodman* in his heads of argument as well as his address before us confined the claim to party and party costs.

78]In the circumstances the appeal is upheld with costs. The order of the court *a quo* is set aside and replaced with the following:

> *79]'The* ***applicant is directed to pay the costs of the application.'***

19 1998 (3) SA 1071 (W) 1075J-1076A

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81]B M GRIESEL

82]NGWENYA J: I agree.

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85]S J NGWENYA

86]McDOUGALL AJ: I agree.

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88]R D McDOUGALL

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