IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 245823/2025

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

[redacted] 22/1/2026

SIGNATURE DATE

In the application of:

**JOHANNES TSEKE MPHAHLELE** Applicant

and

**THE SOUTH AFRICAN BOARD FOR SHERIFFS** First Respondent

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** Second Respondent

**NAMEDI TSHEPO MPHAHLELE** Third Respondent

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**JUDGMENT**

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LABUSCHAGNE J

[1] The applicant was the Sheriff for Lephalale between 01 December 2012 and 02 December 2025 and the Acting Sheriff for Pretoria North East High and Lower Courts (Pretoria North East) from 01 March 2023.

[2] On 15 September 2025 the applicant was appointed by the second respondent ("the Minister") as Sheriff for Pretoria North East with immediate effect, which appointment he accepted on 18 September 2025.

[3] The applicant's letter of appointment indicated that he had to immediately apply for a Fidelity Fund Certificate with the Board, and if he failed to obtain such a Fidelity Fund Certificate, his appointment may be repudiated.

[4] On 03 October 2025 the applicant became aware that the Minister had appointed the third respondent as Sheriff for Pretoria North East on 28 September 2025, effective from 01 November 2025. The applicant was informed by the Board that the Minister had retracted his appointment due to his failure to timeously submit a Police Clearance Certificate to enable the Board to finalise his security clearance and his appointment. This took place on 06 October 2025.

[5] The applicant launched an application (B6834/25) to suspend the retraction of his appointment and to suspend the appointment of the third respondent. In those proceedings the Minister stated that she had not retracted the appointment, but that the appointment was provisional, subject to a condition precedent that the applicant satisfies the requirement for obtaining a Fidelity Fund Certificate, which condition was not fulfilled. Judgment is awaited in that case.

[6] On 08 October 2025 the applicant obtained a Police Clearance Certificate, in which it was indicated that he was convicted on 14 July 1987 on a charge of robbery and sentenced to five lashes corporal punishment and three months imprisonment, which was wholly suspended for three years.

[7] The applicant responded that the Police Clearance Certificate is incorrect as he was not convicted of robbery, but of common assault, and that he had no recollection regarding a suspended custodial sentence.

[8] As a suspended custodial sentence is still custodial, the applicant accepts that he was disqualified in terms of section 33(1)(h), unless he could satisfy the Board in terms of section 33(2) that the issue of a Fidelity Fund Certificate to him is justified in the interests of fairness towards him.

[9] On 13 October 2025 the applicant applied to the Board for a Fidelity Fund Certificate in which he motivated the issuing of the certificate in the interests of fairness to him, as required by section 33(2). The incident had happened almost 40 years before and was a youthful indiscretion (he was 18 at the time) which was exacerbated by peer pressure and the abuse of alcohol. His explanation of the event was that he and a group of friends had noticed the girlfriend of one of his friends in the company of the victim. They decided to teach him a lesson and he was assaulted. There was no dishonesty involved (sec 331(91)(h)).However, the applicant has since then lived an exemplary life and has been admitted as an attorney and has acted as a Sheriff for the past 13 years, serving on the Board of Sheriffs as a member since 18 June 2024.

[10] When applying for his Fidelity Fund Certificate from the Board, the applicant also applied for the expungement of his criminal record in terms of section 271C of the Criminal Procedure Act. The applicant notified the Board on 23 November 2025 that he had obtained an expungement and requested them to take a decision on his application for a Fidelity Fund Certificate. Only on 10 December 2025 was he notified that the application for a Fidelity Fund Certificate had been declined.

[11] On 15 December 2025 the applicant applied on an urgent basis in Part A proceedings for the issue of a Fidelity Fund Certificate pending the review of the decision refusing the application in Part B. The purpose of the application is to maintain the *status quo*.This application is the subject of this judgment.

**URGENCY**

[12] The applicant's Fidelity Fund Certificate, current during 2025, lapsed at the end of 2025. A Fidelity Fund Certificate is, in terms of section 32(2) of the Sheriffs Act, valid until 31 December of the year in respect of which it has been issued. As the refusal to issue a certificate was only made known on 10 December 2025, the applicant was bound to apply to the urgent court for urgent interim relief pending finalisation of the review proceedings.

[13] I am satisfied that the application is urgent in the aforesaid circumstances. Without a Fidelity Fund Certificate, the applicant cannot act as Sheriff. He employs fourteen (14) persons who cannot discharge their duties until he has a Fidelity Fund Certificate, and the review in part B is not ripe for hearing.

***PRIMA FACIE* RIGHT**

[14] The applicant needs to establish a *prima facie* right pending a review application, by establishing good prospects of success in the review application and that the applicant relies on strong grounds which are likely to succeed (see Economic Freedom Fighters v Gordhan 2020 (6) SA 325 (CC) at para [60]).

[15] The Board's interpretation of the applicant's letter of appointment was that the applicant's appointment was provisional, subject to a condition precedent that he obtain a Fidelity Fund Certificate. Failing the aforesaid, it was contended during argument that the condition precedent had not been fulfilled and that the applicant's appointment had lapsed as a matter of law.

[16] The condition precedent referred to is not a condition that, if not complied with would automatically unravel the appointment. It was merely a condition of the applicant's appointment that, should he not obtain a Fidelity Fund Certificate, his appointment could be retracted. Despite the fact that he did not obtain a Fidelity Fund Certificate, it is common cause that there has been no retraction of his appointment by the Minister. His appointment therefore stands as an administrative action until set aside, in terms of the **Oudekraal** principle.In those circumstances, the appointment of the third respondent as Sheriff is *prima facie* irrational.

[17] The applicant's appointment consequently stands until set aside or *"retracted"*. Neither has occurred.

[18] The applicant has consequently established that the appointment of the third respondent was materially influenced by an error of law (section 6(2)(d) of PAJA).

[19] In a letter of 24 November 2025, the South African Board for Sheriffs responds to the applicant's notification of an expungement of his disqualifying conviction. The following is stated:

> *"8. We note your supplementary submission that the Director General has issued a certificate of expungement for this conviction. However, section 33(1)(h) uses the specific wording 'has at any time been convicted'. This legislative drafting is intentional and designed to capture historical conduct regardless of the current status of the criminal record. The expungement removes the record for future purposes but does not erase the historical fact that do you were convicted and sentenced as described, which triggered the disqualification.*
>
> *9. In any event as will be apparent below, the cancellation of your current certificate is based not only on the disqualification itself but on the independent ground of false information provided to the board, which remains unaffected by a subsequent expungement."*

[20] In _Masemola v Special Pensions Appeal Board and Another_ (CCT260/18) [2019] ZACC 39 the effect of a presidential pardon on a prior conviction was at issue. The appellant was convicted on several counts of fraud and was sentenced to five years imprisonment. Pursuant to an investigation by the Special Investigation Unit, the Board advised the applicant that in terms of section 1(8)(b) of the Act he was disqualified from continuing to receive a special pension. He applied for a presential pardon in terms of section 84(2)(j) of the Constitution and the pardon was granted on 21 July 2011. In 2012 he received a SAPS Clearance Certificate, certifying that the conviction had been expunged from his record. The position of the Government Pension Administration Agency was that pardons do not have retrospective effect. The Board contended that the disqualification occurred by operation of law.

[21] The appellant contended that, based on the Constitutional Court's judgment in _The Citizen and Others v McBride_ 2011 (4) SA 191 (CC), the legal effects of a pardon are similar to an amnesty in that the conviction is expunged, restoring the appellant to an *"undamaged legal and civil status"* (see paragraph [31] of *Masemola*). The respondents on the other hand contend that, with reference to _Du Toit v Minister of Safety and Security_ 2009 (6) SA 128 (CC)), that whilst the pardon gives the offender freedom from the consequences of his convictions, it does not undo the past and it operates prospectively. It restores civil status but does not undo collateral consequences of a conviction.

[22] The Constitutional Court in Du Toit found unanimously that General Du Toit's discharge could not be undone. The effect of granting amnesty on civil liability

that has already been determined is, the court noted, *"prospective only"* (see Masemola, para [34]). The Constitutional Court distinguished between the concepts of retrospectivity and retroactivity by stating:

*"A retrospective provision operates for the future only but imposes new results in respect of past events. A retroactive provision operates as of a time prior to the enactment of the provision itself and changes the law applicable with effect from a past date."*

[23] While the expungement was retrospective, it was no retroactive.

[24] The import of the Du Toit judgment, read with Masemola and McBride, is that the expungement could as a minimum act prospectively. This means that, by virtue of the expungement of the applicant's criminal record, and the Board for Sheriffs having been notified thereof before they took their decision on the application for a new Fidelity Fund Certificate, the applicant had been restored to unblemished legal and civil status. The import that was that he was no longer disqualified by virtue of the conviction at the time that the Board took their decision on 10 December 2025 on his application for a new Fidelity Fund Certificate. The fact that the Board for Sheriffs deemed him to be disqualified as a matter of law, implies that the expungement was not taken into account at the time of their decision as a relevant consideration. This establishes on the fact a case in the review application for a challenge to the refusal, based on an error of law (the effect of the expungement) and a failure to take into account relevant considerations (the fact of expungement prior to the decision

by the Board).These are manifestations of the Board applying the test of fairness to the public as yardstick, while the statute refers to "fairness to him".

[25] As the applicant assumed that he was disqualified in terms of section 33(1)(h), his application in terms of section 33(2) required, on the basis of *"fairness to him"* that the legal impact of an expungement had to be properly determined and assessed. The applicant may very well have made submission in this regard and fairness dictated that he should be given an opportunity to address the Board's perception that the disqualification was still applicable or not. This would be determined by the consequences of an expungement being *ex tunc* or *ex nunc*.

[26] In light of the aforesaid I am satisfied that the applicant has established a *prima facie* right to relief in that he has established good prospects of success in the review.

[27] The Board of Sheriffs relies on *Ntsibantu v The Minister of Justice and Correctional Services* 2018 JDR 0574 (WCC), which was followed in *Segwana N.O. v South African Board for Sheriffs* 2025 JDR 0492 (GP) to contend that this court is not empowered to grant an order that a Fidelity Fund Certificate for 2026 be issued pending review of the decision refusing the Fidelity Fund Certificate, taken on 10 December 2025.

[28] There is a significant factual distinction between the aforesaid Ntsibantu matter and the current application. Mr Ntsibantu was found to be disqualified but failed to apply for exemption, in terms of section 33(2) (see Ntsibantu, paras [16] and [43]). As Mr Ntsibantu was disqualified, and did not apply to

be exempted, he could establish no prospects of success in the further review. That makes the Ntsibantu matter distinguishable on the facts.

[29] Further, the Segwana matter was not an application for interim relief but for final relief. Swanepoel J followed the findings of Sher J in the Ntsibantu matter but it is distinguishable from the current application.

[30] In considering the risk of irreparable harm, I take into account the fact that the applicant cannot perform his duties in a position which has not been retracted, without being in possession of a valid Fidelity Fund Certificate. There are fourteen (14) employees dependent on the applicant's ability to render his services validly, based on a current Fidelity Fund Certificate. The applicant has therefore established a risk of irreparable harm if he does not obtain interim relief.

[31] The balance of convenience favours the applicant, as, without interim relief, he would be unlikely to obtain review relief, even if he establishes a case for review. The third respondent's appointment, at the time when the applicant's appointment had not been retracted, is *prima facie* irrational. The risk of service by the third respondent being assailed in court proceedings based on the aforesaid consideration introduces a component of public interest into the balance of convenience. In my assessment of the facts, the applicant should be permitted to render his services as Sheriff for Pretoria North East without this sword of Damocles hanging over his head.

[32] I am satisfied that the interests of the third respondent and the Boad of Sheriffs does not outweigh those in favour of the applicant. The balance of

convenience has therefore been established in favour of the granting of relief to the applicant.

[33] The applicant has no alternative remedy other than to approach the court for relief. The only alternative would be an expedited review, which will in itself take a substantial period of time for purposes of producing a record. It would therefore not be an adequate alternative remedy.

**CONCLUSION**

[34] In the premises the applicant has established a case for urgent interim relief pending finalisation of review proceedings.

[35] I make the following order:

1. The matter is urgent and the forms, service and time periods prescribed by the Uniform Rules of Court are dispensed with in terms of Uniform Rule 6(12).

2. Pending the finalisation of the relief sought in Part B of the application, as well as Part B of the application under case number B6834/2025, the first respondent is ordered to forthwith:

    2.1 Issue the applicant with a Fidelity Fund Certificate for Pretoria North East High and Lower Courts; and

2.2 Remove any reference on the first respondent's website to the third respondent as the Sheriff for Pretoria North East High and Lower Courts.

3. The first respondent is ordered to pay the costs of this application on Scale C.

[redacted]

**LABUSCHAGNE J**
JUDGE OF THE HIGH COURT