IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2025/001285

Date of hearing: 10 and 17 January 2025

Date delivered: 22 January 2025

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

22/1/25 .....
DATE SIGNATURE

In the application of:

DAVID LEKGUA SEGWANA N.O. **Applicant**

and

SOUTH AFRICAN BOARD FOR SHERIFFS **Respondent**

JUDGMENT

SWANEPOEL J:

[1] The applicant alleges that he is a Sheriff appointed for the District of Sasolburg in terms of the Sheriff's Act, 90 of 1986 ("the Act"). He launched this application on an urgent basis, seeking an order that the respondent be directed to issue him with a Fidelity Fund ("FFC") for the year ending 31 December 2025. He also seeks a costs order against the respondent.

[2] The application was launched at approximately midday on 9 January 2025, and it was set down for hearing at 10h00 on 10 January 2025. It was emailed to the respondent at 14h32 on 9 January.

[3] Section 26 of the Act established a fidelity fund for sheriffs, which is largely aimed at indemnifying the public for claims against sheriffs. A Sheriff is obliged to have a FFC by virtue of the provisions of section 30 (1) (a) of the Act. The applicant says that he applied for a FFC on 31 July 2024 and again on 30 October 2024. The respondent acknowledged his application, and advised that if he were not to hear from it, he could infer that the application was in order, and that he would in due course receive his FFC. He says:

> *"To date I have not heard from them, nor was there any query raised."*

[4] The applicant attached his application dated 30 October 2024 to his papers. He was required to answer two questions: The first was whether he had ever been dismissed from a position of trust by reason of improper former conduct involving a breach of such trust. The second was whether he had ever been convicted of any offence involving

dishonesty. In respect of both questions the applicant replied in the negative.

[5] When, by 2 January 2025, he had not yet received his FFC, the applicant addressed an email to the applicant. In the email he referred to "*numerous telephone conversation today*" (sic) that he had apparently had with the respondent's staff. On 3 January 2025 the applicant's attorney wrote to the respondent. He recorded that the applicant had not yet been issued with a FFC, that he had complied with all the legal obligations in terms of the Act for the issuing of the FFC, and that there was no "*cogent valid and legal reason*" for not issuing the FFC. The attorney, Mr. Thapelo Motaung, demanded that a FFC be issued to his client. The respondent replied that the letter had been referred to the relevant department, and that the "*Board compliance and EM*" would provide feedback.

[6] Again, on 6 January 2025, Mr. Motaung wrote to the respondent, demanding a FFC, and again he made the allegation that there was no valid reason to refuse to issue a FFC. When the respondent had not issued the FFC by 9 January 2025, this application was launched. The applicant put forward, inter alia, the fact that he could not fulfil his duties of serving processes in the absence of a FFC, as a ground for the urgency of the application.

[7] The picture one gets from reading the founding affidavit is of an innocent applicant who is at the mercy of the respondent, and who has no idea why his FFC had not been issued.

[8] The respondent delivered an answering affidavit in great haste. The applicant, when faced with the answering affidavit, sought an opportunity to reply. I stood the matter down to later in the day for that purpose. The applicant then sought a postponement so that he could reply, and I postponed the matter to 17 January 2025. Not surprisingly, as will become apparent from the rest of this judgment, there was eventually no reply forthcoming.

[9] The answering affidavit presents a totally different picture of the matter. On 18 November 2024 the respondent addressed a letter to the applicant. The letter was accompanied by a letter of complaint by the Sheriff of certain areas adjoining Sasolburg. More importantly, the letter was also accompanied by an opinion drafted by counsel on the appropriateness of issuing a FFC to the applicant. The opinion recorded the following information:

> [9.1] The applicant was appointed as Sheriff of the Districts of Mkobola, Mbibane and Mdutjana in 2001. On 30 July 2012 he was appointed Sheriff for Sasolburg.
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> [9.2] The respondent instituted disciplinary action against the applicant on 31 January 2017, as a result of numerous complaints, which resulted in his conviction on all charges. The disciplinary

enquiry determined that he had committed offences pertaining to the non-payment of trust monies, and remarked that he had already been convicted on similar charges in 2013. The finding reads (in part) that:

"3.28 Mr. Segwana shows no respect for trust monies and good accounting practices….

3.2.10 Mr. Segwana is not fit and proper to hold the office of a Sheriff;"

[9.3] The sanction imposed on the applicant included a recommendation to the Minister of Justice and Constitutional Development that the applicant be removed as sheriff. An internal appeal by the applicant was unsuccessful, as was an appeal before a Full Court of the Western Cape High Court where the learned Judge remarked:

"…misconduct [is] of such magnitude that the recommendation to the Minister is for the Sheriff's removal is, in my view, the only appropriate sanction, especially for a repeat offender."

[9.4] Astonishingly, the Board was of the view that the sanction applied only to the districts of Mkobola, Mdutjana and Mbibana, and it recommended that the Minister of Justice and Constitutional Development remove him as Sheriff of those areas, leaving him still appointed for Sasolburg. The applicant was so removed on 20 December 2021.

[9.5] On 19 April 2022 the Minister raised certain concerns about the applicant's continued appointment for Sasolburg, and he made the obvious point that if he were not fit to be a Sheriff for the abovementioned three areas, why should he be issued with a FFC for Sasolburg? Nonetheless, the respondent continued to issue the applicant with FFC's until 31 December 2024.

[10] The opinion concluded with the view that the decision of the respondent not to execute the disciplinary sanction of removal as Sheriff for all areas was unlawful, and that the respondent was obliged to cancel the applicant's existing FFC. This view accorded with that of the Minister, and should have been obvious to everyone. Why the respondent issued the applicant with further FFCs in the first place is beyond understanding. In fact, the respondent's conduct flies in the face of section 33 (1) (g) of the Act, that specifically prohibits the issuing of a FFC to a person who "*has at any time been dismissed from a position of trust by reason of improper conduct involving a breach of such trust*".

[11] None of the above is in dispute. The respondent's letter of 18 November called upon the applicant to make representations regarding the letter, and on the opinion, within 14 days. The applicant has never responded to the letter save, in a classic attempt to delay, his attorney enquired from the respondent when the 14-day period commenced.

[12] It is quite apparent that, when the applicant brought the application, he was aware of the process that had commenced for the cancellation of

his FFC. An email dated 2 January 2025 that one Ms. Africa had sent to the applicant also makes it clear that the applicant was aware of the fact that ad hoc Sheriffs would in the meantime be appointed in his stead to serve processes. The email referred to a discussion between Ms. Africa and the applicant, and it referred him to a website link that provided information on the appointment of ad hoc Sheriffs, https:/sheriffs.org.za/how-to-appoint-an-ad-hoc-sheriff.

[13] Therefore, when this application was brought, both the applicant and his attorney knew that there was an ongoing process relating to the cancellation of his FFC, they knew that ad hoc sheriffs were to be appointed in the applicant's stead, but nevertheless, the applicant, with the assistance of his attorney, made the following submission in the founding affidavit:

> *"10.29 It is respectfully submitted that the Applicant has never had a Fidelity Fund Certificate cancelled or that he was disqualified from obtaining such, this clearly indicates the unprocedural manner in which the Respondent has conducted itself in respect of the Applicant despite the Applicant having satisfied and met all the requirements for obtaining same."*

[14] The allegation that the applicant has never had a FFC cancelled is false. The applicant, having received the letter of 18 November 2024 regarding the cancellation of his FFC, also falsely denied having received any feedback from the respondent after he had applied for a FFC. He falsely pretended not to know why the FFC had not been issued. In

addition, the replies to the respondent's questions on the application form, as I referred to above, were false. In my view the applicant is clearly guilty of fraud.

[15] Therefore, even if I were entitled to make the order sought, I would not do so. As the Court pointed out in *Ntsibanto v The Minister of Justice and Correctional Services*[1] a FFC is not simply there for the asking. The applicant has to comply with the requirements of the Act for appointment, and with the Regulations relating to Sheriffs[2]. Section 2 *bis* (b) of the Regulations require the applicant to be a fit and proper person in order to qualify for appointment. The applicant is without any doubt not a fit and proper person to be a sheriff.

[16] In *Ntsibanto (supra)*, also an urgent application, the core issue was whether a court was empowered to make an order directing the Board of Sheriffs to issue a provisional fidelity fund certificate. The court held (per Sher J) that:

> "But off course it is trite, the court's power in this regard is limited to the regulation of its own process. It does not extend to a general power at common law to make orders on matters which are regulated by statute and which fall within the domain of an administrative entity such as the Board, which is a statutorily established regulatory body which has amongst its objects the maintenance of the esteem of, and the improvement of the functions performed by sheriffs. It is the Board upon

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[1] Unreported Western Cape High Court, case no. 156/2018 dated 26 April 2018, para 29

[2] Published in GN R 411 in GG 12307 of 12 March 1990

which the legislature has conferred the power to issue fidelity fund certificates, and not the courts, and the courts should respect this lest they make themselves guilty of overreaching."

[17] I am respectfully in agreement with the above passage. It is not for this Court to consider whether the applicant qualifies to be a sheriff, and whether he has complied with his statutory obligations. That falls within the purview of the respondent. Therefore, even if I were inclined to find that the applicant was a suitable candidate, which I do not, it would be improper for me to tread into the field of responsibility of the respondent.

[18] The respondent argued that the matter is not urgent, and I am inclined to agree. The applicant knew on at least 2 January 2025 (although I believe he knew long before), that his FFC would not be renewed. He waited until 9 January 2025 to launch the application, and he then gave the respondent approximately 20 hours to appear. I would not be surprised if that was an attempt at stealing a march on the respondent, in the hope of obtaining an order in its absence. Clearly, the 'urgency' was self-created. Nevertheless, having heard full argument, and having determined that the application is meritless, I intend to dispose of the matter on the merits.

[19] The final issue is that of costs. During the hearing I asked the applicant's counsel to address me on whether punitive costs would be appropriate, and also on whether his attorney should pay the costs, or at least a part thereof, *de bonis propriis*. Applicant's counsel conceded that the correspondence regarding the cancellation of the FFC had come to

the applicant's attention in November 2024. However, he argued that a letter sent by the respondent on 20 December 2024 to an attorney, Mr. HJ Moolman, who had complained about the applicant's appointment, had put the dispute entirely to bed. That is not the case. All that the letter of 20 December said was that if Moolman wished to attack past decisions of the respondent, he should take those decisions on review. The letter had nothing to do with the ongoing steps against the applicant, and cannot be understood to have resolved the dispute regarding his 2025 FFC.

[20] There could, consequently, not have been any misunderstanding on the applicant and his attorney's part. I find that they knew that the submissions made in the founding affidavit, to which I referred above, were false.

[21] There is a substantial body of authority that has held that if a party is dishonest in a matter, attorney/client costs may be ordered. It is an order not lightly made.[3] In *Pieter Bezuidenhout – Larochelle Boerdery (Edms) Bp ken Andere v Wetorius Boerdery (Edms) Bpk*[4] the Court explained:

> "Alvorens so 'n bevel uitgevaardig kan word, moet daar buitengewone omstandighede bestaan wat bykomende koste-bestraffing van die party teen wie die bevel gemaak word, vereis. Dit is 'n buitengewone bevel en

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[3] See: Erasmus' Superior Court Practice, 2nd Ed, D 5-21, footnote 3 and the plethora of authorities referred to.
[4] 1983 (2) SA 233 (O); See also Herold v Sinclair and Others 1954 (2) SA 531 (A); Ward v Sultzer 1973 (3) SA 701 (A)

behoort nie deur te geredelike verlening tot aledaagsbevel verlaag te word nie."

[22] However, where a party has placed untrue evidence before a court, or has been dishonest, such an award would be justified.[5]

[23] Having made the finding that the applicant was dishonest in the founding affidavit, as well as having lied in the FCC application, I have no doubt that an attorney/client costs order would be appropriate. However, should the applicant's attorney bear some responsibility for his involvement in presenting evidence that he knew was false? A *de bonis propriis* order is even more unusual than an attorney/client costs order, and is not often awarded. In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*[6] Fabricius J said that a de bonis propriis costs order:

> "... is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice,

[5] Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813(V); Grobler NO v Boikhutsong Business Undertaking (Pty) Ltd and Others 1987 (2) SA 547 (BG); Pitluk v Law Society of Rhodesia 1975 (2) SA 21 (RA); Law Society, Northern Provinces v Mogami and Others 2010 (1) SA 186 (SCA)
[6] 2014 (3) SA 265 (GP) at 289 A - D

irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care."

[24] I am dismayed by the conduct of Mr. Motaung. He deliberately attempted to mislead the Court. It was submitted, on his behalf, that an attorney acts on the instructions of his client, and that that is all he did. That may be so, but an attorney is foremost an officer of court, and when an instruction from a client is in conflict with his/her duty to the court, an attorney must advise the client that he/she cannot execute that particular instruction. An attorney must not perpetuate his client's dishonesty, but must be scrupulously honest with the court. He/she must not allow false or misleading facts to be placed before a court. In this case the applicant and his attorney are equally to blame for attempting to mislead the Court, and, in my view, they should be equally liable for the costs.

[25] I make the following order:

[25.1] The application is dismissed.

[25.2] The applicant shall be liable for 50% of the costs of the application on an attorney/client scale. The applicant's attorney, Mr Thapelo Motaung shall be liable for 50% of the costs on the attorney/client scale, de bonis propriis. The costs shall include the costs of 10 January 2025, and shall be calculated on Scale C.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant:	**Adv. S Mqibi** **Adv O Ntsole**
Instructed by:	**Thapelo Motaung Attorneys**
Counsel for the respondent:	**Adv B Joseph**
Instructed by:	**Herold Gie Attorneys**
Date heard:	**10 and 17 January 2025**
Date of judgment:	**22 January 2025**