

SOUTH AFRICA / JUDGMENT

BG Bojosinyane and Associates v The Sheriff Vryburg and Another (1072/2022) [2023] ZASCA 174 (8 December 2023)

[2023] ZASCA 174

COURT

Supreme Court of Appeal

BEFORE

Makgoka, Matojane, Weiner, Koen, Chetty

CASE / FILE NUMBER

1072/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1072/2022

In the matter between:

BG BOJOSINYANE & ASSOCIATES APPELLANT

and

SHERIFF: MICHAEL SMITH

FIRST

RESPONDENT

SOUTH AFRICAN BOARD FOR SHERIFFS

SECOND RESPONDENT

Neutral citation: BG Bojosinyane & Associates v Sheriff: Smith and Another (1072/22) [2023]
ZASCA 174 (8 December 2023)

Coram: MAKGOKA, MATOJANE AND WEINER JJA AND KOEN AND CHETTY AJJA

Heard: 9 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 8 December 2023.

Summary: Civil procedure – Magistrates' Court Act 32 of 1944 and Rules – sheriffs' fees and charges – whether sheriff entitled to demand payment of fees and charges before services rendered.

ORDER

On appeal from: North-West Division of the High Court, Mahikeng (Leeuw JP sitting as court of first instance):

1. The appeal is upheld;
2. The first and second respondents are directed to pay the costs of the appeal jointly and severally, the one paying the other to be absolved;
3. The order of the high court is set aside, and replaced with the following order:

'(a) Unless authorised by a magistrate in terms of section 14(7) of the Magistrates' Court Act 32 of 1944, the first respondent is directed to effect service and to execute any court process emanating from the office of the applicant without any unreasonable delay;

(b) The first respondent is interdicted from requiring payment of any part of his fees or charges in respect of the service or execution of a court process in paragraph (a) above before serving and executing such process;

(c) After the service or execution of any court process referred to in paragraph (a) above, the first respondent is directed, without delay and without first requiring prior payment of any part of his fees and charges relating thereto, to return to the applicant and to the court concerned whatever he has done by virtue of such process, specifying his fees and charges on the original and all copies of the returns of service;

(d) The first and second respondents are directed to pay the costs of the application jointly and severally, the one paying the other to be absolved.'

Koen AJA (Matojane and Weiner JJA and Chetty AJA concurring):

[1] This appeal raises the following issues for decision:

- (a) whether the relief claimed before the North-West Division of the High Court, Mahikeng (the high court) included a determination of the issues in paragraph (b) below; if so
- (b) whether, unless excused by an authorisation granted by a magistrate in terms of s14(7) of the Magistrates' Court Act 32 of 1944 (the Act), a sheriff is entitled to refuse to serve or execute a

court process unless a deposit in respect of the sheriff's fees and charges relating thereto is paid upfront, allied to which is whether once the process is served or executed, a sheriff is entitled to withhold the return of service until payment of his fees and charges specified therein have been paid; and

(c) whether a mandatory interdict to give effect to the determination of the issues in (b) above should have been granted.

[2] The appellant, BG Bojosinyane and Associates, a firm of attorneys, launched an urgent[1] application in the high court against the first respondent, the sheriff of the magistrate's court, Vryburg, claiming the

following relief in its notice of application:

'THAT [the first respondent] is compelled and directed to effect service and/or execute the process of the court, emanating from the office of [the appellant] upon the mentioned or cited party or person stated therein without any avoidable or unreasonable delay and accordingly notify the [appellant] and return to court whatever he has done by virtue thereof [specifying] the total amount of his or her charges on the original and the copies of the return of service.'

The relief claimed was opposed by the first respondent and the second respondent, the South African Board for Sheriffs.[2]

[3] As the basis for the relief claimed, the deponent to the founding affidavit, Mr Boemo Granch Bojosinyane (Mr Bojosinyane), explained that the first respondent demanded and continued to demand exorbitant fees from the appellant 'before he [would] effect service of any civil process sued out by [the appellant], which conduct is contrary to the procedure laid down by the Magistrates' Courts Rules of Court, Magistrates' Courts Act, Uniform Rules of the

above Honourable Court and the Sheriff's Act.' He complained that this resulted in 'unnecessary and uncalled for arguments and disputes (which) inevitably lead to excessive delay to serve [the appellant's] documents or process, or at times such documents are not being served at all as in the present case.' (Emphasis added.)

[4] Mr Bojosinyane illustrated the appellant's complaint with reference to the following matters where the appellant had required the first respondent's services:

(a) In *OA Phora v MM Phora*, a summons was sent to the first respondent on 1 July 2019. On 9 July 2019 the first respondent demanded payment of the sum of R354.25 before he would effect service of the summons on the defendant. An enquiry as to how that amount was arrived at resulted in a revised estimate of R441.31 being provided on 11 July 2019. The appellant then adjusted the estimate to R208.80 which it determined was a reasonable fee, which was deposited into the first respondent's bank account. The summons was served on 19 July 2019. On 25 July the first respondent rendered an account for R399.68, leaving a shortfall of R190.88. The first respondent withheld the return of service until payment was made;

- (b) In *BG Bojosinyane v Isang Nakale Inc* a warrant of execution was sent to the first respondent on receipt of which he 'as usual demanded prior payment' of the sum of R1 000 from the appellant on 22 June 2018. The appellant in a letter dated 26 June 2018 claimed that this amount was excessive. The return of service eventually rendered reflects that an attempt was made to execute the warrant on 20 August 2018, but that it could not be executed. The fees charged per the return totalled R1 266.27. The first respondent's charges were paid directly by the execution debtor.
- (c) In *BG Bojosinyane v K Letsapa*, the first respondent on 16 May 2018 and 17 August 2018 respectively demanded payment of the sum of R230.81 each for service of a summons and a notice to show cause, in each instance on the basis that prior payment 'will be required to attend to your request'. This was followed by a further request on 11 March 2019 for payment of the sum of R323.16 for service of a summons before the first respondent would attend thereto. The appellant on 13 March 2019 queried the amounts demanded but subsequently, in the words of Mr Bojosinyane 'reluctantly and under protest but solely made in order to facilitate service of the process and the finalization of the matters' paid the sum of R323.16 to the first respondent on 18 March 2019. The return of service dated 25 March 2019 reflects that service was effected on 19 March 2019. The first respondent's return of service raised a fee of R271.98. Notwithstanding written demand on 17 July 2019 the credit between what was paid as a deposit and the fees raised, is alleged not to have been refunded to the appellant;
- (d) In *Fire Cash Loans v Department of Education: NL Tong*^[3] the first respondent on 15 April 2014 demanded payment of the sum of R174.15 'which includes this letter and faxes etc' before execution of an emoluments attachment order would take place. After an unsuccessful attempt at execution on 7 July 2014, the order was served on 9 July 2014. The first respondent then rendered an account for R174.15, which included an amount of R36.50 for an unsuccessful 'attempted execution.' The amount claimed is the same amount the respondent had required the appellant to pay before he would serve the process. The appellant questions how the initial demand could be for the same amount as the final fee, when the unsuccessful attempt at execution could not have been known at the time the demand for payment was made.
- [5] The relevant provisions of the Act, the Magistrates' Courts Rules of Court (the rules), and the Sheriff's Act, which provide the legislative framework within which a sheriff is to discharge his or her functions and obligations, alluded to by Mr Bojosinyane when setting out the basis for the appellant's claim, are set out below.
- [6] Rules 8(1) and (2) of the rules provide that:
- '(1) Except as otherwise provided in these Rules, the process of the court shall be served or executed, as the case may be, through the sheriff.

(2) Service or execution of process of the court shall be effected without any unreasonable delay, and the sheriff shall, in any case where resistance to the due service or execution of the process of the court has been met with or is reasonably anticipated, have power to call upon any member of the South African Police Force, as established by the South African Police Service Act, 1995 (Act 68 of 1995), to render him or her aid.’ (Emphasis added.)

[7] Rules 8(3) and (4) provide:

‘(3) The sheriff to whom process other than summonses is entrusted for service or execution shall in writing notify-

- (a) the registrar or clerk of the court and the party who sued out the process that service or execution has been duly effected, stating the date and manner of service or the result of execution and return the said process to the registrar or clerk of the court; or
 - (b) the party who sued out the process that he or she has been unable to effect service or execution and of the reason for such inability, and return the said process to such party, and keep a record of any process so returned.
- (4) When a summons is entrusted to the sheriff for service, subrule (3) shall mutatis mutandis be applicable: Provided that the registrar or clerk of the court shall not be notified of the service and that the summons shall be returned to the party who sued out the summons.’

[8] Rule 8(6) provides:

‘(6) After service or attempted service of any process, notice or document, the sheriff, other than a sheriff who is an officer of the Public Service,[4] shall specify the total amount of his or her charges on the original and all copies thereof and the amount of each of his or her charges separately on the return of service.’[5] (Emphasis added.)

[9] In respect of returns of service, rule 9(17A)(a)[6] provides:

‘The document which serves as proof of service shall, together with the served process of court or document, without delay be furnished to the person at whose request service was effected.’ (Emphasis added.)

[10] The sheriff’s fees and charges are regulated by rule 34, which provides that:

‘(1) The fees and charges to be taken by a sheriff who is an officer of the Public Service shall be those prescribed in Part I of Table C of Annexure 2 and in the case of any other sheriff those prescribed in Part II of the said Table and Annexure.

(2)(a) Every account of fees or charges furnished by a sheriff shall contain the following note:

“You may require this account to be taxed and vouched before payment.”

- (b) Where any dispute arises as to the validity or amount of any fees or charges, or where necessary work is done and necessary expenditure incurred for which no provision is made, the matter shall be determined by the taxing officer of the court whose process is in question.
- (3)(a) Any party having an interest may by notice in writing require the fees and charges claimed by or paid^[7] to the sheriff to be taxed by the registrar or clerk of the court, and may attend on such taxation.
- (b) Upon a taxation referred to in paragraph (a) the sheriff shall vouch to the satisfaction of the registrar or clerk of the court all charges claimed by him or her.
- (c) A fee for the attending of the taxation shall be allowed-
- (i) to the sheriff if the sheriff's fees or charges are taxed and passed in full, as allowed for in Table C; and
- (ii) to the interested party concerned if the sheriff's fees or charges are taxed but not passed in full, on the same basis as the fee allowed to the sheriff under subparagraph (i).'

(Emphasis added.)

^[11] Sections 14(7) and (8) of the Act provide:

'(7) A messenger receiving any process for service or execution from a practitioner or plaintiff by whom there is due and payable to the messenger any sum of money in respect of services performed more than three months previously in the execution of any duty of his office, and which notwithstanding request has not been paid, may refer such process to the magistrate of the court out of which the process was issued with particulars of the sum due and payable by the practitioner or plaintiff; and the magistrate may, if he is satisfied that a sum is due and payable by the practitioner or plaintiff to the messenger as aforesaid which notwithstanding request has not been paid, by writing under his hand authorize the messenger to refuse to serve or execute such process until the sum due and payable to the messenger has been paid.

- (8) A magistrate granting any such authority shall forthwith transmit a copy thereof to the practitioner or plaintiff concerned and a messenger receiving any such authority shall forthwith return to the practitioner or plaintiff the process to which such authority refers with an intimation of his refusal to serve or execute the same and of the grounds for such refusal.'

^[12] Section 16(k) of the Sheriffs Act assigns to the second respondent the responsibility, with the approval of the Minister, to 'frame a

code of conduct which shall be complied with by the sheriff'.^[8] Clause 2 of the Code of the Conduct for Sheriffs (the Code) provides that:

‘A sheriff entrusted with the service or execution of a process shall act without avoidable delay in accordance with the provisions of rule 8(4) of the Magistrates’ Court Rules or rule 4(6)(a) of the Supreme Court Rules: Provided that any process, requiring urgent attention shall be dealt with forthwith.’ (Emphasis

added.)

In terms of the Code sheriffs undertake to comply with the precepts of the Act and clause 8.1 prescribes that a sheriff shall ensure that his or her charges are in accordance with the applicable tariff.

[13] Section 43 of the Sheriffs Act defines improper conduct by a sheriff. Sections 44 to 52 deal with the procedures to be followed in lodging a complaint and the disciplinary procedures and sanctions that may be imposed on a sheriff.[9]

[14] The high court found[10] that the appellant had a clear right to have processes of court served without any avoidable or unreasonable delay. It however dismissed the application for a mandatory interdict on the basis that the appellant had not established an imminent threat of irreparable harm, and that it had not established that it had no satisfactory alternative remedy. During the course of the judgment the high court commented that:

‘Having made a finding that the [appellant] should be non-suited in an application for an interdict against the sheriff, I deem it

unnecessary to deal with the question whether or not the Sheriff is entitled to demand payment prior to rendering his duty to serve or execute process. There is no issue pending in this court in that regard.’ (Emphasis added.)

Did the issues before the high court include whether a sheriff may require payment of fees and charges before processes would be served or executed?

[15] In application proceedings the notice of motion and affidavits contain both the pleadings and the evidence in support thereof.[11]

[16] The brief synopsis of the facts in the four cases relied upon by the appellant in support of its application demonstrates that the demands for upfront payment in each instance resulted in delays, to varying degrees, before the court process was served or executed. The appellant complained that these delays were contrary to the requirement that processes must be served or executed without unreasonable delay. That was the thrust of its complaint and the reason for the application. The major part of the founding affidavit

was devoted to setting out the factual circumstances of the four cases referred to as events which reflect a practice by the first

respondent to demand payment from the appellant, before court processes emanating from its offices are served or executed. This

practice would furthermore continue into the future as the first respondent confirmed that he had taken ‘a decision that the [appellant] needs to pay in advance’.[12]

[17] The high court was therefore required to address this factual premise on which the appellant approached the court for relief and to determine whether the appellant had a clear right to restrain the sheriff from requiring payment of fees and charges before serving or executing the appellant’s court processes. It erred in not doing so.

May the sheriff refuse to serve and/or execute a court process unless the fees and charges relating thereto have first been paid?

[18] It is trite law that where final relief is sought in application proceedings on the affidavits, the facts on which the relief is adjudicated are those stated by the respondent together with the admitted facts in the founding affidavit, or if not formally admitted, are facts that cannot be denied and are therefore regarded as admitted.[13]

[19] The material facts necessary for the adjudication of the issue under discussion have been summarised above in relation to the four cases where the first respondent’s services were required by the appellant. They are largely common cause. The only possible further facts of relevance are that the first respondent in his answering affidavit added that the appellant, since 2014, was not an account holder at his office because the appellant had not paid him for some services rendered, and that the appellant is a ‘bad’ payer. He further contended that he has a discretion to determine which ‘customers’ should pay upfront and which will be granted a credit facility, that he has suspended the appellant’s

account due to non-payment, and that he will continue to demand payments in advance before serving or executing any court processes

at the request of the appellant.

[20] Both the Magistrates’ Court and the Office of the Sheriff, are creatures of statute.[14] The Magistrates’ Court is established by the Act and its administration is governed by the Act and the rules.[15] The rules provide for court processes to be served or executed by a sheriff, and for other matters incidental to the work of sheriffs.

Sheriffs are appointed in terms of the Sheriffs Act.[16] Being creatures of statute means that they have no inherent powers, but only such powers as are expressly, or by necessary implication, conferred upon them.[17]

[21] The legislative framework does not provide that a sheriff may demand payment of a deposit upfront in anticipation of fees and charges to be incurred for services still to be rendered.

[22] What is furthermore clear from the legislative framework, viewed against the fundamental right of all persons to have access to courts and to have disputes adjudicated in an expeditious manner, is that all court processes must be served without delay. The service and execution of court processes has indeed been described as ‘the cornerstone of our legal system’.[18] It is in the interests of the administration of justice that our courts operate efficiently and without unreasonable or avoidable

delays.

[23] If payment may be insisted upon before a process is served or executed, then delays will be inevitable from when the process to be served is received by the first respondent: while the first respondent prepares an estimate of the amount of his fees and charges he requires to be paid; that estimate is conveyed to the appellant; the appellant assesses the reasonableness or otherwise of the amount demanded; correspondence is exchanged where the reasonableness of the estimate is debated; payment is made; payment is received by the first respondent; and the process is finally served or executed. These delays are demonstrated by the facts of the four cases relied upon by the appellant.

[24] The reasonableness of fees and charges charged by a sheriff may be challenged by way of taxation, but only after the court process has been served or executed and the actual fees and charges have been specified in the return of service. Taxation at that stage provides for an expeditious and inexpensive resolution of any fee disputes. But there is no provision for anticipated fees demanded in the form of a payment up front, to be challenged to determine the reasonableness or otherwise of the amount demanded. Disputes about the reasonableness of the amount demanded up front will result in court processes not being served or executed with no mechanism to resolve such disputes, and hence even further delays.

[25] The issue is not whether these delays are unreasonable from the financial perspective of a sheriff, but that they are unreasonable and avoidable in the greater interest of the administration of justice, and inconsistent with the legislative framework.

[26] Not allowing demands for payment of anticipated fees up front would not leave the first respondent without a remedy in respect of

practitioners who are slow or bad payers. He can obviously always institute action for payment of unpaid taxed fees. But that apart, s 14(7) of the Act, quoted above, provides a remedy whereby he may withhold services, once authorised by a magistrate, in regard to the service or execution of a particular process until all previous fees outstanding in respect of services rendered more than three months previously, to that particular practitioner or person who required his services, have been paid in full. Obtaining such authority from a magistrate might occasion some delay, but it is the only delay sanctioned by the legislative framework within which sheriffs, who accept appointment as sheriffs, have to operate. The three-month period is obviously a reasonable time for any disputes regarding the quantum of previous fees charged, to have been resolved, either by agreement or taxation.[19]

- [27] As regards returns of service, rule 9(17A)(a) requires that a sheriff's return of service must be provided without delay. The return of service is part and parcel of the service and execution process. The retention of a return of service by a sheriff will not delay the service or execution of the court process, but it can and will cause a delay in the administration of justice. The return of service is an important document. Not only does it serve as prima facie proof of the service or execution of the court process, a necessary fact in the judicial process, but as required by rule 8(6) it also records and is the method contemplated by the rules to convey details of the fees charged by a sheriff to a practitioner. In the light of the express requirement in rule 9(17A)(a) that it must be provided 'without delay', the return too cannot be withheld pending payment. To do so would be inconsistent with the legislative framework.
- [28] In summary, the first respondent is not entitled to demand payment up front for fees and charges contemplated, but yet to be incurred, for the service and execution of court processes. Similarly, returns of service may not be withheld by him pending payment being made of the fees and charges reflected therein for the service and execution of court processes.

The interdictory relief

- [29] The relief which should follow in the light of the conclusions reached above can be expressed as declaratory relief, or it can be couched as a mandatory interdict. The high court treated the application as one for an interdict. That was how the appellant's case was presented. The appellant also argued the appeal on the basis that it sought an interdict.
- [30] The requirements for a final interdict are trite. The applicant for such an interdict must demonstrate a clear right, establish an imminent threat of harm, and show that it has no satisfactory alternative remedy.
- [31] In the light of the conclusions reached above, the appellant has established a clear right, subject to the provisions of s14(7) of the Act, to have court processes served or executed without unreasonable delay. It is entitled to restrain the first respondent from requiring payment of a deposit in respect of anticipated fees and charges before serving or executing a court process, or rendering the return of service relating thereto.
- [32] As regards the requirement of imminent harm or injury, the first respondent's stated intention to continue insisting on payment from the appellant before rendering any service or executing court processes emanating from the appellant, confirms not only an injury in law which the appellant has suffered in the past, but also an ongoing injury which is reasonably apprehended and feared[20] to occur again in the future.[21]
- [33] Finally, as regards the third requirement, the appellant established that it has no satisfactory alternative remedy but to apply to court for appropriate relief. Taxation of the fees and charges demanded in advance is not a remedy because such taxation is not available within the legislative framework. Disciplinary proceedings before a committee of the Sheriff's

Board do not present a satisfactory remedy to the appellant who would still be required first to pay whatever is demanded as a deposit up front before the court process is served or executed. The disciplinary process will take time, and even if the eventual finding is one of some form of unprofessional conduct and a sanction, it will be no remedy to the appellant who in the interim required service and execution of a court process without unreasonable delay. Instituting disciplinary proceedings is therefore not an alternative satisfactory remedy 'with the same result',[22] nor will it provide adequate redress.[23]

[34] The requirements for an interdict all being satisfied, the appellant was entitled to be granted interdictory relief.

Conclusion

[35] The appeal accordingly succeeds. The order granted should however address the specific conduct of the first respondent which the appellant sought to restrain. Such an order is set out below.

[36] The costs of the appeal and the costs of the application in the high court should follow the result. The second respondent joined in the application and appeal and opposed the relief claimed. It should be directed to pay the appellant's costs jointly and severally with the first respondent.

[37] The following order is granted:

1. The appeal is upheld;
2. The first and second respondents are directed to pay the costs of the appeal jointly and severally, the one paying the other to be absolved;
3. The order of the high court is set aside, and substituted with the following order:

P A KOEN

ACTING JUDGE OF APPEAL

Makgoka JA

[38] I have read the judgment of my Colleague Koen AJA. I agree with the order he proposes. However, I prefer a more linear route.

[39] The principal issue in this appeal is whether a Sheriff is entitled to demand upfront payment for their fees and charges before they serve a court process. The appellant, Bojosinyane and Associates (Bojosinyane) had sought a mandatory interdict in the North-West Division of the High Court, Mahikeng (the high court), against the first respondent, the Sheriff of Vryburg (the Sheriff). He sought relief that the Sheriff be ordered to serve court process emanating from its office without insisting on upfront payment for his fees. The high court dismissed that application with costs on an attorney and client scale. The appeal is with the leave of

this

Court.

Factual

background

[40] The background is briefly this. Bojosinyane is a firm of attorneys situated in Hartswater, Northern Cape Province. It has a branch office in Vryburg, North West Province. The Sheriff has been appointed for the district of Vryburg. Bojosinyane had an account with the Sheriff. Over time, a dispute arose between Bojosinyane and the Sheriff about the reasonableness of the fees charged by the Sheriff against Bojosinyane. As a result, in some instances, the latter withdrew payment of charges demanded by the Sheriff. In response, the Sheriff took the stance that henceforth, he would serve process from Bojosinyane only upon receipt of upfront payment for his estimated fees.

[41] Because of the dispute, the Sheriff approached the local Magistrate for authorisation to refuse to serve process from Bojosinyane, pursuant to s 14(7) of the Magistrate Court's Act 32 of 1944. The section reads as follows:

‘A messenger receiving any process for service or execution from a practitioner or plaintiff by whom there is due and payable to the messenger any sum of money in respect of services performed more than three months previously in the execution of any duty of his office, and which notwithstanding request has not been paid, may refer such process to the magistrate of the court out of which the process was issued with particulars of the sum due and payable by the practitioner or plaintiff; and the magistrate may if he is satisfied that a sum is due and payable by the practitioner or plaintiff to the messenger as aforesaid which notwithstanding request has not been paid, by writing under his hand authorise the messenger to refuse to serve or execute such process until the sum due and payable to the messenger has been paid.’

[42] The application was unsuccessful, as the Magistrate on 8 August 2014, found that the Sheriff had ‘failed to show compliance with the requisite provisions of the section ...’ The reasons for that conclusion are not germane to the appeal. Upon

such refusal, the Sheriff closed Bojosinyane's account and informed it that going forward, he would serve process from it only upon upfront payment for any process.

In the high court

[43] Consequently, Bojosinyane launched an urgent application in the high court for a declaratory interdict that the Sheriff is obliged to serve process emanating from it without ‘any avoidable or unreasonable delay’ Bojosinyane complained that since April 2014, the Sheriff was ‘demanding and continuing to demand, exorbitant fees’ from it before would effect service of any process from its office. Bojosinyane said that this led to excessive delays in having the documents served, as the parties would be arguing about the reasonableness

or otherwise of the Sheriff's upfront charges. In most instances, Bojosinyane paid the deposit under protest in order to facilitate the service of process. Bojosinyane averred that the Sheriff's conduct was in contravention of rule 8 of the Magistrate's court rules and amounted to self-help. By the time the application was launched in the high court, there was no process that the Sheriff had not served, mainly because Bojosinyane had paid the demanded upfront payment.

[44] In answer, the Sheriff stated that it was practice in his office that once an account is closed, payments should be made in advance when the erstwhile account holder would be obliged to pay upfront for his fees. Since Bojosinyane's account had been closed since April 2014, he 'properly exercised [his] discretion to seek upfront payment from Bojosinyane. He found support for this stance in a newsletter of the South African Board for Sheriffs (the Board) issued in August 2009. There, it is recommended

that where Sheriffs are owed money by an attorney or a member of the public, in order to protect themselves against prescription, they should serve the process and withhold the return of service until the fees are paid. The Board supported the Sheriff's stance.

[45] The urgent application was struck off the roll for lack of urgency. Subsequently, in the normal course, the matter served before Leeuw JP in the high court. By that time, the South African Board for Sheriffs had been admitted as a second respondent in the application. The high court found that Bojosinyane had satisfied only one of the three requisites for a final interdict,[24] , namely a clear right. As to the injury or reasonable apprehension thereof, the high court reasoned:

'...[T]here is no real dispute pending between [Bojosinyane] and the Sheriff. The fact that the Sheriff threatened to continue with his conduct of demanding payment upfront from [Bojosinyane] does not necessarily entitle [it] to approach this court to obtain an interdict against the Sheriff.'

[46] With regard to the absence of an alternate remedy, the high court held that Bojosinyane has the right to submit the sheriff's accounts for taxation in terms of rule 34(3). Also, the high court found that Bojosinyane could lodge a complaint against the Sheriff with the Board if it is of the view that the Sheriff overcharged it. These measures, said the high court, offered Bojosinyane adequate alternative remedies. For these reasons, the high court was of the view that the order sought by Bojosinyane was academic. Consequently, it concluded that it was 'unnecessary to deal with the question whether or not the Sheriff is entitled to demand payment prior to rendering his duty to serve or execute process.' Accordingly, the high court dismissed Bojosinyane's application with costs of both the Sheriff and the Board, such costs to be paid on an attorney and client scale.

Analysis

of the high court judgment

[47] I propose to immediately deal with how the high court dealt with the application for an interdict. The finding that the matter was academic is difficult to understand. In no uncertain terms, the Sheriff had expressly stated his intention to continue refusing to serve process from Bojosinyane unless a deposit was paid on a case-by-case basis.

An interdict is appropriate not only for present infringement of rights but also and when future injury is feared.[25] Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.[26] In the present case there was an express intention to continue the injury.

[48] As to the alternate remedy, it is now settled that for a remedy to be a bar to an interdict, the remedy must be effective. In *Hotz v University of Cape Town* this Court explained:

‘An alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court. The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict.’

It is clear that taxation and disciplinary proceedings against the Sheriff, are not legal, and therefore, not effective, remedies.

[49] With regard to the punitive costs order against Bojosinyane, it is not clear from the judgment of the high court as to why it was made. The Judge President said the following: ‘I have already alluded above that the applicant[27] who is an attorney, should be [au fait] with the Rules and relevant statutes prescribed by the law, and should have reflected on this issue prior to approaching this court for an interdict.’

[50] A costs order on an attorney and client scale is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation.[28] Costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant.[29] As such, the order should not be granted lightly, as courts look upon such orders with disfavour and are loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have. Nothing in this case even remotely resembles any of the considerations referred to above. Even if Bojosinyane was ill-advised (it was not) in bringing the application, that hardly constitutes a factor to warrant a punitive costs order.

[51] Thus, the learned Judge President was plainly wrong on how she approached the application.

In this Court

What was the issue before the high court?

[52] In this Court, Bojosinyane contended that the issue is that which the high court declined to consider: whether a Sheriff, absent an authorisation envisaged in s 14(7) as outlined earlier, is entitled to demand upfront payment for their charges before serving a court process. The Sheriff contended that the case it had to meet in the high court was different from what was being asserted on appeal. The Board supported this submission. It was contended that the issue in the high court was the reasonableness of the Sheriff's upfront fees rather than whether he was entitled to demand upfront payment.

[53] The notice of motion did not mention the Sheriff's refusal to serve process unless upfront payment was made, and for that conduct to be interdicted. However, in the founding affidavit, the issue was squarely raised. In paragraph 32 of its founding affidavit, Bojosinyane made the following averments:

'The [Sheriff's] conduct [of demanding upfront payment] is. . . wrongful and unlawful in view of the fact [he] can utilise the remedy set out in section 14 of the Magistrate's Court for an authorisation by [a] magistrate to refuse to serve the process emanating from [Bojosinyane's office].'

In paragraph 33 Bojosinyane averred that the Sheriff's conduct amounted to self-help, and in paragraph 34, it averred that the Sheriff's conduct was 'in contravention of rule 8 of the Magistrate's Court Rules. The Sheriff denied these averments and insisted that he was perfectly entitled to do so.

[54] This is also how the high court understood the issue before it. In para 8 of its judgment, the high court identified the issues as being whether Bojosinyane had made out a case for an interdict, and if so, 'whether this court may grant an order restraining the Sheriff from demanding payment prior to service or execution of process emanating from the office of [Bojosinyane].'

[55] I therefore conclude that the issue of whether, absent authorisation in terms of s 14(7), a Sheriff is entitled to refuse to serve court process unless payment for their fees and charges is made up-front was squarely before the high court. But even if it was not raised in the pleadings, this is a point of law. It is now settled that the mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. The proviso is that a party will not be permitted to raise a point that was not covered in the pleadings if its consideration will result in unfairness to the other party.[30] In the present case the Sheriff and the Board do not allege any, and I find none. In all the circumstances, there is no merit in the Sheriff's and the Board's contention.

The issue for

determination

[56] With that out of the way, I turn to the issue on appeal, which is this. Outside the purview of s 14(7), does a Sheriff have a right to refuse to serve court process unless payment for their fees and charges is made up-front? The question must be answered with reference to the legislative provisions that regulate Sheriffs. Rule 8(2) of the Magistrate Court rules provides, among other things, that '[s]ervice or execution of process of the court shall be effected without any unreasonable delay.' Rule 8(3) enjoins the sheriff, upon service of a process other than summons, to notify the registrar or clerk of the court and the party who sued out the process, that service or execution has been duly effected, stating the date and manner of service or the result of execution and return the said process to the registrar or clerk of the court.

[57] Rules 8(6) and 34 are particularly relevant to the present case, both of which refer to the Sheriff's charges. Rule 8(6) reads as follows:

'After service or attempted service of any process, notice or document, the sheriff, . . . shall specify the total amount of his or her charges on the original and all copies thereof and the amount of each of his or her charges separately on the return of service.'

Rule 34(2)(b) deals with disputes about the Sheriff's charges and how they are to be resolved. It provides:

'Where any dispute arises as to the validity or amount of any fees or charges, or where necessary work is done and necessary expenditure

incurred for which no provision is made, the matter shall be determined by the taxing officer of the court whose process is in question.

[58] The upshot of these legislative provisions is clear. None of them remotely entitles a Sheriff, for any reason whatsoever, to refuse to serve court process unless upfront payment for her or his fees and charges is made by an account holder. If anything, they are obliged to serve process entrusted to their office 'without any unreasonable delay', as rule 8(2) commands, and thereafter render an account setting out her or his charges, pursuant to rule 8(6). The only basis upon which she or can do so, is within the circumscribed circumstances of s 14(7) and upon authorisation by a magistrate. Thus, absent a s 14(7) authorisation, a Sheriff must serve the process, render their account and the return of service. The disputes about the Sheriff's fees referred to in rule 34(2), can only arise after the process had been served, and such disputes would be determined by the Taxing Master.

[59] The Sheriff had another string to his bow. He submitted that he could in certain circumstances, to avoid prescription for example, serve court process but withhold the return of service and only release it upon payment of his charges. The Board supported this. This submission is mentioned merely to be rejected. The simple answer is provided in rule 9(17A)(a), which, consistent with rule 8(2), requires a Sheriff to render her or his return of service ‘without delay’ to ‘the person at whose request service was effected.’

[60] In sum, a Sheriff does not have a lawful basis to insist upon upfront payment for her or his charges or to refuse to serve process until such payment is made. They can only do so when authorised in terms of s 14(7). Similarly, they do not have any lawful basis to withhold a return of service until payment is made. The objective in both rules 8(2) and 9(17A)(a), ie avoidance of undue delay in serving court process, would be defeated if the Sheriff’s contentions were to be accepted.

The delay is inherent in the refusal to serve court process until payment is made up-front. What is more, the Sheriff’s conduct in this case amounts to self-help. As the Constitutional Court held in *Lesapo v North West Agricultural Bank*,^[31] ‘[t]aking the law into one’s own hands is . . . inconsistent with the fundamental principles of our law.’^[32]

[61] In all the circumstances, the appeal must succeed. Costs must follow the result. The Board must pay the costs jointly and severally with the Sheriff. It aligned with the Sheriff’s cause, both in the high court and in this Court.

T MAKGOKA

JUDGE OF APPEAL

Appearances:

For the appellant: J H F Pistor SC

Instructed by: Bojosinyane & Associates, Hartswater

Phatshoane Henney Attorneys, Bloemfontein.

For the first respondent: N Jagga

Instructed by: Kotze Louw Swanepoel Attorneys, Vryburg

Pieter Skein, Bloemfontein.

For the second respondent: N Riley

Instructed by: Herman Scholtz Attorneys, Mahikeng.

c/o Snaid & Morris Attorneys, Sandton.

Honey Attorneys, Bloemfontein.

[1] The first respondent raised the lack of urgency as a first point in limine in the application. The application was struck off the roll at the first appearance on 19 September 2019 for lack of urgency. The matter thereafter proceeded in accordance with the provisions of the Uniform Rules of Court.

[2] The second respondent is a statutory body established in terms of section 7 of the Sheriff's Act 90 of 1986. It was not

initially a party to the application before the high court but was joined as the second respondent on 3 December 2020 well before

judgment was delivered on 15 April 2021. The second respondent applied for condonation for the late filing of its heads of argument

in the appeal, which was granted unopposed.

[3] The facts appear from the ruling of the magistrate Mr BE Chulu.

[4] Rule 8(7) provides that: '[t]he Director-General of Justice shall by notice in the Gazette publish the name of every court for which a sheriff who is an officer of the Public Service has been appointed'.

[5] There is no provision for such charges to be specified prior to the service of any process.

[6] Rule 4(6A)(a) of the Uniform Rules of Court similarly provides that: 'The document which serves as proof of service shall, together with the served process of court or document, without delay be furnished to the person at whose request service was effected.' (Emphasis added.)

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[7] It was argued that this reference to 'or paid to the sheriff' meant that the reasonableness of a deposit claimed by a sheriff, and paid, could also be determined by taxation in the event of a dispute as to the reasonableness thereof. I disagree. The scheme provided in the legislative framework resulting in payment being made to a sheriff is payment of charges reflected on a return of service after the services have been rendered. The legislative scheme does not countenance a series of taxations: one to determine the reasonableness of a deposit required to be paid before the sheriff will serve or execute a court process, and another once the actual services have been rendered and the actual charges are levied in the return of service. This will place an undue burden on taxing masters.

[8] Such a code was published in GN 954, GG 12840, 16 November 1990.

- [9] These provisions are not quoted in this judgment, as it is only the fact that they are available that is relevant to this judgment, and not the detail thereof.
- [10] The first respondent also raised points in limine: that the appellant had alternative remedies available to it; that the magistrates' court was competent to deal with the issue; and non-compliance with the full court judgment in *AECI v Laufs*
- [2016] ZANWHC 63), in opposition to the relief claimed. The second point in limine will be considered as part of the merits in this judgment. The third and fourth points in limine were not dealt with in the judgment of the high court. There is no cross appeal in respect thereof. They are accordingly not considered in this judgment.
- [11] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) para 13; *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 234.
- [12] The learned judge in the high court concluded that the order sought was, in her view, academic. As the threat of demanding security for the payment of fees before processes of court would be served or executed was expressly stated to apply into the future, the relief was, with respect neither academic, nor moot.
- [13] *Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G; *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634F.
- [14] *National Credit Regulator v National Consumer Tribunal and Others*
- [2023] ZASCA 133 para 51; *Tshoga v S* [2016] ZASCA 205; 2017 (1) SACR 420 (SCA) para 53.
- [15] The rules are made by the Rules Board for Courts of Law, which has the power to make, amend or repeal rules for the High Court and the Magistrates' Courts in terms of the Rules Board for Courts of Law Act 107 of 1983. The purpose of these rules is to promote access to the courts.
- [16] Section 2 of the Sheriffs Act provides for the appointment of a sheriff who performs his or her duties within the area of jurisdiction of the lower and superior courts for which he or she has been appointed.
- [17] In *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) para 5 it was said that 'It is well-established that the magistrates' court has no jurisdiction and powers beyond those granted by the Act. . .' Specifically regarding sheriffs, in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) the high court had ordered the sheriff to compile a list of occupants to be evicted from a building. This court declared that part of the order to be a nullity as the 'Sheriffs Act did not confer such a power on the sheriff – a creature of statute.' See also *South African Board of Sheriffs v Cibe and Others* [2022] ZAGPJHC 153 para 37; *Bonsai Investments Eighty Three (Pty) Ltd v Kögl and others* [2011] NAHC 189 para 13.

[17] In *Ndamase v Functions 4 All* 2004

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[18] D Harms Civil Procedure in Magistrates' Courts Volume 2 (Service Issue 57, August 2023) para B8.3. Sheriffs also execute processes required to give effect orders of various courts. Section 42(1) of the Superior Courts Act 10 of 2013 provides that: ‘(1) The process of the Constitutional Court and the Supreme Court of Appeal runs throughout the Republic, and their judgments and orders must, subject to any applicable rules of court, be executed in any area in like manner as if they were judgments or orders of the Division or the Magistrates’ Court having jurisdiction in such area.’ (Emphasis added.)

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[19] There is no similar provision in the high court, but that does not detract from the above interpretation of the legislative framework.

Unlike the magistrates’ court which is a creature of statute, the high court has inherent jurisdiction and power, confirmed by section 173 of the Constitution, to regulate its own process and to develop the common law taking into account the interest of justice. Section 43(1) of the Superior Courts Act 10 of 2013 provides that ‘a refusal by the sheriff or a deputy to do any act which he or she is by law required to do, is subject to review by the court concerned on application ex parte or on notice as the circumstances may require.’

[20] *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006

- (1) SA 252 (SCA) paras 20-21. It is not an injury that has occurred and is not likely to be repeated.

- [21] I respectfully disagree with the conclusion of the high court that this threat would not entitle the appellant to approach the court to obtain an interdict. No reason was stated for that conclusion.
- [22] D E van Loggerenberg Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa Volume 1 (Revision Service 27, May 2023) at Act-p180; Reserve Bank of Rhodesia v Rhodesia Railways 1966 (3) SA 656 (SR).
- [23] Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd 1965
- (1) SA 683 (T).
- [24] An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. Setlogelo v Setlogelo 1914 AD 221 at 227. These requisites have been restated by this Court in a plethora of cases, most recently in Hotz and Others v University of Cape Town
- [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) para 29; Van Deventer v Ivory Sun Trading 77 (Pty) Ltd 2015
- (3) SA 532 (SCA) [2014] ZASCA 169 para 26; and Red Dunes of Africa v Masingita Property Investment Holdings
- [2015] ZASCA 99 para 19. They were affirmed by the Constitutional Court in Pilane and Another v Pilane and Another [2013] ZACC 3; 2013 (4) BCLR 431 (CC) para 38.
- [25] Phillip Morris Inc v Marlboro Trust Co SA 1991 (2) SA 720 (A) at 735B.
- [26] NCSPCA v Openshaw
- [2008] ZASCA 78; 2008 (5) SA 339 (SCA); [2008] 4 All SA 225 (SCA); para 20.
- [27] The Judge President failed to make a distinction between BG Bojosinyane and Associates as a firm of attorneys, and its principal, Mr Boemo Granch Bojosinyane, the deponent to the founding affidavit.
- [28] See Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597 at 607.
- [29] Public Protector v South African Reserve Bank
- [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) para 223.
- [30] Barkhuizen v Napier [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 39.
- [31] Lesapo v North West Agricultural Bank and Another [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (CC).
- [32] Ibid para 11.

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