

SOUTH AFRICA / JUDGMENT

## Bulk Brick Supplies Property (Pty) Ltd v South African Board for Sheriffs (3249/2021) [2022] ZAECKMHC 104 (22 November 2022) [2022] ZAECKMHC 104

COURT

Eastern Cape High Court, Makhanda

BEFORE

JE Smith

CASE / FILE NUMBER

3249/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MAKHANDA)

CASE NO.: 3249/2021

Matter heard on: 13 October 2022

### Judgment

delivered on: 22 November 2022

In the matter between: -

BULK BRICK SUPPLIES PROPERTY (PTY) LTD

Applicant

and

THE SOUTH AFRICAN BOARD FOR SHERIFFS

Respondent

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED.

### JUDGMENT

SMITH J:

## Introduction

- [1] The applicant, a duly registered and incorporated private company, seeks an order reviewing and setting aside the decision of the South African Board for Sheriffs (the respondent), taken on 23 April 2021 and repudiating its claim for compensation in terms of s 35 (a) (i) of the Sheriffs Act, 90 of 1986 (the Act), because of perceived non-compliance with s 36 (2) (a) of the Act. The latter section provides that a claim against the Fidelity Fund for Sheriffs (the Fund) must be lodged within three months of the claimant becoming aware of the contingency.
- [2] Although the respondent has raised various points in limine in its answering affidavit, it did not pursue any of them during argument. This was not at all surprising since those points were all demonstrably without any merit.
- [3] The applicant contends that the impugned decision falls to be reviewed and set aside on the grounds that it is irrational, was taken for an ulterior purpose and was based on an erroneous understanding of the applicable legal principles and the underlying factual matrix.

## Factual background

- [4] There has been protracted correspondence between the applicant's attorneys and the respondent, both before and after the lodging of the applicant's claim. The contents of those letters and emails have considerable bearing on the determination of the issue as to whether the applicant lodged its claim properly and timeously. I am therefore constrained to go into some detail regarding the history of the correspondence, so as to provide proper context for my findings in respect of that issue, as well as the issue regarding the appropriate scale of costs.
- [5] The material facts are common cause and uncomplicated. On 18 September 2013, the applicant obtained judgment against the Bizana Local Municipality and other defendants in the Mthatha High Court for the capital sum of R213 158.90, together with interest thereon and costs of suit. The sheriff of Bizana, Dumisani Godlwana (the sheriff), thereafter attached one of the municipality's vehicles in pursuance of a writ of execution. He, however, failed to report to the applicant or its attorneys regarding the execution of the writ, and all attempts by the applicant's attorneys to get a report from him were unsuccessful. As a result, the applicant's attorneys lodged a formal complaint with the respondent on 28 January 2016.
- [6] On 17 August 2016, the applicant became aware of the fact that the municipality had paid the judgment debt to the sheriff to secure the release of the motor vehicle. The applicant's attorneys conveyed this fact to the respondent on 17 August 2016, together with a request that the respondent move swiftly to investigate the matter and take the appropriate steps. The applicant eventually lodged its claim with the respondent on 14 October 2016.

- [7] The respondent's Fund administrator, one Phila Ngwane, wrote to the applicant's attorneys on 26 October 2016 confirming that:
- (a) it had received the applicant's claim against the Fund; (b) the claim had been registered and a claim number issued; and (c) it would consider the claim and revert to the applicant in due cause.
- [8] On 9 February 2017, the respondent informed the applicant's attorneys that it required a power of attorney, together with relevant supporting documentation. Even though the applicant was not certain as to what supporting documentation were required, it supplied the respondent, inter alia, with: a copy of a court order confirming the Bizana Local Municipality's liability; the sheriff's notice of attachment; and the bank statement received from the Bizana Local Municipality confirming that the capital sum had been paid to the sheriff. It also filed the power of attorney on 15 February 2017.
- [9] In the meantime the applicant's attorneys and representatives of the respondent entered into numerous discussions regarding the progress - or lack thereof - of the applicant's claim. On 21 July 2017 they wrote to the respondent outlining the applicant's concerns that the process has taken an inordinately long time and requested clarification as to what more was required of it.
- [10] In reply, the respondent stated that it had reviewed the claim and wanted to know in what year the Bizana Local Municipality had made the payment to the sheriff. It also referred the applicant to the provisions of s 37 of the Act, namely that the claimant was required to exhaust all available legal remedies against the sheriff prior to instituting action against the Fund. It furthermore drew the applicant's attention to the provisions of s 36 (2) (b) of the Act and granted it six months from the date of the letter, being 10 July 2017, to provide the requested information.
- [11] On 31 July 2017, the applicant's attorneys wrote to the respondent enquiring about the outcome of the disciplinary proceedings against the sheriff and requested the respondent to waive the requirements of section 37 of the Act. The respondent's fund administrator replied on 1 August 2017, informing the applicant's attorneys that the respondent could not waive the requirements of s 37 (2) "as the amount is substantial." It furthermore informed the applicant's attorneys that the only information still outstanding was the date on which the Bizana Local Municipality made the payment to the sheriff.
- [12] The respondent further provided the applicant's attorneys with a record of the disciplinary proceedings against the sheriff. The record indicated that the sheriff was, inter alia, found guilty of failing to respond to correspondence and releasing the attached motor vehicle without receiving an instruction to do so and after having received payment of an unknown sum of money.

- [13] The applicant was only able to reply to the respondent's only outstanding queries, namely the date and amount of the payment, during August 2017. It had ascertained from the Bizana Local Municipality that it paid the sum of R213 158.90 to the sheriff on the 9 of May 2014. This information, together with the municipality's bank account statement, were sent to the respondent under cover of a letter dated 28 August 2017.
- [14] The applicant's attorneys again wrote to the respondent on 16 January 2018, requesting confirmation that the Fund would consider its claim in the event that the money could not be recovered from the sheriff. It furthermore informed the respondent that in line with its decision not to waive the requirements of section 37 (2) of the Act, the applicant's attorneys have drafted a summons and particulars of claim and were awaiting service upon the sheriff.
- [15] On 23 March 2018, the applicant's attorneys informed the respondent that they had been unable to effect service on the sheriff as he no longer traded at his given address. They were eventually able to effect service, and obtained judgment against the sheriff on 9 May 2018 in the Mthatha Regional Court for payment of the sum of R213 158.90, together with interest thereon and costs of suit on the attorney and client scale.
- [16] The respondent did not reply to that letter, and on 27 September 2018, the applicant's attorneys again wrote to it confirming that judgment had been obtained against the sheriff, that tracing agents had been appointed to locate him and that the tracing agent's report indicated that the sheriff was not in a financial position to satisfy the judgment debt.
- [17] The respondent, however, required the applicants to take steps to execute the judgment against the sheriff before it would consider the claim. The applicant then employed another tracing agent to locate the sheriff, but when his address was eventually ascertained, it was discovered that he no longer lived there. The applicant communicated this state of affairs to the respondent on 1 March 2019. The applicant's attorneys confirmed that they had exhausted all remedies against the sheriff and reminded the respondent that its fund was created to assist members of the public in the position of the applicant with their claims.
- [18] There was no reply to that letter and the applicant's attorneys send further correspondence to the respondent on 27 March 2019 and 30 April 2019. Eventually, the representative of the respondent contacted the applicant's attorneys telephonically on 6 May
2019. Pursuant to that conversation, the applicant's attorneys provided the respondent with a return of service dated 22 January 2019, together with a tracing report as proof that the applicant was unable to execute against the sheriff. The applicant's attorneys thereafter, at the respondent's request, performed a deeds office search in respect of the sheriff and sent evidence thereof to the respondent under cover of a letter dated 21 May 2019.
- [19] The respondent thereafter failed to reply to further letters written by the applicant's attorneys to it on 20 June 2019 and 2 July

2019. It eventually only replied on 25 September 2019 stating that the applicant's claim had been submitted to its board for consideration on 9 September 2019, but had been deferred to the next meeting. It also said that it required a copy of the summons and supporting documents in respect of the judgment obtained against the sheriff within 10 days. The applicant's attorneys duly provided the requested documentation under cover of a letter dated 26 September 2019.
- [20] On 1 November 2019, the respondent advised the applicant's attorneys that it had reviewed the applicant's claim and because 'the fund is a fund of last resort', the applicant was required to excuss against the sheriff, including through sequestration proceedings, and must explore alternative forms of service. It also required the applicant to submit further proof of attempts to excuss against the sheriff.
- [21] After the applicant's attorneys had advised the respondent that they have taken all necessary steps to excuss against the sheriff and that he could not be located, the respondent replied on 6 December 2019, stating that the applicant's claim had been repudiated on the grounds that s 37 (2) of the Act provides that 'the fund is a fund of last resort' and the applicant has not fully excussed against the sheriff. It insisted that the sheriff must be sequestered and the vehicle mentioned in the tracing agent's report attached. It informed the applicant that its claim had consequently been repudiated 'and the file is now pended, upon the above requirements been complied with'.
- [22] On 5 February 2021, after the applicant had informed the respondent that it had obtained legal opinion to the effect that sequestration is not a valid form of excussion or debt enforcement, the respondent, although stating that it had obtained a contrary opinion, nevertheless, requested the following from the applicant: (a) a deed search of all provinces showing that the sheriff has no immovable property; (a) a warrant of execution against immovable property and a nulla bona return; (c) a return of service in respect of the summons; and (d) an affidavit reflecting attempts to arrange payments with the sheriff and indicating why it would not benefit the creditors to proceed with sequestration. The letter concluded by stating that the respondent would consider the claim for "possible payment at the next meeting in February 2021".
- [23] The applicant submitted the requested documentation to the respondent under cover of a letter dated 11 February 2021, and eventually, having received no response from the respondent, it instituted action proceedings against the respondent during April 2021.
- [24] After the summons had been issued, the respondent wrote to the applicant's attorneys on 23 April 2021, stating that the board had investigated and considered the applicant's claim and it had decided to repudiate the claim because of non-compliance with s 32 (2) (a), read with s 36 (3) of the Act, in that the claim had not been lodged within three months of the applicant becoming aware of the contingency. It subsequently also relied on this defence in its plea filed in the action proceedings.

[25] In the light of the stance adopted by the respondent, the applicant has brought these review proceedings. The parties have agreed that the action proceedings will be stayed pending the finalisation of the review application.

#### The applicable statutory provisions

[26] In terms of s 36 (2) of the Act, “subject to the provisions of subsection (3), no person shall have a claim against the Fund in respect of a contingency referred to in section 35 unless –

- (a) the claimant lodges his claim with the Board in terms of subsection (1) within three months after he became aware of the contingency; or
- (b) the claimant furnishes the Board, within six months after a written demand was sent to him by the Board, with such proof in verification of his claim as the board may reasonably require.’

[27] And in terms of s 36 (3), the respondent, if it is satisfied that, having regard to the circumstances of a claim or the proof required by it was lodged or furnished as soon as possible, ‘may at its discretion extend the period mentioned in (a) or (b) of subsection (2) as the case may be’.

[28] The Act also provides for the establishment of the Fund, which is funded out of interest paid to the sheriff’s trust accounts in terms of s 22 (4) of the Act. One of the main purposes of the fund is the settlement of claims admitted against the Fund or judgments, including costs obtained against the Fund.

[29] In terms of s 35 (1) of the Act, monies in the Fund shall be utilised to compensate any person who ‘suffers any loss or damage as a result of the failure of the sheriff to pay out or deliver to such person any money or property over which he acquired control by virtue of his office, or the proceeds of the sale of such goods’.

#### Discussion

[30] The respondent’s reliance on the applicant’s contended non-compliance with the time period mentioned in s 36 (2) (a) of the Act is premised on its contention that the applicant had been aware of the contingency since between March 2015 to January 2016, but only lodged the claim on 14 October 2016, consequently outside the prescribed time limit.

[31] In my view this argument is not sustainable. Section 35 provides that moneys in the Fund shall be utilised to compensate persons who suffer loss or damages as a result of the failure of the sheriff to pay out or deliver to such persons any money or property over which he acquired control by virtue of his office, or the proceeds of such goods. The applicant could only have submitted a claim for compensation once it had known the extent of the loss, namely the sum that the municipality had paid into the sheriff’s trust account. It is common cause that it only became aware of the amount of money paid to the sheriff on 17 August 2016, when it was provided with a copy of the municipality’s cheque account statement. It was only then that the applicant had acquired all the information necessary to submit a

valid claim. In my view, the suggestion that it could have submitted a claim for compensation in respect of an unknown sum is preposterous. As mentioned, the claim was duly lodged on 14 October 2016, thus within three months from the date on which the applicant had become aware of the contingency.

- [32] In any event, the applicant's attorneys had been in continuous communication with the respondent from the date of the lodging of its complaint on 28 January 2016, and had made it clear that once the facts giving rise to the applicant's claim were ascertained, it would be lodged with the Fund. I have tabulated above a plethora of letters and emails exchanged between the parties in which the respondent has, inter alia, requested the applicant to furnish further information or documentation in support of its claim. It is common cause that those were furnished to the respondent within the period of six months prescribed by s 36 (2) (b) of the Act. The respondent did not raise the issue of non-compliance with s 36 (2) (a) at the time, but elected to provide the applicant an opportunity to submit further information or documentation in support of its claim. Once it had done so, it was not at liberty to reject the claim for non-compliance with s 36 (2) (a).
- [33] The respondent has also relied on s 37 (2) of the Act, requiring the applicant to fully excuss against the sheriff before it could finalise the claim. The dispute between the parties at that stage was whether or not such excussion involved sequestration proceedings, with no mention of the contended failure by the applicant to lodge the claim timeously. This was indeed the dispute that brought about the litigation between the parties. It is thus manifest that the applicant's contention that the claim was lodged out of time was belatedly contrived by it solely for the purpose of avoiding liability to the applicant in respect of its established claim.
- [34] Mr Groenewald, who appeared for the respondent, submitted that even if the decision of 23 April 2021 were set aside, the decision taken by the respondent on 6 December 2019 remains extant for as long as it has not been set aside. The applicant is not seeking to review that decision and such an application would on any event be doomed to fail due to the long delay. The April 2021 decision was not a substitution or revocation of the December 2019 decision, but rather constituted additional reasons for the repudiation of the claim on 6 December 2019, or so the argument went.
- [35] In my view this argument is also untenable. It is clear from the correspondence between the parties that the decision taken in December 2019 was not final and that the claim had been "pending" subject to further compliance with the respondent's requirements. In the event, the email of 5 February 2021 unambiguously indicated that the respondent considered the claim to be extant, and requested further information in order to "better assess", it. The respondent furthermore stated that it 'await same urgently and confirm that the matter will be considered for possible payment at the next committee meeting after February 2021'. It was thus manifest that insofar as the respondent was concerned,

the decision taken during December 2019 did not amount to a final repudiation of the claim.

- [36] I am accordingly satisfied that the applicant has made out a case for the impugned decision to be reviewed and set aside. There appears to me to be sufficient evidence supporting the applicant's contention that the decision was taken for an ulterior purpose, as envisaged by s 6 (2) of the Promotion of Administrative Justice Act, 3 of 2000, namely to frustrate and obstruct its claim and to gain an unfair advantage in litigation. The respondent has also failed to take into account relevant considerations, namely, inter alia, the date when the applicant had become aware that a specific sum of money had been paid to the municipality.
- [37] The decision was also irrational, based on an erroneous understanding of the law and the material facts. The respondent has failed to have regard to the fact that it had elected to act in terms of s 36 (2)
- (b) of the Act by requesting the applicant to submit further documentation in support of its claim. Its election to do so clearly took the matter out of the ambit of s 36 (2) (a) of the Act. It was thus precluded from rejecting the applicant's claim on the basis of non-compliance with the latter provision.

The appropriate scale of costs

- [38] The applicant has, in my view, been justifiably displeased with the manner in which the respondent has dealt with its claim and conducted the litigation. Mr Smuts SC, who together with Mr Miller appeared for the applicant, has correctly submitted that it appears that the respondent's functionaries were of the unfortunate and erroneous view that their statutory function is to avoid payment of claims at all costs. They clearly appear to have been annoyed by the applicant's persistent attempts to enforce its rights and seem to have been oblivious of the purpose behind the establishment of the Fund. This much is evident from some of the truculent statements in its answering affidavit. By way of example; it refers to attempts by the applicant to convince it that sequestration is not a form of excussion, as 'correspondence ad nauseam', and terms the applicant's reliance on the fact that it did not have knowledge of the exact amount paid to the sheriff until August 2016, an 'excuse' and 'afterthought' in order to bring its claim within the parameters of the act.
- [39] Sheriffs are appointed by the Minister of Justice in terms of section 2 of the Act and are responsible for the execution of all sentences, judgments, writs, summonses and processes of both the lower and higher courts. They therefore play an important and indispensable role in the administration of justice. Without them court orders would be meaningless. It is equally important that litigants who entrust the execution of successful litigation to sheriffs must do so with the comforting knowledge that they will be fully indemnified for losses or damages suffered as a result of wrongful conduct by the responsible sheriff. It is in recognition of this vital role and responsibility assumed by sheriffs that the Act, inter alia, provides for: the establishment of a South African Board of Sheriffs (ss 7 – 21); sheriffs to operate trust accounts (ss 22 - 25); the establishment and control of the Fund (ss 26 - 29); and the issuing of fidelity fund certificates to compliant sheriffs (s 32). As mentioned, one of the

main purposes of the Fund is to compensate persons who suffer loss or damages as a result of the wrongful conduct of a sheriff.

- [40] The overly technical approach adopted by the respondent when processing the applicant's claim and the belligerent manner in which it conducted the litigation is all the more surprising because it is hard to conceive of a more deserving claim than that of the applicant. It is common cause that the money claimed by the applicant was paid to the sheriff by the municipality and that he has failed to account to the applicant in respect thereof. The respondent has independently verified all those facts and successfully instituted disciplinary proceedings against the sheriff as a result. One would thus have expected the respondent, even if the claim had been lodged out of time, to exercise its discretion in terms of s 36 (3) in favour of the applicant. Our courts have repeatedly said that organs of state have a duty to litigate honourably and to make decisions

that are reasonable, rational and fair. In *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E), at para 17, Plasket J (as he then was) said the following regarding the statutory obligations of the Road Accident Fund:

*"It is expected of organs of state that they behave honourably – that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. This is particularly so in the case of the defendant: it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that monetary compensation and compensation in kind is able to. That places the defendant in a position of great responsibility: its control of the purse-strings places it in a position of immense power in relation to the victims of road accidents, many of whom, it is well-known, are poor and 'lacking in protective and assertive armour.'"*

- [41] Even though the respondent bears a statutory responsibility properly to verify claims and ensure that monies are only paid out to deserving claimants, in my view, it also has an obligation to assist claimants by providing guidance in respect of the procedures for lodgement and the supporting documents that it may require for consideration of claims. It is also required to act fairly and reasonably when assessing claims and not to rely on inconsequential technicalities to avoid payment of deserving and duly established claims. This much is also evident from the fact that even though s 36
- (2) prescribes time periods within which claims have to be lodged, in terms s 36 (3), the respondent is allowed wide discretion to condone non-compliance with that section in deserving cases. It is manifest that the respondent was oblivious of this obligation. This much is evident from its view that 'it cannot be expected from the respondent to educate the applicant's attorneys in the lodging of a claim with the fidelity fund when the provisions of the Act are clear'.

[42] While the respondent has correctly insisted upon excussion against the sheriff, its conduct, after it had been demonstrated by the applicant that sequestration was not a form of excussion or execution, was not bona fide. Its reliance on s 36 (2) (a) of the Act after civil action had been instituted, was therefore clearly contrived and an impermissible strategy to avoid its

statutory obligations to compensate the applicant in respect of a loss which had been conclusively established. In my view this

unacceptable conduct warrants a punitive costs order.

Order

[43] In the result the following order issues:

1) The respondent's decision to repudiate the applicant's claim on the basis of non-compliance with section 36 (2) (a), read with section 36 (3) of the Sheriffs Act, 90 of 1986, as communicated to the applicant by letter dated 23 April 2021, is

reviewed and set aside.

2) The respondent is ordered to pay the costs of this application on the scale as between attorney and client, with such costs to include the costs of two counsel, where so employed.

JE SMITH

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant : Adv. IJ Smuts SC with Adv. TS Miller

: Whitesides Attorneys

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MAKHANDA

(Ref.: Mr Barrow)

Counsel for the Respondent : Adv. JH Groenewald

: Netteltons Attorneys

High Street

(Ref.: Ms Pienaar)

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