

SOUTH AFRICA / JUDGMENT

Ntsibantu v South African Board for Sheriff (1552/2017) [2017] ZAWCHC 150 (18 December 2017) [2017] ZAWCHC 150

COURT

Western Cape High Court, Cape Town

BEFORE

A Le Grange, L J Bozalek

CASE / FILE NUMBER

1552/2017

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 1552/2017

In the matter between:

NCEDILE NELSON NTSIBANTU, THE SHERIFF Applicant

and

THE SOUTH AFRICAN BOARD FOR SHERIFFS Respondent

JUDGMENT DELIVERED: 18 DECEMBER 2017

LE GRANGE, J:

Introduction:

- [1] In this matter the Applicant, in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), seeks the review and setting aside of a decision taken by the Respondent (“the Board”), refusing to issue a fidelity fund certificate to him for the calendar year of 2017, as required by s 30(1)(a) of the Sheriffs Act 90 of 1986 (“the Act”). The Applicant also seeks that the pendente lite order granted by Binns-Ward, J on 13 January 2017 be confirmed.

- [2] Mr. Van der Linde, SC appeared for the Applicant and Mr. I Jamie, SC assisted by Ms. V Barthus appeared for the Board.

Background:

- [3] The salient facts underpinning the Application in summary are the following: Since the start of 2013, the Applicant had been the duly appointed sheriff for the area Cape Town West which covers the High Court and certain magisterial courts jurisdictions. The Applicant held a similar position of sheriff previously in Elliotdale, Eastern Cape during the period of December 2002 to November 2012.
- [4] The current application was preceded by two other applications. The first was launched in November 2016 by the Board primarily to compel the Applicant to disclose all of his bank statements since he took up office as a sheriff. According to the Board, the first application was precipitated by complaints by a number of attorneys, including preliminary findings by the Board, of questionable transactions made by the Applicant in respect of his trust account. This matter became settled between the parties after the Applicant agreed to cooperate with the Board to address some of the serious shortcomings in his accounting systems.
- [5] The second application was instituted by the Applicant as a result of the Board's decision on 8 December 2016, refusing to issue the Applicant a fidelity fund certificate for the calendar year of 2017. In that matter, the applicant sought urgent interim relief against the Board pending the current review application. Binns-Ward, J granted certain interim relief which inter alia included the Board being directed to issue the Applicant a fidelity fund certificate pending the finalization of the current review

proceedings. In that judgment, Binns-Ward, J at paragraph [20] also made certain remarks regarding the requirements of 23(1)(b) of the Act. According to our Learned Brother's remarks, 23(1)(b) does not require a sheriff to produce an unqualified auditors report. It merely requires him to submit his records to audit. The subsequent furnishing of an auditors report in terms of s 23(2) serves as confirmation that the obligation in terms of s 23(1)(b) had been complied with. Any deficiencies identified in the audit report may, no doubt, lead to disciplinary action being taken against the sheriff, but that is a separate matter from compliance with s 23(1)(b).'

The Board's decision:

- [6] The Board in its written notice in terms of s 23(3) and s 33(1)(i) of the Act to the Applicant on 8 December 2016, acknowledged receipt of the Applicant's audit report dated 21 August 2016 as compiled by C2M Chartered Accountants Inc. ("C2M"). The Board further stated that it found gross irregularities in the Applicant's bookkeeping and accounting records. The Board also highlighted C2M's qualified report, in particular his non-compliance with s 23 of the Act. The following qualifications were recorded by the C2M:

- (1) The inability to establish whether there was sufficient funds to cover trust balances on 31 August 2015 and 26 February 2016;
 - (2) The failure to keep proper accounting records in terms of section 23(1)(a) of the Act;
 - (3) The failure to comply with section 22 and specifically, section 22(2) of the Act.
- [7] In the letter, the Board further recorded its grave concern regarding the manner that the Applicant was using his business bank account to receive trust monies and that his business bank records were in fact deemed as his trust account records. The Board furthermore alerted the Applicant that certain investment vehicles were linked to the business account, which were in fact also trust monies and that a real danger existed that the funds in question could become part of his personal assets in the event of insolvency or upon death. The Applicant was further called upon to submit all his records, including his business records and business special bank investments, for the period of 1 March 2015 to 28 February 2016 to his auditors in order for them to conduct a proper audit and submit the report to the Board within 30 days.
- [8] In that letter, the Applicant was informed of his non-compliance with s 23(1)(b) of the Act and until such time in failing to comply with the said section, he is disqualified from being issued a fidelity fund certificate for the period of 2017 in terms of s 33(1)(i).
- [9] The Applicant, pursuant to this letter, then employed HDP auditors to address the concerns raised by the Board. This culminated in a further report dated 26 December 2016, which was forwarded to the Board.
- [10] In the HDP report the following findings were made:
- (a) The trust bank account went into overdraft on three occasions but appeared to be an issue of timing as on each occasion a large deposit was made the following day which cleared the overdraft. These payments were made in respect of remittance advices where there had been a one day delay in the deposits recorded by the bank.
 - (b) Trust monies were deposited directly into the business account by the Road Accident Fund who had been asked to update its system in order to pay monies into trust. The matter had been resolved.
 - (c) Most of the offending transactions occurred in years prior to that under review and as such the Applicant was seen to have addressed same.
 - (d) The Applicant has taken steps to resolve all the difficulties with his accounting set up and is now using an electronic accounting package designed for sheriffs.
- [11] HDP auditors in conclusion made the following remarks:

“In conclusion, we believe that there have been contraventions of section 22 and 23(1)(a) of the Sheriff’s Act and thus issuing a qualified report. However, we also are of the opinion that the contraventions were largely as a result of ignorance rather than mal-intent. The accounting system employed by the sheriff’s office is of an adequate standard and as mentioned previously will be updated to include additional reports that would assist with the audit. All the accounting has been captured and given a reasonable time we believe that the trust account can be reconciled accurately.”

- [12] Notwithstanding the report by HDP, the Board refused to issue the Applicant a fidelity fund certificate.
- [13] It is common cause that the Applicant has been charged by the Board with improper conduct and received a charge sheet on 22 March 2017. This process is still pending and had not been finalized, for a variety of reasons.

The Review:

- [14] In terms of s 30(1)(a) of the Sheriffs Act, 90 of 1986 (“the Act”) a sheriff shall not perform any functions assigned to him unless he or she is the holder of a fidelity fund certificate. In terms of s 32(2) of the Act, a fidelity fund certificate is only valid until 31 December of the year in respect of which it has been issued.
- [15] The Applicant in its founding affidavit cited various sections namely, 6(2)(a)(iii), (b), (c), (d) (e)(v), (e)(vi), (f) and
- (h) of PAJA which he claims justify a review and setting aside the decision taken by the Board. The argument initially advanced by Mr. Van der Linde appeared to be that it was an unfair and or unlawful administrative action taken by the Board to have refused the Applicant a fidelity fund certificate without granting him an opportunity to defend himself against the various charges. It was also argued that the Board had other mechanisms which they could have used against the Applicant such as disciplinary proceedings. This argument on behalf of the Applicant was seemingly premised on the proposition that s 23(1)(b) merely requires him to submit his accounting books and records for auditing. It was further contended that the subsequent furnishing of an auditor’s report by the Applicant in terms of s 23(2) only serves as confirmation that the obligation in terms of s 23(1)(b) had been complied with as the said section does not require a Sheriff to produce an unqualified auditor’s report. Moreover, if any deficiencies were to be identified in the auditor’s report, such deficiencies can lead to disciplinary action being taken against a Sheriff, however, this does not mean that s 23(1)(b) has not been complied with. Support for the proposition was found in the remarks made by Binns-Ward J, in para
- [20] of his judgment.

[16] Adv van der Linde also seemed to suggest that his argument was fortified by the various other options that were open to the Board when dealing with a member whose accounts are not in order. The options alluded to were inter alia; - (s24) to approach a superior court for an order prohibiting the Sheriff from dealing with a said account and where the court may appoint a curator bonis to control and administer that account on behalf of the Sheriff; - (s34) which provides for the cancellation of a fidelity fund

certificate but only after 14 days' notice in writing to the Sheriff and; a third option,

- (s 45) the bringing of a charge of improper conduct followed by an enquiry with stipulated procedural safeguards (ss 46 and 47). In this regard, the s 49(c) provision was pointed out which has the effect that one of the actions which can be taken against a Sheriff is cancelling the fidelity fund certificate of the sheriff. A further option suggested it was in the power of the Minister to suspend a Sheriff from office although in terms of s 51 this can only be done where the Sheriff has been charged with improper conduct.

[17] The main thrust of Mr. Jamie's argument was that s23(1)(b) cannot be given a literal interpretation but must be considered within the broader context of the Act and in conjunction with the provisions of ss 22, 23 and 33 of the Act. It was further contended that s 23(1)(b) cannot be fulfilled unless 23(1)(a) has been complied with. To this end, it was argued that s 23 properly construed, means the Act obliges Sheriffs to open and keep separate trust accounts and or other interest-bearing accounts as mentioned in s 22(1) or subsection (2), and a failure to do so and have those separate records audited as required by 23(1)(b), precludes the Board legally in terms of s 33(1)(i) from issuing a fidelity fund certificate.

[18] Mr. Jamie also contended that the Applicant's understanding is that the Act merely requires the furnishing of an audit report and that "any audit report must be accepted" for purpose of s 23(1)(b) is misguided, as such an interpretation will nullify the real purpose of the provisions which is to ensure accountability, transparency and the effectiveness of the auditing process.

[19] Reliance was also placed on the matter of Board of Sheriffs v Koen

(2002) Western Cape High Court, for the proposition that where a Sheriff, as in the present instance failed to comply with the

statutory requirements to renew his fidelity fund certificate, the Board is legally prohibited from issuing such certificate and in the absence of a formal application to the Board to exercise their discretion in terms of s 33(2), the Board may not mero muto issue such a certificate.

[20] In Koen, the Sheriff failed to submit audits; had filed an incomplete application for a fidelity fund certificate; had failed to comply

with ss 23(1)(b) and s30(1)(b), and had not paid the prescribed levy to the Board. Koen was notified by the Board about the shortcomings

and was informed that without a certificate he could not carry out the functions of a Sheriff. The Board's decision not to issue a certificate was taken on review. When the matter came before court, it was postponed by agreement on the basis that the Board would consider the application for the certificate at its meeting and that same would be attended by Koen and his counsel. Leave was granted that should he be unsuccessful in obtaining the certificate, he could approach the court on the same papers.

- [21] At the meeting Koen asked the Board to exercise its discretion in terms of 33(2) of the Act. The Board voted and a decision was taken to issue the certificate on condition that Koen submit audited financial statements every 6 months. Koen thereafter approached the court and supplemented his papers with the transcript from the meeting with the Board. He sought a costs order on the basis that he had obtained substantial success. The court a quo held that it was satisfied that even without getting into the merits of the application, the failure by the Board to comply with the rules of natural justice in removing Koen from the post of Sheriff and declining to issue a certificate was fatally defective and could have decided the whole issue. The court a quo expressed the view that Koen would have been successful and the Board was ordered to pay costs.
- [22] On appeal Griesel J, writing for the Full Court, came to a different conclusion and held at para [48] that the Board's decision not to renew Koen's fidelity fund certificate was in fact in all the circumstances procedurally fair and that he would not have been successful in obtaining any of the relief sought in the court a quo. It was further decided at para [49]-[52] that where a Sheriff fails to comply with the statutory requirements for an application to renew his or her fidelity fund certificate, the Board is precluded by the peremptory provisions as contemplated in s 33(1) to issue a fidelity fund certificate, and in the absence of a formal application by a Sheriff, the Board is not compelled to mero muto in terms of s 33(2) to issue such a certificate.
- [23] The importance of s 33(2) is that the Board has a discretion to issue a fidelity fund certificate to a Sheriff who is subject to a disability but only when he or she applies therefor.

Discussion:

- [24] In casu, The Board's decision that s 33(1) prohibits it from issuing a fidelity fund certificate to the Applicant as he failed to comply with s 23(1)(b), brings into sharp focus the meaning and purpose of s 23(1)(b) within the context of the Act as a whole and the underlying legal duty on Sheriffs to account for trust monies. The relevant provisions of Chapter III, namely ss 22-23 provides as follows:

22 Accounts for trust moneys

- (1) Every sheriff shall open and keep a separate trust account, which shall contain a reference to this subsection, with a banking institution or building society, and shall forthwith deposit therein the moneys held or received by him on account of any person.

- (2) (a) A sheriff may invest in a separate savings or other interest-bearing account opened by him with a banking institution or building society any money deposited in his trust account and not immediately required for any particular purpose.
- (b) A savings or other interest-bearing account referred to in paragraph (a) shall contain a reference to this subsection.
- (3) The amount standing to the credit of an account opened by a sheriff in terms of subsection (1) or (2), shall not form part of the assets of that sheriff or, if he dies or becomes insolvent, of his deceased or insolvent estate.
- (4) Interest on money in an account mentioned in subsection (1) or (2) shall, unless the person on whose behalf the sheriff is holding or has received those moneys, in writing indicates otherwise, be paid in the prescribed manner to the Fund by the sheriff concerned: Provided that, before a sheriff pays the interest to the Fund, he or she may deduct his or her expenses incurred in respect of his or her trust account, from the interest accrued on the trust account in accordance with a tariff and procedure prescribed by the Board.

[Subsection (4) substituted by section 7 of Act No. 74 of 1998]

23 Book-keeping and auditing of accounts

- (1) A sheriff shall, subject to the provisions of subsection (4)—
 - (a) keep separate record of moneys deposited or invested by him in, and payments made by him out of, an account mentioned in section 22(1) or (2) ;
 - (b) cause the records referred to in paragraph (a) to be audited by an auditor at least once annually.

[Subsection (1) substituted by section 2(a) of Act No. 3 of 1991]

- (2) An auditor who has performed an audit in terms of subsection (1) (b) shall as soon as may be practicable after completion of the audit furnish the Board with a report on his findings on the prescribed form.
- (3) If in the opinion of the Board sound reasons exist for doing so, it may by way of a notice in writing request any sheriff to submit to the Board within the period specified in the notice, which period shall not be less than 30 days after the date of the notice, such auditor's report, statement or other document relating to an account mentioned in section 22(1) or
- (2) as the Board may require.
- (4) The Board may, on such conditions as it may determine, exempt a sheriff from the provisions of subsection (1)(b) of this section.

[Subsection (4) added by section 2(b) of Act No. 3 of 1991]

[25] In respect of the issuing, disqualification and cancellation of fidelity fund certificates ss 32 to 34 provides as follows:

32 Issue of fidelity fund certificates

- (1) If the Board is satisfied, after consideration of an application referred to in section 31, that the sheriff is, having regard to the provisions of section 33, a suitable person to hold a fidelity fund certificate, the Board shall issue to him a fidelity fund certificate on the prescribed form.
- (2) A fidelity fund certificate shall be valid until 31 December of the year in respect of which it has been issued.
- (3) Notwithstanding the provisions of subsection (2), the Board may at any time issue to an acting sheriff a fidelity fund certificate having a period of validity of not less than one month and not more than one year.

[Subsection (3) substituted by section 10 of Act No. 74 of 1998]

33 Disqualifications relating to fidelity fund certificates

- (1) Subject to the provisions of subsection (2), the Board shall not issue a fidelity fund certificate to a sheriff if he—
 - (a) is not a South African citizen permanently resident in the Republic;
 - (b) is not of or over the age of 21 years;
 - (c) is an unrehabilitated insolvent;
 - (d) is of unsound mind;
 - (e) does not comply with the prescribed standard of training;
 - (f) does not have the prescribed practical experience;
 - (g) has at any time been dismissed from a position of trust by reason of improper conduct involving a breach of such trust;
 - (h) has at any time been convicted of any offence involving dishonesty or of any other offence for which he has been sentenced to imprisonment without the option of a fine;
 - (i) has failed to comply with a provision of section 23(1)(b) during a period of one year immediately prior to the date on which he applies for a fidelity fund certificate;
 - (j) has at any time been prohibited under section 24(1) from dealing with an account mentioned in section 22(1) or (2) in any manner;
 - (k) was previously the holder of a fidelity fund certificate which has been cancelled under section 34(1) or 49;

- (l) has at any time incurred liability towards the Board by virtue of the provisions of section 39, unless he has repaid the relevant amount in full to the Board or has made in the opinion of the Board satisfactory arrangements for the repayment of any such amount;
- (m) has not obtained professional indemnity insurance to the satisfaction of the Board to cover any liability which he or she may incur in the course of the performance of his or her functions in terms of this Act.

[Paragraph (m) inserted by section 11 of Act No. 74 of 1998]

- (2) If in respect of any sheriff who is subject to any disability mentioned in subsection (1), the Board is satisfied that, having regard to the relevant considerations, the issue of a fidelity fund certificate to him is justified in the interest of fairness towards him, the Board may, on such conditions as the Board may with the concurrence of the Minister determine, issue a fidelity fund certificate to him when he applies therefor.

34 Cancellation of fidelity fund certificates

- (1) Notwithstanding the provisions of Chapter IV, the Board may cancel a fidelity fund certificate issued to a sheriff after at least 14 days' notice in writing to the sheriff—
 - (a) if the sheriff becomes subject to a disability mentioned in section 33(1)(a) , (c) , (d) , (g) , (h) ,
 - (i) or (l);
 - (b) if the sheriff contravenes or fails to comply with a condition imposed under section 33(2); or
 - (c) if that fidelity fund certificate was issued on information subsequently proved to be false.
- (2) The Board shall cancel the fidelity fund certificate of a sheriff if it is requested by the sheriff to do so or if the sheriff ceases to hold office.
- (3) Any person who has in his possession or under his control any fidelity fund certificate cancelled under this section, shall return that certificate to the Board within 30 days after he became aware of the cancellation.

[26] It is now well accepted in our law that when a court is seized, as in this instance, with interpreting a statute, a sensible meaning is to be preferred over one that may undermine the purpose of the statute. In this regard, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph [18] and *Novartis SA v Maphil Trading* 2016 (1) SA 518 at paragraphs [24]-[29]. In *Endumeni supra* at paragraph [18], the following was held:

“...The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent

purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[27] In the present instance, Chapter III of the Act deals with the 'Position of Trust of Sheriffs'. On an objective and purposive reading of the provisions of the Act, s 22 clearly creates an obligation on a Sheriff to account for trust monies. This requires him (or her) to keep 'a separate trust account' and to 'forthwith deposit therein the monies held or received by him on account of any person'. The further provisions permit a Sheriff to deposit trust monies into a separate savings or other interest-bearing account. The underlying purpose of this section is clear and that is, trust monies must be kept separate from amongst others, the Sheriff's own monies and that of his business.

[28] Similarly, s23 deals with bookkeeping and auditing of accounts. Section 23 (1)(a) and (b) compels a Sheriff to 'keep separate record of monies deposited or invested by him in..' and payments made by him out of the abovementioned trust account and to submit these records to be audited annually. On a purposive reading of these two sub-clauses it is evident that the records that need to be audited annually must be that of the separate records a Sheriff is compelled to keep (my underlining). The sub-clauses can therefore not be interpreted disjunctively but conjunctively in order to give it a sensible and businesslike meaning. I am therefore inclined to agree with the argument advanced by Adv. Jamie that s 23(1)(b) properly interpreted requires a Sheriff to cause his or her separate records to be audited and if those separate records are insufficient then a Sheriff has failed to comply with the basic requirements as contemplated in s 23(1)(a) which means that,

s 23(1)(b) has not and cannot be complied with.

[29] In advancing this argument further, it was contended that both audit reports, the one commissioned by the Board and the other by the Applicant, recorded that there was no proper or full separation of trust and business monies. Accordingly, it was contended that s 23(1)(a) read with s 22 was not adhered to and by definition s 23(1)(b) could therefore not be complied with, whether such an audit was qualified or not.

[30] The argument advanced on behalf of the Board, is indeed convincing. If the statutory requirements of s 23(1)(a) read with s 22 are not adhered to, it follows by reading the subsections conjunctively that by definition s 23(1)(b) cannot be complied with even if those inadequate records achieved a qualified or unqualified audit report.

- [31] Having regard to the abovementioned, it follows that in the present instance, the Applicant fell within the purview of s 33 which is headed 'disqualifications relating to fidelity fund certificates'. The Applicant was indeed someone who under subsection 33(1)(i) had 'failed to comply with a provision of section 23(1)(b) during a period of one year immediately prior to the date on which he applied for a fidelity fund certificate'. That being the case, the Board was therefore legally compelled to act in accordance with the provisions of s 33(1) which stipulates that it 'shall not issue a fidelity fund certificate to a sheriff if he – (is so disqualified).
- [32] The contention by the Applicant that this Court should follow the remarks made by our Learned Brother, Binns-Ward J, in para
- [20] of his judgment is, unconvincing. Firstly, the issues for consideration before our Learned Brother were entirely different at the time. It related mainly to the interim relief that was sought at the time. Secondly, and perhaps more importantly Binns-Ward J, when he made the remarks never had the benefit of full argument relating to the issues in the review application.
- [33] The issue is therefore not whether s 23(1)(b) requires a Sheriff to produce a qualified or unqualified auditor's report but whether a Sheriff has submitted all his separate accounting records as required by s 23(1)(a) to audit. If a Sheriff has failed to keep separate trust and interest-bearing account records in terms of s 23(1)(a) then it must follow he or she could not have caused separate records to be audited. If that is the case, the underlying purpose of s 23(1)(b) cannot be complied with and hence the peremptory provision of s 33(1)(i) precludes the Board from issuing such a certificate, as the Sheriff is disqualified when he applies therefor.
- [34] Support for this reasoning is also to be found in Koen. Although the facts in Koen are different, the Full Court at para [49]-[52] held that where a Sheriff fails to comply with the statutory requirements for an application to renew his or her fidelity fund certificate, the Board is precluded by the peremptory provisions as contemplated in s 33(1) to issue a fidelity fund certificate, and in the absence of a formal application by a Sheriff, the Board is not compelled to mero motu in terms of s 33(2) to issue such a certificate. The Applicant in casu, did not make any formal application to the Board under the provisions of s 33(2) and therefore the remarks by Binns-Ward J are of no assistance to him.
- [35] Turning to some of the specific facts in the present instance. In the first audit report as complied by C2M in August 2016, it is evident that the Applicant failed to keep proper accounting records as required by s 23(1)(a). The Applicant also failed to comply with s 22 and specifically 22(2). This section and subsection deal with the opening and keeping of trust accounts and the depositing of trust monies into a trust account and the related trust balances of trust creditors. In sum, C2M auditors were not satisfied that the Applicant complied with s 23 of the Act.

- [36] With regard to the Board's own inspection, it was determined that the Applicant used his business bank account to receive trust monies. The Applicant's business bank records were now also regarded as trust accounting records. He also failed to comply with sec 22 which deals with the keeping of separate trust accounting records.
- [37] The Applicant was called upon by the Board in terms of sec 23(3) to submit all of his banking records for audit, including 'business bank records' and business bank special investment accounts.
- [38] It was during this stage, on 8 December 2016, the Board said to the Applicant that 'currently you are not in compliance with 23(1)(b)' and will not issue a 2017 fidelity fund certificate 'until such time' as the Applicant complies with 23(1)(b).
- [39] On a plain reading of the decision taken by the Board, it did not decide that the Applicant would never get his 2017 fidelity fund certificate but that he would have to submit all his records i.e. including business bank records so that they could do a proper audit.
- [40] The Applicant attempted to resolve the situation by referring to his subsequent audit report by HDP dated 26 December 2016, which contains a more benevolent interpretation or assessment of the Applicant's accounting records.
- [41] There are two difficulties in this regard. The first is the audit report is still damning of the Applicant's accounting records. In this regard, HDP recorded the following: '[a]n accounting system was employed and transactions were recorded but there are weaknesses. We are reasonably sure that the trust bank account exceeds trust creditors but there is some uncertainty'. Furthermore, in the accompanying letter HDP said 'we were unable to obtain a list of trust creditors that agreed with the trust current account and trust savings account that had been opened'. (This was an audit for 2016). Moreover, according to HDP, the Applicant failed to keep the trust bank account; it went into overdraft on three occasions and there were 'numerous instances in which trust monies were deposited directly into the business bank account'. Although it was stated that this matter had apparently been resolved, by definition the Applicant on his own auditor's report was not keeping trust monies separate. The report then specifically recorded that the Applicant had contravened s 22 and 23(1)(a) of the Act.
- [42] The second difficulty with the HDP audit report is that strictly speaking, it is irrelevant to the administrative law challenge of the Board's decision on 8 December 2016, since the report did not exist at the time of that decision. But even if it is taken into account, the report does not assist the Applicant's case as his accounting records still fall foul of the provision of s 22 and 23(1)(a).
- [43] The Applicant has also contended, that the Board was trying to circumvent the provisions of the Act by refusing to issue his

certificate rather than instituting and finalising the disciplinary proceedings against him. More importantly, the Applicant has averred that if his fidelity fund certificate was not issued to him, it will put him out of business. This argument of the Applicant is in my view misplaced. There is an important distinction between the charges which the Applicant may face in the disciplinary enquiry (which may require a more thorough investigation) and the Applicant's non-compliance in respect of keeping separate records and accounts. Whilst both categories may result in the Applicant being disqualified as a Sheriff, it is the latter where the Board has no discretion to issue a certificate. To do so would amount to an illegality unless the Applicant has brought an application in terms of s 33(2) for the Board to consider.

[44] In the present instance, the Applicant for some unknown reason did not deem it appropriate to utilise the provisions in terms of s 33(2) to obtain an exemption from his disqualification and to carry on his business.

[45] This brings me to the question whether the administrative law challenge was not premature as the Applicant did not exhaust all his internal remedies. Although the Applicant has in his founding affidavit cited various sections of PAJA which he claims justify a review, none of it in my view justifies that the decision of the Board be reviewed and set aside. More importantly, in terms of s 7(2)(c) of PAJA, the Applicant has failed to set out any exceptional circumstances why it would have been in the interest of justice to exempt him from the obligation to exhaust his internal remedy as provided for in terms of s 33(2) of the Act. On the facts of this case, it is evident that the Applicant is not a new-comer to the profession as a Sheriff. In fact, he was a Sheriff for more than 10 years' in the Eastern Cape before accepting the Sheriff's post in Cape Town West. It is therefore rather disquieting that he still has these major difficulties in keeping proper and separate accounting records as required by the Act.

[46] For these stated reasons, I am satisfied that the Board's interpretation of s 23(1)(b) cannot be faulted and it did not commit a reviewable act by refusing to issue the Applicant a fidelity fund certificate for the year 2017 until he fully complies with s 23(1)(b) of the Act.

[47] It follows that the Application cannot succeed.

[48] In the result, the following order is made.

The Application is dismissed with costs.

LE GRANGE, J

I agree.

BOZALEK, J

Coram

: L J Bozalek J et A Le Grange J

Judgment

by

: Le Grange J

For the Applicant

: Adv H van der Linde SC

For the Respondent

: Adv I Jamie SC

Date of Hearing

: 24 November 2017

Judgment

delivered on

: 18 December 2017

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ntsibantu-v-south-unknown-topic-awchc-2017>

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