IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 4220/2010

In the matter between:

RENE ETIENNE OSHE BRUWER Applicant

and

SOUTH AFRICAN BOARD FOR SHERIFFS Respondent

JUDGMENT DELIVERED ON 30 NOVEMBER 2010

BLIGNAULT J:

[1] This is an opposed review application which is interlinked with a number of other opposed applications between the same parties.

[2] Applicant is the Sheriff for the High Court and the Magistrate's Court for the district of Durban North. Respondent is the South African Board for Sheriffs, constituted in terms of the Sheriffs Act 90 of 1886 ("the Act"), with offices at 4 Church Square, corner Spin and Parliament Streets, Cape Town.

[3] In this application applicant seeks to have reviewed and set aside a decision taken by respondent and conveyed to him on 25 February 2010 not to issue a fidelity fund certificate to him for the year 2010. Applicant also claims certain consequential relief.

[4] Applicant was informed of respondent's impugned decision by way of a letter dated 25 February 2010. The letter informed applicant that the reasons for respondent's decision were his failure to comply with the signing of the "Final Written Warning" by 10 February 2010 and the signing of the "Admission of Guilt" form by 10 February 2010. The letter also informed applicant that his operation as a sheriff without a fidelity fund certificate would be unlawful in terms of the Act.

[5] Applicant described the recent history of the matter. In December 2009 he applied in the usual manner to respondent for his fidelity fund certificate for the year 2010. On 10 December 2009 he received a letter from respondent attaching a complaint from one Singh in the form of an affidavit. Applicant replied to the complaint on 24 December 2009 but he did not keep a copy of that letter.

[6] On 9 February 2010 applicant received a telefax from respondent. Apart from the covering sheet it comprised two documents. The first was a letter headed "Final Written Warning". The first part of that letter reads as follows:

> *"**RE: FAILURE TO APPOINT A DEPUTY SHERIFF IN TERMS OF SECTIONS 6 (1) OF THE SHERIFFS ACT 90 OF 1986***
>
> *This is a Final Written Warning in terms of the **Disciplinary Code and Procedures** for the transgression of **Section 43 (1)(h) (ii)** and **Section 43 (1)(d)** of the **Sheriffs Act 90 of 1986**, read with **Schedule 6** of the **Code of Conduct for Sheriffs**, accompanied by a fine of **R10 000,00** in terms **of Section 45 (2)(b)** of the **Act**. Should you engage in further transgressions, the final written warning may be taken into account in determining a more serious sanction.*
>
> *The final written warning will be placed on your personal file and will remain valid for a period of six months from the date hereof. After six months, the final written warning will be removed from your personal file and destroyed. If you object to the warning, you may direct an appeal to the Legal and Compliance Manager within **five (5)** working days."*

The second part of the letter contained particulars of the alleged improper conduct on the part of applicant. It related to the conduct of one Sephilal.

[7] The second document was headed "Admission of Guilt Agreement". It reads as follows:

> *"**BE PLEASED TO TAKE NOTICE THAT** after due consultation with the Board, I am willing to enter a plea of guilt for making use of fraudulent and misleading representations in using a simulated official as a Deputy Sheriff and failure to appoint same in the prescribed manner, in particular Mr Ivan Sephilal whom I allowed to misrepresent himself as a Deputy Sheriff by virtue of which I am in transgression of **Section 43 (1 (h) (ii)** and **Section 43 (1)(d)** of the **Sheriffs Act 90 of 1986**, read with **Schedule 6** of the **Code of Conduct for Sheriffs**.*
>
> *I enter into the above with the undertaking that the Board is recommending a sanction of:*
>
> ***a)*** *a fine of R10 000,00 and*
>
> ***I FURTHER** undertake to return this agreement to the Board by **10 February 2010** as stipulated by the Board, and confirm that the amount of **R10 000,00** will be paid to the Board by **Wednesday, the 10th day of February 2010**.*
>
> ***TAKE FURTHER NOTICE** that I confirm that I enter into this agreement with full knowledge of my rights.*
>
> ***FURTHER THAT** I fully understand the consequences of this agreement, which is made without any duress on my part."*

[8] Applicant said that he was confused as to how to react to these documents. The next day, 10 February 2010, he received a telefax from respondent informing him that the admission of guilt fine had to be paid the next day. Upon receipt of this telefax he did not know what to do and he decided to pay the fine on 11 February 2010.

[9] On 25 February 2010 applicant received the letter from respondent which conveyed to him the decision which forms the subject matter of the present review application.

[10] A flurry of applications then followed. Applicant launched an urgent application on 2 March 2010 for interim relief. The court postponed the urgent application to 25 March 2010 and granted applicant interim relief. On 11 March 2010 respondent launched a conditional counter-application in which it sought an order in the event of applicant's application for urgent relief succeeding. On 23 March 2010 applicant launched the present review application. Applicant's urgent application and respondent's conditional counter-application served before the court on 25 March 2010. On 25 March 2010 the court ordered that the review application would be heard on 13 September 2010 and that suitable interim

relief would in the meantime be granted to both parties. The review application was then further postponed and heard by me on 8 November 2010.

[11] In applicant's founding affidavit in the review application he summarised his grounds of review with reference to certain provisions of the Promotion of Administrative Justice Act 3 of 2000. These grounds all relate to respondent's decision not to issue to him a fidelity fund certificate for the year 2010. Applicant contended that respondent's decision was unlawful and procedurally unfair in terms of the provisions of sections 44, 45, 46 and 47 of the Act. They read as follows:

> ***"44. Lodging of complaint against sheriff***
>
> *(1) Any complaint, accusation or allegation against a sheriff may be lodged with the Board in the prescribed manner.*
>
> *(2) The Board shall keep record of each complaint, accusation or allegation lodged with it in terms of subsection (1).*
>
> ***45. Charge of improper conduct. –***
>
> *(1) The Board may, on its own initiative or upon the lodging of a complaint, accusation or allegation referred to in section 44(1), charge a sheriff by a notice in writing with improper conduct.*

(2) (a) *A notice referred to in subsection (1) shall be served upon a sheriff in the prescribed manner, and shall contain or be accompanied by a request that the sheriff furnishes the Board with a written admission or denial of the charge and, if the sheriff so prefers, a written explanation in connection with the charge within 14 days of the service thereof.*

(b) The Board may, if it believes that on conviction of the sheriff a fine not exceeding the prescribed amount will be imposed upon him or her, afford the sheriff an opportunity to admit his or her guilt in respect of the charge and to pay the fine determined by the Board in the said notice on or before the date specified in the notice without appearing before the Board.

(c) Any sheriff who wishes to pay an admission of guilt fine referred to in paragraph (b), must –

(i) pay the fine in the prescribed manner before the date specified in the notice; and

(ii) surrender the notice at the time and place of payment of the fine.

(d) The Board shall keep a register in the prescribed form of all fines paid in terms of this subsection, and a copy of the register shall be included in the reports referred to in section 59.

(3) The Minister may at any time withdraw a charge of improper conduct.

***46. Inquiry into improper conduct**. – The Board shall, unless an admission of guilt fine has been determined and paid in terms of section 45(2), inquire into a charge of improper conduct at such time and place as the Board may determine and shall in the prescribed manner give the sheriff charged at least 14 days' notice in writing of the time and place so determined.*

47. Procedure at inquiry. –

(1) The Board may authorize any person to attend an inquiry instituted in terms of section 46, to adduce evidence and arguments in support of the charge and to cross-examine any person who has given evidence in rebuttal of the charge.

(2) At such inquiry the sheriff charged shall have the right to be present, to be assisted or represented by another person, to give evidence and, either personally or through a representative -

(a) to be heard;
(b) to call witnesses;
(c) to cross-examine any person called as a witness in support of the charge; and
(d) to have access to documents produced in evidence.

(3) The failure of the sheriff charged to attend the inquiry shall not invalidate the proceedings.

(4) The Board shall keep a record of the proceedings and of the evidence given."

[12] Applicant accordingly contended that respondent's decision not to issue a fidelity fund certificate to him for the year 2010 should be reviewed and set aside.

[13] Respondent opposed the review application. Mr Cheslan America, the executive manager of respondent, deposed to a provisional answering affidavit filed on 25 March 2010. In this affidavit Mr America raised a defence *in limine*, namely that applicant had brought two applications for the same relief and based on the same facts.

[14] On 30 August 2010 respondent filed a substantive answering affidavit in the review application, also deposed to by Mr America. Mr America stated first that first respondent was persisting with its defence of *lis alibi pendens.* In regard to the merits Mr America alleged that applicant defiantly and fraudulently allowed one Sephilal to hold himself out as a sheriff. During 2009 Sephilal had been charged with 19 charges of misconduct. It appears that

Sephilal was found guilty on a number of these charges and summarily dismissed.

[15] Mr America said that applicant knew of Sephilal's dismissal but nevertheless started using Sephilal as a deputy sheriff without following the prescribed procedures. On 11 December 2009 applicant lodged an application for the appointment of Sephilal as a deputy sheriff. The application, Mr America said, was defective.

[16] Mr America stated that the reasons for respondent's decision not to issue applicant with a fidelity fund certificate for 2010 were the following:

> *"26.1 The applicant's trend of non-compliance and late compliance with is legal obligations;*
>
> *26.2 The fact that the applicant only submitted payment for the issuing of his Fidelity Fund Certificate on **20 January 2010**, two and a half months after payment was due;*
>
> *26.3 The fact that the applicant defiantly continued to operate as sheriff from **01 January 2010 to 26 February 2010** whilst prohibited from doing so due as not having been issued with a Fidelity Fund Certificate for operation in 2010;*

26.4 The illegal use by the applicant of Mr SEPHILAL as a Deputy Sheriff; and

26.5 The fact that the applicant has failed to surrender the admission of guilt notice, after he made the admission of guilt payment to the respondent, as stipulated in Section 45(c)(ii) and his persistence with his refusal to do so".

[17] Mr America added that applicant's collusive and sometimes criminal dealings with Naidoo was also one of the facts which made applicant not fit to hold the office of sheriff. The investigation into the alleged wrongdoings on the part of Naidoo, he said, was still pending at the time when he deposed to the answering affidavit.

[18] Mr America said that on 12 May 2010 applicant had been charged with 8 (eight) charges of misconduct. A disciplinary hearing in regard to these charges was still pending.

[19] The matter was heard by me on 8 November 2010. Mr S M Shepstone appeared on behalf of applicant and Mr J D de Vries on behalf of respondent.

[20] Mr Shepstone dealt briefly with respondent's defence of *lis alibi pendens*. He submitted, correctly in my view, that the first application was brought to obtain interim relief. The second application is the review application in which applicant is seeking final relief.

[21] Applicant's case on the merits of the review seems straightforward. One must assume from the five factors mentioned in Mr America's answering affidavit that applicant had been found guilty on these five charges. Respondent did not, however, charge applicant of the complaints in question and it did not give applicant written notice of the hearing. It is self-evident, therefore, that applicant was not able to exercise any of the rights described in section 47(2) of the Act, as he was never informed by respondent what he was being charged with.

[22] In arguing the case for respondent, its counsel reiterated the five charges which appeared in Mr America's answering affidavit. Counsel also submitted, with reference to applicant's complaint of procedural unfairness, that, in the context in which the admission of guilt fine was paid, applicant had admitted that he was guilty of the charges set out in the admission of guilt agreement.

[23] It seems to me that respondent's main defence ignores the fundamental distinction in our law between an appeal and a review. In an appeal the question is whether the decision was right or wrong. In a review the focus is on the process and on the way in which the decision maker came to his conclusion. See the following passages in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) paras [30] and [31]:

> *"... ...The question on review is not whether the record reveals relevant considerations that are capable of justifying the outcome. That test applies when a court hears an appeal: then the inquiry is whether the record contains material showing that the decision - notwithstanding any errors of reasoning - was correct. This is because in an appeal the only determination is whether the decision is right or wrong.*
>
> *[31] In a review the question is not whether the decision is capable of being justified (or, as the LAC thought, whether it is not so incorrect as to make intervention doubtful), but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process and on the way in which the decision-maker came to the challenged conclusion.... ..."*

[24] In the present case the court has been requested to review the respondent's decision, namely to consider whether

respondent followed a valid procedure in arriving at the decision in question. The issue is not whether the outcome of the process was right or wrong.

[25] In the case of applicant, as I pointed out above, the process followed by respondent was fundamentally flawed. Respondent's first defence accordingly fails.

[26] Respondent's second defence is based on the provisions of section 46 of the Act. The defence appears to be that applicant's payment of the fine of R10 000,00 amounted to an "admission of guilt fine" within the meaning of section 46 of the Act. In view thereof, so ran the argument, no further inquiry was necessary or proper.

[27] The procedure for the determination and payment of an "admission of guilt fine", is set out in section 45 of the Act. It contains five requisites which may be summarised as follows:

(1) The initiation of a charge by way of notice in writing to be served upon the sheriff.

(2) A request for a written admission or denial of the charge.

(3) An opportunity to allow the sheriff to consider an admission of guilt and the payment of the fine.

(4) Payment of the fine by the sheriff.

(5) The signature of the admission of guilt by the sheriff.

[28] In the present case not one of these five requisites was met save, perhaps, the payment of the fine. This took place, however, in circumstances where undue influence was being exerted upon him by respondent. Its validity is therefore doubtful.

[29] Applicant is accordingly entitled to the principal relief sought by him.

[30] Applicant also asked for an order that respondent be directed to issue a fidelity fund certificate to him. Ordinarily a court would not grant such an order but as the remaining period to the end of this year is relatively short, I am prepared to grant this order.

[31] Applicant asked, in the third place, an order that respondent be directed to issue fidelity fund certificates to certain of his employees. The circumstances in which respondent refused to grant fidelity fund certificates to such employees did not, however, feature as part of the review before me and I cannot grant such an order.

[32] The question of the validity of the final written warning issued to applicant was similarly not investigated before me and I cannot make any order in regard to it.

[33] In the light of my finding that respondent's handling of the alleged complaint against applicant was invalid, I am of the view that applicant is entitled to the repayment of the alleged fine of R10 000,00.

[34] In the result I make the following orders:

(1) The decision of respondent not to issue a fidelity fund certificate to applicant for the year 2010, is reviewed and set aside.

(2) Respondent is directed to issue such a certificate to applicant for the year 2010.

(3) Respondent is ordered to pay the sum of R10 000,00 to applicant.

(4) Respondent is ordered to pay applicant's costs.

A P BLIGNAULT