IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case Numbers: A 217/ 2022 and A 221 / 2022

In the matter between:

SOUTH AFRICAN BOARD FOR SHERIFFS	Appellant
and	
THAKA FREDERICK SEBOKA	First Respondent
STEPHANUS JOHANNES VAN WYK	Second Respondent
DEPUTY MINISTER	
(JUSTICE AND CONSTITUTIONAL DEVELOPMENT)	Third Respondent

Coram: Wille, Kusevitsky *et* Francis, JJ

Heard: 19 July 2023

Delivered: 19 October 2023

JUDGMENT

WILLE, J (majority with Francis J concurring and with Kusevitsky J, dissenting):

Introduction:

[1] These consolidated appeals lie against the orders by Allie J and van Zyl AJ, granted on 31 March 2022 and 20 May 2022, respectively. Full reasons for their orders were subsequently handed down in both these matters. If this appeal succeeds, it will have no practical effect since the first and second respondents have since been removed from their respective posts.[1]

[2] Nevertheless, the appellant contends that this appeal is not moot and argues that the issues that still require determination are these: (a) the appellant's powers to issue a fidelity fund certificate 'certificate' by way of legislative intervention; (b) the validity of the appointments of acting sheriff's by the third respondent without the confirmation of the appellant; (c) the appellant's apparent lack of power to discipline an acting sheriff after he or she vacates his or her office; (d) the obligation to 'consult' with the appellant and the heads of court before the appointment of acting sheriffs and, (e) costs.

Overview:

[3] The relevant legislation provides, among other things, for the appointment of sheriffs, the establishment of the appellant, a fidelity fund for sheriffs and the regulation of the conduct of acting sheriffs and matters connected in addition to that.[2] The third respondent under delegated authority, in the prescribed manner and under certain prescribed conditions, may appoint fit and proper persons as acting sheriffs of the court for a lower or superior court.[3] The delegated authority to the third respondent was a matter of common cause prior to August 2022.[4]

[4] As a general proposition a sheriff may hold office, until the date on which he attains the age of sixty-five years. This notwithstanding, a sheriff may be re-appointed as an acting sheriff for such additional period as the third respondent may, after

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1 These respondents were 'acting' sheriffs of the court.
2 The relevant legislation is set out by way of Act 90 of 1986 (the 'Act').
3 These appeals involve acting sheriffs, and my references will be so confined, unless otherwise indicated
4 This delegated authority was withdrawn in August 2022.

consultation with the appellant, determine from time to time.

[5] Suppose also, a sheriff, for any reason, ceases to hold office, then in that case, the third respondent (again under delegated authority), in the prescribed manner, may appoint a person to act as an acting sheriff for such period as may be determined from time to time. An acting sheriff shall not perform any functions assigned to a sheriff by or under any law unless: (a) the acting sheriff is the holder of a certificate or (b) the acting sheriff has paid the prescribed monetary contribution to the appellant.[5]

[6] Further, the third respondent may only appoint a person to act as an acting sheriff as aforesaid after consultation with the judicial officer who heads the court in respect of whose area of jurisdiction such appointment is to be made and subject to written confirmation by the appellant that it is prepared to issue a certificate to that person. This may be on different conditions, which the third respondent may determine.[6]

[7] In addition to the functions assigned to the appellant (by way of the legislative intervention), the appellant may: (a) arrange for cover, through insurance, for sheriffs against any loss, damage, risk or liability which they may suffer or incur, subject to the approval of the third respondent; (b) frame a code of conduct which shall be complied with by sheriffs and, (c) in general perform such acts as may be necessary or expedient for the achievement of its objects. This we understand to mean service delivery to ensure equal access to justice. Following the provisions by way of legislative intervention, a fund falls to be established and into which is paid: (a) interest paid to the fund which accrues from funds in a sheriff's trust account; (b) the prescribed contributions paid by sheriffs; (c) interest derived from the investment of the sums of money in the fund; (d) monies recovered on behalf of the fund under subrogation; (e) monies paid to the appellant by an insurer and, (f) monies which may accrue to the appellant from any other source. The fund is controlled and managed by the appellant and monies forming part of the fund must, until spent or invested, be paid into and kept in an account opened with a registered deposit taking institution.[7]

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[5] This is on a plain reading of section 30 (1) (c) (i) and (ii) of the Act.
[6] The conditional appointment of an acting sheriff by the third respondent bears further scrutiny.
[7] Section 26 of the Act.

[8] The monies in the fund must be utilised: (a) for the settlement of claims admitted against the fund or judgments, including costs, obtained against the fund; (b) for any contribution in the discretion of the appellant in respect of expenses incurred by a claimant to verify his claim; (c) for legal expenses incurred in defending an action against the appellant in respect of the fund or otherwise incurred concerning the fund; (d) for premiums payable in respect of insurance agreements entered into by the appellant; (e) for the expenses involved in the control and management of the fund and, (f) for interest on and redemption of loans negotiated by the appellant on behalf of the fund.

[9] In addition, the appellant may, at its discretion, agree with an insurer for insurance cover whereby the fund will be indemnified against liability to compensate any person who suffers any loss or damage as a result: (a) of the failure of a sheriff to pay out or deliver to any such person any money or property over which he acquired control under his office or the proceeds of the sale of such goods; (b) of an act or omission of a sheriff in connection with the service or execution of any process; (c) of the arrest of any person; (d) of the rescue or escape of any person arrested or committed to custody and for which the sheriff may be liable in law. Typical losses covered by the fund include monies retained from sales in execution pending registration of transfer of immovable properties and monies held because of payments made to a sheriff by judgment debtors. The fund does not reimburse losses suffered due to a sheriff's negligence in their business performance.

[10] Further, the appellant may prescribe, in connection with indemnity insurance, the minimum requirements to be complied with, the contingencies to be covered by such insurance and the circumstances under which a person who would otherwise be required to obtain such insurance shall be exempted from such insurance. Thus, there are two species of insurance at play. The first type of insurance is professional indemnity insurance, which must be obtained by a sheriff. An acting sheriff is not obliged to obtain such professional indemnity insurance unless this is a condition of his or her appointment.[8]

[8] Section 30 (1) (c) (i) and (ii) makes no provision for professional indemnity insurance for an acting sheriff.

[11] The second type of insurance is the insurance to indemnify the fund, which the appellant may, in its discretion, elect to enter into against liability for the contingencies that may arise.[9] Again, on the face of it, this applies only to the post of a sheriff and not to the post of an acting sheriff. We say this because of the wording of the section, which dictates that this agreement shall be entered into in respect of sheriffs generally. Further, remember that acting sheriffs are not disqualified from acting without professional indemnity insurance unless this is stipulated as an appointment condition.

[12] That being said, an acting sheriff must apply in the prescribed form to the appellant for the appellant to issue the relevant certificate to him or her, and the defined contribution must accompany the application. In addition, a *sheriff* applying for a certificate must furnish such additional particulars in connection with his application as the appellant may require. This provision, again, on the face of it, on a strict interpretation of the law, may not find application concerning an acting sheriff.[10]

[13] In addition, certificates must be applied for every year, and the application must include the following: (a) a completed and signed application form; (b) the prescribed contributions; (c) a certified copy of the identity document of the acting sheriff and, (d) documentary proof that professional indemnity insurance is in place. This latter requirement qualifies the possible risk to the appellant. Once the appellant is satisfied, after consideration of the application, that an acting sheriff is a suitable person to hold a certificate, the appellant is *obliged* to issue a certificate in the prescribed form, which shall be valid until the end of the calendar year in respect of which it has been published. The appellant may also give an acting sheriff a certificate with a validity period of at least one month and not more than one year. As a matter of pure logic, if a certificate is issued, *albeit* for one month, the appellant must have been satisfied with the risk associated with the appointment. It is significant in this connection that the appellant may arrange for cover, through insurance, for sheriffs against any loss, damage, risk or liability which they may suffer or incur, subject to the approval of the third respondent. Thus, the third respondent does have some influence in this process and the assessment of risk.

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[9] This is terms of section 35 of the Act.

[10] Section 31 (3) of the Act refers only to a 'sheriff' in terms of subsection (1) of section 31 of the Act. In the definition section in the Act, the term sheriff includes an acting sheriff for the purposes of Chapter III thereof.

[14] The appellant may not issue a certificate to a sheriff if they are not 'suitable'. An acting sheriff will not be suitable if he or she: (a) is not a citizen and permanent resident; (b) is not of or over the age of twenty-one years; (c) is an un-rehabilitated 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 because 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) failed to comply with the provisions relating to book-keeping and the auditing of accounts during a period of one year immediately before the date on which the application for the certificate is made; (j) has at any time been prohibited by a court from dealing with the accounts for trust money in any manner; (k) was previously the holder of a certificate which has been cancelled or withdrawn by the appellant; (l) has at any time incurred liability towards the appellant after the appellant has settled a claim or judgment against the fund, unless this amount has been repaid to the appellant or satisfactory arrangements have been made for the repayment of any such amount and, (m) has not obtained the necessary professional indemnity insurance to the satisfaction of the appellant to cover any liability which he or she may incur during the performance of his or her functions. Again, this latter requirement qualifies the possible risk to the appellant.

[15] These criteria would disqualify a *sheriff* from obtaining a certificate from the appellant. The same disqualifications would apply to the post of an acting sheriff, save that an acting sheriff is not obliged to, but may, provide to the appellant proof of professional indemnity insurance unless this appears as a condition of his appointment. The appellant also has the power to cancel a certificate issued after at least fourteen days' notice in writing: (a) if the *sheriff* becomes subject to specific disabilities which would disqualify the *sheriff* from being issued with a certificate; (b) if the *sheriff* contravenes or fails to comply with a condition imposed by the appellant when issuing a certificate or, (c) if that certificate was issued on information subsequently proved to be false. Moreover, the appellant must cancel a certificate of a *sheriff* if it is requested by the *sheriff* to do so or if the *sheriff* ceases to hold office.

[16] Any person possessing any revoked certificate must return the revoked certificate to the appellant within thirty days of becoming aware of the cancellation. These are additional safeguards at the disposal of the appellant which would, in our view, equally apply to the post of an acting sheriff. What remains is how one interprets the provision that only obliges an *acting sheriff* to put up professional indemnity insurance if this is a condition of his or her appointment.

[17] The answer may lie in the claim procedure. When proceeding with a potential claim against an acting sheriff, the potential claimant must exhaust all available legal remedies against the practitioner concerned and against any other persons liable for any loss suffered before having recourse to claim under and in terms of the certificate. The fund is not responsible for any loss or damage suffered by an acting sheriff because of any act or omission by the acting sheriff or any employee in the acting sheriff's service. No person shall recover from the appellant in respect of the fund any amount more significant than the difference between the amount of the loss or damage suffered and the amount or value of all sums of money or other benefits received or the entitlement to receive from any other source in respect of that loss or damage. In addition, no amount shall be paid out of the fund as interest on the amount of any claim admitted against the fund or any judgment obtained against the fund.

[18] In addition, when the appellant settles any claim or judgment against the fund, there shall pass to the appellant all the rights and remedies of the claimant in respect of his lawsuit against the acting sheriff or other person or, if applicable, in the case of the death, insolvency or other legal incapacity of any such acting sheriff or person, against the estate of any such acting sheriff or person.

[19] A complainant may complain about the conduct of an acting sheriff to the appellant. A complaint must be submitted through an affidavit in the prescribed format by the person affected by the acting sheriff's conduct. Where the complainant has instructed an attorney or a third person to complain on their behalf, the written authorisation must accompany their complaint. If and when the appellant finds a sheriff guilty of improper conduct, the appellant may cancel the sheriff's certificate. This is yet another safeguard at the disposal of the appellant.

Context:

[20] The first respondent was previously appointed as a sheriff, and he after that reached retirement age and was no longer entitled to hold office as a sheriff. The second respondent was also previously appointed as a sheriff of the lower court. These posts in the various sheriff's offices were historically fragmented, with different sheriffs set for the high and lower courts. Nearly three decades ago, the third respondent decided to combine the offices of the high and lower courts.

[21] When the office occupied by the second respondent became vacant, the second respondent applied to the third respondent to be appointed as the sheriff of the high court, and he was so appointed. At this time, the retirement age for sheriffs appointed for the lower court was pegged at seventy years of age. The retirement age for sheriffs selected after that was pegged at sixty-five years of age.

[22] Thus, the second respondent was obliged to retire as the sheriff of the high court five years before he was compelled to retire as the sheriff of the lower court. Following consultations, the third respondent reappointed the second respondent as the sheriff of the high court for a further period so that the date he would reach the compulsory retirement age as sheriff of the high court would coincide with the mandatory retirement age as the sheriff of the lower court. After that, the second respondent reached the compulsory retirement age as the sheriff of both courts and was no longer entitled to hold office as a sheriff. Subsequently, the third respondent re-aligned some magisterial districts to reconfigure certain jurisdictional boundaries to ensure equal access to justice. This process took longer than anticipated. However, the third respondent attempted to complete the process before appointing permanent sheriffs in areas that might have been re-configured. Thus, pending this process, the third respondent preferred appointing retired sheriffs in acting positions to ensure stability and continuity within the sheriff’s offices and to maintain service delivery. Both the first and second respondents received letters from the third respondent informing them that they had been appointed as acting sheriffs in their separate areas of jurisdiction for a limited specified period or until the vacant posts had been filled, whether by way of advertisement or re-description and allocation, whichever occurred first.

[23] Upon being appointed as acting sheriffs, they were both in possession of certificates at the instance of the appellant. Their appointments as acting sheriffs were extended from time to time, and they were again issued certificates at the instance of the appellant. The third respondent had yet to appoint permanent sheriffs in several jurisdictions, and the first and second respondents acting appointments were again extended. Similarly, during this time, the first and second respondents held valid certificates and complied with the appellant's fund requirements.

[24] A paradigm shift occurred when the third respondent announced the appointment of ten new board members to the appellant, and the new board members were to serve a three-year term. The new board adopted a policy decision that the appellant would no longer issue any certificates to retired sheriffs because these retired sheriffs continued appointment as acting sheriffs (so they alleged) posed a direct and substantial threat to the fund.

[25] After that, the appellant refused to issue the first and second respondents their required certificates, notwithstanding that the third respondent desired to renew their appointments until the proposed re-configuration process had been completed. This new policy shift at the instance of the appellant was then the focus of a challenge by the first and second respondents before our colleagues Justice Allie and, after that, before Justice van Zyl. These successful challenges at the instance of the first and second respondents form the subject matter of this consolidated appeal and the issue of costs.

Chronology:

[26] Given the new regime at the helm of the appellant, the third respondent commenced with a line of open communication with the appellant. The third respondent said that he was busy completing the re-configuration of the court districts, which would impact the several vacant sheriff's posts. This was because the third respondent was still determining when the process would be completed. This was necessitated by a process involving consultation with many different stakeholders. In anticipation of these possible delays, the third respondent was preparing for the extensions of acting sheriff's positions that were looming and due to expire.

[27] Attached to this correspondence by the third respondent featured a list of all the sheriffs appointed in acting positions whose appointments were due to expire. The appellant was requested to indicate whether any disciplinary proceedings were pending against any of the so-listed sheriffs and whether the appellant was willing to issue them with the required certificates should they be appointed. The third respondent wanted to know if these acting sheriffs were disqualified from being appointed.

[28] The first and second respondents featured on the list attached to the correspondence because their interim appointments were due to expire. Despite this, this correspondence remained unanswered for more than two months. After that, the first respondent received a letter from the third respondent notifying him that the appellant was not prepared to issue him a certificate because 'serious complaints' had been preferred against him. The appellant was unwilling to furnish the third respondent with information about the details of the alleged complaints as the matter was before the appellant's disciplinary committee and was (according to the appellant) the subject of legal privilege.

[29] This notwithstanding, an agreement was brokered between the third respondent and the appellant that the first respondent would be issued a certificate for one month only. Moreover, by way of response, the first respondent communicated with the appellant and confirmed that there were no credible complaints against him, as alleged. Further, he opined that the appellant was not at risk from the perspective of any potential claim against the fund.

[30] Most significantly, the first respondent subsequently received correspondence from the appellant congratulating him on his appointment as an acting sheriff and set out the requirements for the first respondent to be issued with a certificate for the period of his interim appointment. Shortly after this, the first respondent submitted his application with all the required documents for a certificate after paying the prescribed fees. The first respondent also attached a certificate confirming his professional indemnity insurance to his application. After that, the appellant caused its policy decision in connection with the appointment of retired sheriffs' to be published on their official website.

[31] The fundamental issue highlighted by the appellant was that the appointment of retired sheriffs exposed the fund to substantial risk. This was also because (so it was alleged) that once a sheriff retired, the said retiree no longer fell under the appellant's disciplinary jurisdiction of the regulatory body. The appellant alleged this was an ongoing concern because they struggled to obtain fund insurance. The appellant averred that a potential service provider had advised them that this was the fundamental reason prospective insurers were unwilling to insure the fund. Nothing more and nothing less was said in this connection, and no supporting documentation or additional facts were placed before the court in support of this averment.

[32] In response, the third respondent again communicated with the appellant. It is helpful to set out the stance adopted by the third respondent in this connection, namely:

- *On Friday, 18 February 2022, I received, via WhatsApp, a letter from you dated 17 February 2022, which provided a list of acting sheriffs "who are in good standing and currently have no pending complaints and disciplinary matters against them and are eligible to be considered for extension." This list included retired sheriffs, thus making it abundantly clear that retired sheriffs who are in good standing and without complaints or disciplinary matters are to be considered for acting appointments.*

- *You also attached a list of sheriffs in close proximity to these vacant offices whom I could consider for appointment as acting sheriffs and stated that those "who are in close proximity, but have pending complaints and/or disciplinary actions against them… have been omitted." Here too, the list of possible acting appointments included retired sheriffs.*

- *This list comprised of the original 18 names in your letter of 17 February 2022 minus 8 of those names. You provided a list of "eligible sheriffs which the Minister may consider for acting appointment". This list includes some retired sheriffs, and some retired sheriffs were on the list of those you would issue fidelity fund certificates to.*

- *With regard to your letter of the 5 February 2022, you state that the Board had taken a decision not to issue retired sheriffs with fidelity fund certificates in respect of acting positions post their retirement from the profession. You do not provide a reason for the*

Board's decision or point out on what bases the Board would refuse to issue the Fidelity fund certificates to them.

- *A decision such as this has a significant impact on the sheriffs' profession and on service delivery. With a crucial decision like this, I would've expected the SABFS to properly inform me, in writing, of this decision and the reason for it.*

- *For the record, I personally do not view retired sheriffs as necessarily being more of the risk than others sheriffs, especially since the retired sheriffs are experienced and would have been in receipt of fidelity fund certificates in the past.*

- *This is the first time during my tenure that I have been informed that a retired sheriff should not be considered for appointment as an acting sheriff as it poses a substantial and direct risk to the Fidelity Fund.*

- *I would also like to state that in my eight years of appointing acting sheriffs, the SABFS has never raised problems with retired sheriffs getting a fidelity fund certificate. In fact, the current Board has indicated on a number of occasions that it is prepared to issue a fidelity fund certificate to a retired sheriff or a sheriff reaching retirement age. I do not know why this is now suddenly a problem.*

- *The Sheriffs Act provides that a sheriff shall hold office until the date on which he or she attains the age of 65 years, but may be reappointed for such period as the Minister may, after consultation with the Board determined.*

- *In other words, as the Sheriffs Act specifically provides that sheriffs who have reached the age of 65 may be reappointed by the Minister after consultation with the Board, I thus view your decision not to give retired sheriffs fidelity fund certificates as trying to overrule the Act which specifically allows for retired sheriffs to be reappointed.*

- *In conclusion, there appears to be a seemingly sudden and undue interest in the appointment of acting sheriffs from the side of the Board and in particular reluctance to appoint retired sheriffs. I am therefore concerned that the Board is over-reaching into a terrain which is that of the Executive and trying to impose its will and decisions on the Executive without proper consideration as to the service delivery implications of such a decision."*

[33] After that, the third respondent addressed a letter to two voluntary associations representing the sheriffs' interests and raised the following issues, namely: (a) that the third respondent had reappointed several acting sheriffs until the vacancies had been filled and permanent appointments had been made, whether by way of advertisement and allocation, whichever occurred first and, (b) that no less than ten acting sheriffs had been re-appointed for a period of one month because the appellant had stated that these sheriffs had severe complaints against them and the appellant was only prepared to issue these acting sheriffs with a certificate for one month to facilitate a proper hand-over process.

[34] According to the third respondent, the appellant had decided not to issue certificates to acting sheriffs who had attained retirement age, even if they were in good standing. Thus, this policy decision significantly impacted service delivery. According to the third respondent, this policy decision should have been discussed with him (given his delegated authority) and with the sheriff's profession in general.

[35] Further, the third respondent indicated that it was the first time during his tenure that he had been notified that a retired sheriff could not be considered for appointment as an acting sheriff as this allegedly posed a substantial risk to the fund. What was curious about the position adopted by the appellant was that the appellant stated it could not furnish the third respondent with the details of any complaints pending against these acting sheriffs as the matters were before the appellant's disciplinary committee and were the subject of legal privilege.

[36] Thus the position adopted by the appellant left the first and second respondents in an untenable position. Accordingly, they decided to approach the court to challenge the policy view adopted by the appellant. In their application (which was presented before Allie J), they sought the following relief: (a) declaring the appellant's failure and refusal to issue them with the required certificates to be unlawful; (b) ordering and directing the appellant to forthwith issue them with the certificates provided that the certificates would be *ipso facto* cancelled if they ceased to hold office; (c) directing them to return any certificates to the appellant within thirty days after they ceased to hold office and, (d) that the appellant be ordered to pay their costs on an attorney and client scale.

[37] This application was successful. In summary, the appellant was directed to confirm in principle to issue the first and second respondents with certificates if they qualified (or were not disqualified) after having been appointed by the third respondent. Significantly, the appellant remained defiant despite the necessary applications and indemnity insurance cover provided to the appellant by the first and second respondents when they applied for their credentials following the provisions of the court order. This resulted in another application being presented to the court (before van Zyl AJ), declaring the appellant's failure to issue the required certificates to the first and second respondents unlawful.

Consideration:

[38] The core issue that bears scrutiny is the argument by the first and second respondents that this appeal is moot. Section 16(2)(a) of the Superior Courts Act provides as follows:[11]

'…(i) When at the hearing of an appeal, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs…'

[39] A case that presents before an appeal court may eventually lose an element of justiciability and become moot. This may occur if a disagreement that initially existed is no longer live due to a change in the status of the parties involved. In this case, the delegated authority bestowed upon the third respondent was withdrawn, and the first and second respondents were removed from their respective posts as acting sheriffs. On the facts these appeals are undoubtedly moot. Our courts have over time developed some exceptions to this mootness doctrine. One of these exceptions goes to equitable mootness which is a cousin to the mootness doctrine.

[40] This is then in the form of a court's discretion in matters of judicial administration

[11] Act 10, of 2013.

in the interests of justice. Thus, although moot, some disputes may have the potential of recurrence. This exception falls, however, to be used sparingly and applies only in exceptional circumstances.

[41] As a general proposition, judicial resources ought to be used efficiently. They should not be dedicated to advisory opinions or abstract propositions of law, and courts should avoid deciding abstract, academic, or hypothetical matters.[12] Thus, a court has only discretionary power to entertain even moot issues.[13]

[42] The delegated authority given to the third respondent was reviewed. Following this, the delegated authority given to the third respondent to appoint and remove acting sheriffs was terminated.[14] The reason for the termination of this authority appears to have been a breakdown in the relationship between the third respondent and the appellant.[15] The recurrence of this unfortunate relationship is highly unlikely. Thus, looms the issue if it would be appropriate and competent for this court to decide the currently formulated challenges by the appellant.

[43] I say this because these challenges are all underpinned by historical facts and circumstances. By way of illustration, the 'certificate' issue is inextricably factually connected, among other things, with the previously delegated authority to the third respondent, which has long since been withdrawn.

[44] Accordingly, the argument is whether the challenges by the appellant would or could not be dispositive of what may occur in future with a different variation. As a matter of logic, this reasoning applies equally to the previous challenges piloted by the first and second respondents. Our sense of this issue must also be influenced by subsequent litigation chartered by the appellant against the first and second respondents. Several months after the third respondent appointed the first and second respondents as acting sheriffs, the appellant launched two urgent applications against the first and second respondents in different jurisdictions.

[45] The appellant sought the following relief against the first and second

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[12] *J T Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC).
[13] *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC).
[14] In August 2022.
[15] More specifically a breakdown of the relationship between the two respective office bearers.

respondents, namely: (a) that they forthwith are interdicted from performing the functions of a sheriff without a certificate pending the final determination of the application presented before van Zyl, AJ and (b) that the third respondent be ordered to appoint acting sheriffs (save for the first and second respondent) within ten days of the date of the order and until the final determination of the application that presented before van Zyl, AJ.

[46] The application against the first respondent was struck from the roll for lack of urgency. The matter remains pending, and no date for the hearing of the matter on the opposed motion court roll has been set. In all probability, this matter is unlikely to proceed because it has become moot and of academic value only. Significantly, the appellant has not engaged with this issue at all. The application against the second respondent was heard, and an order was issued, interdicting the second respondent from performing the functions of a *sheriff* (no reference in the order was made to an acting sheriff) without being given a certificate by the appellant.

[47] In response, the second respondent delivered a notice of application for leave to appeal. This application was dismissed, and the second respondent approached the Supreme Court of Appeal for further relief. This latter application was also dismissed with costs. After that, the first and second respondents received letters from the third respondent informing them that the appellant had requested the third respondent to remove them as acting sheriffs and allowed them to give reasons why they should not be dismissed as acting sheriffs. The third respondent was provided with comprehensive and detailed reasons why the first and second respondents should be kept on as acting sheriffs. Despite this, the third respondent advised both the first and the second respondents that they would be removed as acting sheriffs.[16] Both the respondents sought to review this decision. This review application was dismissed. As a result, the first and second respondents have not been in their respective positions as acting sheriffs for almost a year. Most significantly, the appellant opposed the second respondent's application for leave to appeal on the basis that the issue was moot.

[16] This was on 10 October 2022.

[48] The appellant concedes that overturning the court's orders of the first instance will have no practical effect as the first and second respondents have been removed from their posts as acting sheriffs. The appellant argues that this court must exercise its discretion to hear these appeals as it is in the interests of justice to do so. They say this, among other things, because they allege that the appellant is hamstrung in exercising its statutory powers to regulate the sheriff's profession, which negatively impacts the administration of justice.

[49] We do not see it this way. This is because the third respondent's delegated authority has been withdrawn. Thus, the same facts or similar variations will not be presented to another court for adjudication. The argument about the issue of conflicting judgments is also unpersuasive. I say this because the other matters before the different courts were presented with additional facts for different remedies

[50] Firstly, we see no judicial precedent tension between the orders of Allie J and van Zyl AJ granted and the order delivered by Sher J. Before, Sher J was presented an application on behalf of a sheriff, not an acting sheriff. The facts are entirely different with those involving this consolidated appeal. This matter was about relief pending the outcome of a review application where a sheriff was in default and his certificate had been revoked. I am in wholesale agreement with the order and the legal reasoning adopted by Sher J, as his core finding was that the court had no power to have ordered the granting of a provisional fidelity fund certificate pending the outcome of the review application. It is difficult to understand how this order (or even the legal reasoning attached to it) conflicts with the orders and legal reasoning adopted by Allie J and van Zyl J. We remain unpersuaded.

[51] Secondly, turning now to the jurisprudence by Hendricks JP.[17] This case was also fact specific. Before Hendricks JP, was an application involving interdictory relief because of complaints set out in a charge sheet against the second respondent coupled with several alleged violations and certain alleged breaches of the sheriff's code of conduct by the second respondent.

[17] *South African Board for Sheriffs v Stephanus Johannes Van Wyk and Others* [Case No. UM 169/2022].

[52] The learned judge ordered, among other things, that the second respondent be interdicted from performing the functions of a *sheriff* (this must have included an acting sheriff) without a valid certificate issued by the appellant. Undoubtedly, this order was correct as it bore reference to the specific conditions of appointment of this acting sheriff by the third respondent. Thus, this order (and its legal reasoning) does not conflict with the order (and the legal reasoning attached to it) by van Zyl AJ. Further, van Zyl AJ only ordered that the first and second respondents were not prohibited from carrying on their business of acting sheriffs because the appellant needed to issue them with certificates as directed by the court. This is of crucial importance as one of the specific conditions attached to the appointment of the second respondent was that he complied only with the *requirements* to be issued with a certificate.

[53] Finally, turning to the judgment of van der Westhuizen, J.[18] The case presented involved a review application by the two respondents in this appeal against the third respondent for removing them as acting sheriffs. Judge van der Westhuizen held that it was a condition of the first and second respondents' appointment as acting sheriffs (when appointed by the third respondent) that they complied with the *requirements* to be issued certificates from the appellant. More importantly, another specific condition was attached to their appointments as acting sheriffs, namely that they were not *charged* with improper conduct by the appellant during their appointment periods.

[54] This is a discrete issue from the legal reasoning by van Zyl AJ following a strict interpretation of the applicable legislation. The respondent is empowered to attach conditions to the appointment of acting sheriffs, which he did in this case. The appellant raises another point. The point is that van Zyl AJ made a definitive finding as to the consultation process that needed to be followed with the judicial heads of the court in whose jurisdiction such acting appointments were to be made. It is so that van Zyl AJ expressed an opinion in this connection in the reasons she handed down. However, most importantly, no order was made to deal with this issue.

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[18] *Seboka and Another v Minister of Justice and Correctional Services and Others* (2022-39227) [2022] ZAGPPHC966 (9 December 2022). It is also crucially important in this context to distinguish between absolute and conditional precedents.

[55] We are also not convinced that this issue was adequately before her on the papers, and this issue was not central to and did not influence her main findings as set out in the order granted.

[56] Thus, none of these cases conflict with or are mutually destructive of each other, either by their orders or by the legal reasoning attached to them. Put another way, none of these different decisions would create a binding precedent tension in our jurisprudence.

[57] In one final throw of the dice, the appellant contends that this appeal is not moot because of costs. For the request to this court on the question of costs alone, the test is whether the interest of justice permits this. If a matter is factually moot, this mootness cannot be overlooked merely because of the issue of costs. I find that the facts of this case do not warrant this appeal court's interference in the costs orders issued in the courts of the first instance. This appeal court is not clothed to provide litigants with legal advice or opinions on hypothetical scenarios underpinned by discrete factual scenarios on issues that may or may not present themselves before a court in the future.

[58] Also, we do not see how the appellant is hamstrung. It is difficult to understand how setting aside the orders by the courts of the first instance will assist the appellant in the 'future exercise of its statutory powers' to regulate the sheriff's profession. The factual position and circumstances that prevailed almost a year ago and whatever influences these held for the lawfulness or otherwise of the previous court orders, should have no bearing on any future acting appointments that may or may not be contemplated in consultation with the appellant. Thus, while these matters may engage this appeal court's jurisdiction, it is not in the interests of justice to entertain these appeals.

Costs:

[59] Even with the orders granted in the court of the first instance, the appellant persisted in its refusal to issue the certificates to the first and second respondents. The appellant disputed the validity of the first and second respondents' appointments as acting sheriffs by the third respondent and held out to the public that there were no

acting sheriffs in these respective areas of jurisdiction. The reasons for the appellant's refusal to recognise the appointment of the first and second respondent by the third respondent as acting sheriffs and to issue them with certificates are not understood and were not legitimate. Further, it was a matter of common cause that the third respondent appointed the first and second respondents as acting sheriffs for their respective jurisdictions.

[60] Undoubtedly, the power at this time to appoint acting sheriffs resided with the third respondent. This authority was expressly conferred on him. Thus, the appellant was not at this time vested with any power to appoint or remove a sheriff or acting sheriff. The appellant exercised an advisory and consultative role. The veto right in the hands of the appellant applied in respect of the grounds of disqualification by way of legislative intervention. These disqualification grounds did not apply to either the first or second respondent. The power vested in the third respondent at the time to have appointed the first and the second respondents and their subsequent appointment constituted an administrative decision that the appellant should have considered and remained valid until set aside through review.[19]

[61] I disagree that public members would be at risk because the appellant did not issue the first and second respondents with certificates. The public would enjoy recourse against the fund irrespective of whether the first and second respondents were given certificates. Also, the appellant had several safeguards to regulate the conduct of the first and second respondents. Further, through legislative intervention, a claimant may claim from the fund only after all available legal remedies have been exhausted against the acting sheriff regarding whom the claim arose and against all other persons liable for the loss or damage suffered by the claimant. Any other claims by public members against an acting sheriff cannot be recovered from the fund but fall to be recovered directly from the acting sheriff personally. For these claims, sheriffs themselves take out indemnity liability insurance.

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[19] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para [26].

[62] This indemnity liability insurance covers the unintentional acts of an acting sheriff or his or her employees, which may result in loss or damage to members of the public. By contrast, fund insurance cover is limited to intentional dishonest or fraudulent acts of an acting sheriff or his or her employees, resulting in loss or damage to the public. By its very nature, indemnity liability insurance is more comprehensive than fidelity insurance coverage. Finally, if the fund settles any claim, there shall pass to the appellant all the rights and remedies of the claimant in respect of the lawsuit against the acting sheriff (or other person) or, if applicable, in the case of the death, insolvency or other legal incapacities of any such acting sheriff or person, against the estate of any such acting sheriff or person. Thus, it is difficult to discern how the members of the public would be at risk because the first and second respondents were not issued with certificates by the appellant.

[63] I mention these issues only as they have some bearing on the costs of these appeals. It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and after due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[20] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court. No hard and fast rules have been set for compliance and conformity by the court unless there are exceptional circumstances.[21]

[64] In all the circumstances, a costs order is warranted for some of the reasons set out in this judgment. Whilst we harbour some doubt about the propriety of appellant's alleged conduct during this litigation, we cannot visit upon the appellant the requested cost order sought by the first and second respondents since the inception of this litigation, absent further evidence.

[65] That being said, it must have dawned on the appellant shortly after the first and second respondents were removed from their posts as acting sheriffs that the issues

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[20] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055 F- G.
[21] *Fripp v Gibbon & Co* 1913 AD 354 at 364.

in this consolidated appeal remained moot. For these reasons, a portion of the costs will be awarded to the first and second respondents in this consolidated appeal. The doctrine of mootness took final shape when the review application was dismissed by way of the order handed down on 9 December 2022. Thus, the appellant shall be liable for the costs of and incidental to these consolidated appeals on a party and party scale (including the fees of senior counsel where so employed), as taxed or agreed, from 1 January 2023 and after that. The date is pegged at 1 January 2023 to have afforded the appellant some time to have considered and deliberated upon its legal position after the review application was dismissed on 9 December 2022.

[66] Thus, the following order is granted namely that:

1. The consolidated appeals are dismissed as they are moot.

2. The appellant shall be liable for the costs of and incidental to these consolidated appeals on a party and party scale (including the fees of senior counsel where so employed), as taxed or agreed, from 1 January 2023 and after that.

WILLE, J

I agree:

FRANCIS, J

KUSEVITSKY, J:((dissenting).

[67] I have had the benefit of reading the judgment ("the main judgment") penned by my brother Wille J and agreed with by Francis J. I am unfortunately not in agreement with the reasoning and conclusion therein and would have upheld the appeal for the reasons that follow.

[68] The factual background underpinning the consolidated appeals, as well as the legislation applicable to the powers of the Appellant ("the Board'), the appointment of

sheriffs and acting sheriffs and the role of the Board and Third Respondent within that regulatory framework has been fully set out and canvassed in the main judgment and needs no repetition.

[69] The main judgment found that the issues were moot since firstly, the First and Second Respondents ("the Respondents") have been removed from their posts as acting sheriffs and secondly, because the Third Respondent's delegated authority has been withdrawn. Whilst factually it may be the case that the First and Second Respondent's no longer occupy the position, the same can not be said about the latter contention.

[70] It is common cause that the delegated authority in favour of the Third Respondent was revoked, ostensibly because of personality clashes between the Third Respondent and the Board. In the main judgment, one of the reasons for the mootness in this regard is the contention that because the Third Respondent's delegated authority had been revoked, that the same facts or similar variations will not be presented to another court for adjudication. This therefore begs the question, does this mean that at some future point, the Minister might not again exercise this power of delegation upon a newly appointed deputy minister with whom no such personality clash exist *viz a viz* the Board?

[71] The answer to this lies in section 63 of the Sheriffs Act 90 of 1986 ("the Act") which provides the following:

> "63. Minister may assign functions to officers – (1) The Minister may –
>
> (a) delegate to any officer of the Department of Justice any power conferred upon the Minister by this Act, excluding the power referred to in section 62 (1), on such conditions as the Minister may determine; or
>
> (b) authorise any such officer to perform any duty assigned to the Minister by this Act.
>
> (2) Any such delegation under subsection (1) (a) shall not prevent the exercise of the relevant power by the Minister himself."

[72] Section 63 therefore makes it clear that the Minister retains the power to delegate his or her authority, since it is not the act of delegation that has been revoked but rather the withdrawal of the delegation in respect of the designated Third Respondent in this instance. Put differently, the *power* to delegate has not been removed because the Act makes provision therefore and because the *act* of delegation is a feature of administrative functions within the realm of the regulatory legislative framework. Thus the withdrawal of this delegation in respect of the Third Respondent in my view is of no moment because it was clearly a response to address the impasses that existed between the relevant parties at that time. But respectfully, this is not a reason to not hear the appeal as indicated and for the further reasons advanced hereunder.

[73] The establishment of the Board and their powers stems from the Act and its regulations. The Board is also ascribed certain functions; which functions vests solely within their domain as prescribed in the enabling Act. The main judgment found that there was no judicial tension between the orders complained of and the judgment of Sher J. I disagree. *See Ntsibantu v Minister of Justice and Correctional Services and Another*[22]. The central question there was whether the court was empowered to make an order directing the Board to issue a 'provisional' fidelity fund certificate to the applicant, who was at the time the Sheriff for the Higher and Lower courts for Cape Town West, pending the outcome of a review of the Boards refusal to provide him with a fidelity fund certificate for 2018. Sher J reiterated in his reasons that, in terms of the Act, it is the Board which is empowered to issue fidelity fund certificates, and not the courts, and in considering whether or not to grant such a certificate, the Board is required to take into account a number of factors, many of which will only become known to it after it has processed the information which is set out in the contents of the relevant forms.[23] It is clear from the general scheme of the Act that it lies within the discretion of the Board to determine whether an applicant who seeks the issue of a fidelity fund certificate, or the renewal thereof, is a suitable candidate.[24] Even if a

[22] Reasons in Case No. 156/18

[23] at para 38

[24] at para 39

candidate is found to be a fit and suitable person and has complied with all of the necessary formal requirements, and the refusal to issue a certificate or to renew such certificate is motivated simply by considerations of malice or bad faith, a court should not be making orders directing the Board to issue the applicant with such a certificate, even if this were only to be so-called 'provisional certificates', as it would be treading into terrain within which the Board's province, where it is required to make a value-based decision after weighing up a number of considerations.[25] The court should respect the Board's functions and powers in this regard, by leaving it up to the Board to decide on whether or not to grant an applicant such assistance, on proper application made to it by the applicant. By makeing an order directing the Board to issue a non-compliant sheriff with a renewal certificate, the court may effectively be usurping the Board's powers and emasculating it from carrying out its legislative functions, and it may perversely have the opposite effect of what the Act is aimed at achieving viz. the adherence by sheriffs to a system of control and regulations by the Board.[26]

[74] One of the main arguments advanced by counsel for the Appellant was the fact that the First and Second Respondents in the court *a quo* failed to challenge the impugned decisions of the Board in review proceedings as they ought to have done. Had they done so, then the relief that they sought might have been competent. It is common cause that both applications *inter alia* sought the declaration of decisions made by the Board to be declared unlawful and ordering it to issue the Respondents with fidelity fund certificates.

[75] On 31 March 2022, Allie J made the following Order:

1. "The first respondent's failure, refusal and/or neglect to confirm to the second respondent, in writing, that it is prepared to issue fidelity fund certificate to the applicants, is declared that [sic] unlawful;

[25] at para 40

[26] at para 42

2. The first respondent is ordered to forthwith confirm to the second respondent, in writing, that it agrees in principle to issue the applicants with fidelity fund certificate, should the second respondent appoint the applicants, for a period prescribed by the second respondent."

[76] The court found that it could see no basis for the refusal of the Board to indicate that it had no objection to the issuing in principle of a fidelity fund certificate to the Respondents. The court also recognised that there was no basis upon which a fidelity fund certificate could be refused where there is pending disciplinary proceedings in circumstances where those disciplinary proceedings have not been finalised and have not culminated in an adverse finding against the relevant sheriff. The court then opined that if these allegations were so egregious or serious, the Board would have placed it before court and deduced that because they had not, the failure indicated '*there is no need to suspend the particular applicants from continuing as sheriffs*..."

[77] In my view, the Respondents did not bring a review regarding a failure to make a decision, put differently, no review was brought because of the failure to finalise their disciplinary proceedings. Firstly, orders are not to be granted based on speculation or where no evidence was placed before court to make such a determination. Whilst the order is nuanced to indicate a decision to be taken '*in principle'*, I am of the view that had the order been couched in a formulation that directed the board to notify the Respondents in writing whether *or not*, to grant a fidelity fund certificate, it would have been clear that the decision to so grant vested with the Board.

[78] Secondly, whilst the court acknowledged the situation with pending disciplinary action, it opined that '*the refusal of a fidelity fund certificate purely on the basis that there are pending disciplinary proceedings…cannot be used as a stick with which to beat an acting sheriff. Either it must be processed to finalisation, or it must be withdrawn*.' Again, these were not review proceedings where this might have been a consideration. Thus in my view, the order granted was not competent and the issue of the punitive cost order granted against the Appellant warranted an adjudication into the merits on appeal.

[79] Thirdly, the court also made a finding *that once a sheriff is retired, no disciplinary procedures can be taken against him/her….it is the statutory duty of the board to take further action against that sheriff…. Board seems to have misconceived its functions*". The functions of the Board were fully canvassed during the hearing of the matter. It was argued that it is the Board's prerogative to establish whether an applicant is fit and proper. It was agreed that it was not simply a box-ticking exercise. There were no facts present for that court to make a such a far reaching determination. In my view, such a finding cannot stand. And in any event, there is nothing before us to warrant making a finding either way on this issue. In other words, it is not for this court to make that determination.

[80] The second Order, granted by van Zyl AJ *inter alia* provides the following:

> '1. …
>
> 2. It is declared that the first applicant is the Acting Sheriff: Pretoria Higher and Lower Courts for the period 1 April 2022 to 28 February 2023.
>
> 3. It is declared that the second applicant is the Acting Sheriff: Tlokwe (Potchefsstroom) Higher and Lower Courts for the period 1 April 2022 to 28 February 2023.
>
> 4. It is declared that the applicants are not prohibited from performing any functions assigned to a sheriff by or under any law due to the first respondent's failure to issue each of the applicants a fidelity fund certificate pursuant to the provisions of the Sheriffs Act 90 of 1986.
>
> 5. It is declared that the first respondent's failure to issue fidelity fund certificates to the applicants in the prescribed form is unlawful.
>
> 6. The first respondent is directed forthwith to issue each of the applicants with a fidelity fund certificate in the prescribed form, valid for the period 1 April 2022 to 28 February 2023, provided that such fidelity fund

certificates shall be *ipso facto* cancelled if the applicants cease to hold office.'

[81] In argument, there was much debate regarding whether or not the Minister is required to consult with the heads of court prior to an appointment and whether the Board has jurisdiction or not to discipline retired sheriffs. In my view, the crisp question is whether the appointments by the Minister of acting sheriffs in terms of section 5(1B) of the Act without written confirmation that the Board is prepared to issue a fidelity fund certificate to a particular candidate is *ultra vires*. In both findings, it is in fact the court that determined the appointment of the acting sheriffs.

[82] The issue with regard to the professional indemnity insurance was the basis for the granting of the order so made. This issue was also a feature in argument before this court. The Appellant argued that the *dictum* by van Zyl AJ are inconsistent with the statutory powers of the Board in terms of section 5(1B). The Court in its reasons stated the following:

"[62.6] The role of the Board in the permanent appointment of sheriffs or the appointment of acting sheriffs is limited to the issuing of a fidelity fund certificate to the said Sheriff and it is the prerogative of the Minister of Justice and Correctional Services to appoint Sheriffs and acting Sheriffs and that [75] Because the Deputy Minister is clothed with the legal authority to appoint the applicant as acting sheriff's, the Board must obey this decision or approach a court of law to set the appointments aside."

[83] I agree with the Appellant that this proposition is incorrect in law. This is the second reason, in my view, that the matter can never be moot in light of orders that are clearly *ultra vires*. The Appellant, correctly in my view, reiterated the criteria for the appointment of sheriffs, which criteria would be equally applicable to acting sheriffs. Section 2 of the Act makes it clear that appointments are made *after* consultation with the Board[27] and such appointment is *subject to* written confirmation by the Board. The

[27] section 2(3)(b)

finding thus that the role of Board is to *obey* the Deputy Minister is not countenanced by the Act and constitutes curtailment of the Boards statutorily mandated powers to regulate the Sheriff's profession.

[84] Furthermore, the question also arose as to whether or not applicants should be in possession of a fidelity fund certificate or whether the payment of the prescribed contribution to the Board would suffice in compliance with section 30 (c) of the Act.[28] Van Zyl AJ pronounced that the Act, by virtue of the option expressed in the use of the word '*or'* used in subsection 30 (c), provides for two requirements to perform the functions of a sheriff: he must either be the holder of a fidelity fund certificate, or he must have paid the prescribed contribution to the Board. There is no question as to the proper interpretation of this section, especially when contrasted with the 'and' in relation to sheriffs in section 30(a) and (b). The court held that if the Board was of the view that the applicants will be in contravention of the provisions of the Act if they perform the functions of acting sheriffs without a valid fidelity fund certificate, then this view was incorrect with reference to section 30.[29]

[85] This in my view is a further reason why this court sitting as a Court of Appeal should have dealt with the clear conflicting approaches to this provision if one has regard to the approach adopted in *Seboka and Another v Minister of Justice and Correctional Services and Others* where van der Westhuizen J held the following:

> "[20] In terms of the provisions of the Act, the second respondent is empowered to issue Fidelity Fund Certificates to appointed sheriffs. In terms of the definition of "sheriff "in the Act, an acting sheriff is included.

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[28] "30. Prohibition of performance of functions of sheriff in certain circumstances.

…

…

(c) in the case of an acting sheriff –

(i) the acting sheriff is the holder of a fidelity fund certificate; or

(ii) the acting sheriff has paid the prescribed contribution to the Board.

[29] Paras 48 and 77 of van Zyl AJ's Reasons

> It was submitted on behalf of the applicants that acting sheriffs required no Fidelity Fund Certificates to act as sheriffs. Reliance was placed on the term "or" appearing in section 30(1)(c) of the Act. There is no merit in that submission. It is trite that the term "or" in legislation, or other document, may have the meaning of the term "and". It depends on the context in which it appears. It is clear from a purposive reading of the Act as a whole that the term "or" in section 30(1)(c) of the Act has the meaning of the term "and". To hold otherwise would render the requirement in section 30(1)(c)(i) nugatory. Further, in the context of the Act read as a whole, it would make no sense not to require an acting sheriff to hold a Fidelity Fund Certificate. It is to be recorded that the applicants have since their various appointments as acting sheriffs, annually applied for the issuing of Fidelity Fund Certificates. That conduct clearly indicated that they were obliged as acting sheriffs to hold Fidelity Fund Certificates. Furthermore, the respective letters of appointment as acting sheriffs obliged the applicants to hold Fidelity Fund Certificates." (*footnotes omitted*)("own emphasis")

[86] The same sentiments were expressed by Hendricks JP in *South African Board for Sheriffs v SJ van Wyk & 2 Others*[30] when the matter came before him in the North West High Court. In that case, Mr. van Wyk had made similar arguments in relation to the approach approach adopted by Van Zyl AJ to the effect that section 30(1) as is stood made it clear that in the case of the appointment of an Acting Sheriff, he/she should be the holder of a fidelity fund certificate or had paid the prescribed contributions to the Board. Emphasis was placed on the use of the word '*or'* meaning in the alternative. The court held that this subsection of the Act should not be read in isolation and disjunctively with what is contained in section 5(1B) of the Act which empowers the Deputy Minister to attach conditions for the appointment of an Acting Sheriff. It must be read conjunctively.

[30] Case No. UM169/2022

[87] Thus, in my view, contrary to the findings in the main judgment, there does exist real tensions between the different approaches to these provisions which would have warranted this court's attention.

[88] Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 provides that: '*When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'* Courts of appeal as well as the Constitutional Court in direct access applications have however exercised a discretion to hear matters that are moot when the appeal requires the adjudication of a distinct point of law that does not involve a determination of the merits or factual matrix.[31] In *Independent Electoral Commission v Langeberg Municipality*[32], the court held that the prerequisite for the exercise of the discretion is that any order which the Court may make will have some practical effect either on the parties or on others.

[89] In *Normandien Farms v South African Agency for the Promotion of Petroleum Exploration & Exploitation SOC Ltd & Another* 2020 (4) SA 409 (CC), the court, with reference to *AA Investments (Pty) Ltd v Micro Finance Regulatory Council*[33], held as follows:

'*[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the inquiry. The central question for consideration is: whether it is in the interests of justice to grant leave to appeal, notwithstanding the mootness. A consideration of this Court's approach to mootness is necessary at this juncture, followed by an application of the various factors to the current matter.*

[31] Natal Rugby Union v Gould [1988] ZASCA 62; 1999 91) SA 432 (SCA)

[32] [2001] ZACC 23; 2001 (3) SA 925 (CC) at para 11

[33] [2006] ZACC 9; 2007 (1) SA 343 (CC)

[47] *Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical".*

[48] *This Court has held that it is axiomatic that "mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require". This Court "has discretionary power to entertain even admittedly moot issues".*

[49] *Where there are two conflicting judgments by different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of entertaining a moot matter.*

[50] *Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:*

(a) whether any order which it may make will have some practical effect either on the parties or on others;

(b) the nature and extent of the practical effect that any possible order might have;

(c) the importance of the issue;

(d) the complexity of the issue;

(e) the fullness or otherwise of the arguments advanced; and

(f) resolving the disputes between different courts." ("Own emphasis")

[90] That court, without prescribing a *numerus clausus* of what constitutes the interests of justice, held:

"*[31] Important to the interests of justice is the question of mootness. However, it too is but one of the factors that must be taken into consideration in the overall balancing process. In Independent Electoral Commission v Langeberg Municipality, this Court, per Yacoob J and Madlanga AJ, held that:*

> *[T]he Court has discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which the Court may* make will have some practical effect either on the parties or on others. *Other factors that may be relevant will include the nature and extent of the_practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced."*

[91] Thus in my view, it cannot be said that the appointment of sheriff's and acting sheriff's, and the conflict when it comes to their appointment in certain instances cannot be said to not be in the public interest. Secondly, from what is apparent, no less than five matters were heard in various divisions, four by the same parties in various divisions, on the same or similar issues. Most certainly it cannot be said that adjudicating on the aforementioned issues, amounts to an exercise in advisory opinions or abstract propositions of law which would negate against an exercise of discretion in favour of adjudicating the matter. There exists a discrete legal point of law of public importance that most certainly, as enunciated by the Appellant, leaves it hamstrung in the effective fulfilment of their legislative obligations. I would have exercised my discretion to entertain this appeal. Finally, the punitive cost order granted by Allie J and the appeal against, which by its very nature cannot be moot, would also have tipped the scale in favour of the Appellant.

KUSEVITSKY, J