THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 293/2024

In the matter between:

SOUTH AFRICAN BOARD FOR SHERIFFS	**APPELLANT**
and	
THAKA FREDERICK SEBOKA	**FIRST RESPONDENT**
STEPHANUS JOHANNES VAN WYK	**SECOND RESPONDENT**
DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**

Neutral citation: *South African Board for Sheriffs v Thaka Frederick Seboka and Others* (Case no 293/2024) [2026] ZASCA 109 (20 August 2026)

Coram: DAMBUZA, KGOELE and KATHREE-SETILOANE JJA and STEYN and CHILI AJJA

Heard: 20 August 2025

Delivered: 20 August 2026

Summary: Civil Procedure – Sheriffs Act 90 of 1986 – the role of the South African Board for Sheriffs in the appointment of acting sheriffs and the issuing

of fidelity fund certificates – whether the matter is moot – whether acting sheriffs may perform their responsibilities without a fidelity fund certificate.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Wille, Francis and Kusevitsky JJ), sitting as court of appeal:

1 The appeal is upheld in part.

2 Each party shall pay its own costs.

3 The order of the full court is set aside and replaced with the following order:

'(a) The appeal against the order of the Western Cape Division of the High Court (Allie J) is dismissed with costs.

(b) The appeal against the order of the Western Cape Division of the High Court (Van Zyl AJ) is upheld.

(c) The order of Van Zyl AJ is set aside and replaced with the following order:

(i) The application is dismissed with costs.'

JUDGMENT

Chili AJA (Dambuza and Kgoele JJA and Steyn AJA concurring):

[1] This appeal comes before us by way of special leave granted by this Court on petition. It is an appeal against the judgment of the Western Cape Division of the High Court, Cape Town, per Wille and Francis JJ, with Kusevitsky J dissenting (the full court), dismissing the appellants' appeals against the judgments of Allie J and Van Zyl AJ.[1]

Factual background

[1] The applications that served before Allie J and Van Zyl AJ were consolidated for purposes of the appeal that served before the full court.

[2] The first and second respondents, Mr Thaka Seboka (Mr Seboka) and Mr Stephanus van Wyk (Mr van Wyk), had served as sheriffs within their respective areas of jurisdiction, namely, Pretoria Central High Court and Lower Courts and Potchefstroom High Court and Lower Courts, for many years. After attaining their age of retirement,[2] the third respondent, the Deputy Minister in the Department of Justice and Constitutional Development (the Deputy Minister), in the exercise of powers delegated to him by the Minister of the same Department reappointed them as acting sheriffs from time to time, to posts that became vacant following their retirement.[3] Their last acting stints were due to expire on 31 March 2022. No sheriffs had been recommended to fill the vacant posts that became available following their departure.

[3] During that period, a change occurred in the structure of the South African Board for Sheriffs (the Board). The new Board members resolved not to recommend the reappointment of retired sheriffs. Tension ensued between the Board and the Deputy Minister. When the Deputy Minister subsequently expressed his intention to reappoint Mr Seboka and Mr van Wyk as acting sheriffs for the period 1 March 2022 to 29 February 2023, the Board resolved not to indicate whether it was prepared to issue fidelity fund certificates to them. Following numerous correspondences between the Board and the Deputy Minister, the Board eventually decided to issue Mr Seboka and Mr van Wyk with fidelity fund certificates valid for one month only (1 to 30 March 2022). The Board imposed two conditions to the issue of the certificates: (1) that Mr Seboka and Mr van Wyk make applications to the Board for the certificates and (2) that at the end of their one-month term they hand over to the Director General of the

[2] The retirement age for sheriffs in terms of s 4(1) of the Sheriffs Act 90 of 1986 (the Act) is 65 years.
[3] In terms of s 63(1) of the Act.

Department of Justice and Constitutional Development court processes and other documents in their possession.

[4] All of this prompted Mr Seboka and Mr van Wyk to approach the Western Cape Division of the High Court, Cape Town (the high court) on an urgent basis for an order: declaring the Board's failure, refusal and/or neglect to issue them with fidelity fund certificates to be unlawful and directing the Board to issue them with fidelity fund certificates which would be valid until 31 December 2022. They also sought a costs order against the Board. On 31 March 2022, the high court (per Allie J) issued the following order:

'1. the 1^{st} respondent's [the Board's] failure, refusal and/or neglect to confirm to the 2^{nd} respondent [the Deputy Minister], in writing, that it is prepared to issue fidelity fund certificates to the applicants [Mr Seboka and Mr van Wyk], is declared unlawful;

2. the 1^{st} respondent [the Board] is ordered to forthwith confirm to the 2^{nd} respondent [the Deputy Minister], in writing, that it agrees in principle to issue the applicants [Mr Seboka and Mr van Wyk] with fidelity fund certificates, should the 2^{nd} respondent [the Deputy Minister] appoint the applicants [Mr Seboka and Mr van Wyk], for a period prescribed by the 2^{nd} respondent [the Deputy Minister];

3. the applicants [Mr Seboka and Mr van Wyk] are directed to return the fidelity fund certificates to the 1^{st} respondent [the Board] within 30 days after they cease to hold office;

4. the 1^{st} respondent [the Board] is ordered to pay the costs of suit on an attorney & client scale.'

[5] On the same day, 31 March 2022, the Board forwarded a letter to the Deputy Minister, expressing its intention to appeal the order of Allie J. The Board also alerted the Deputy Minister to the fact that the acting appointments of Mr Seboka and Mr van Wyk were due to expire on the same day. In paragraph 9 of the letter, the chairperson of the Board stated:

'Consequently, we request that you urgently send to us, proposed names for acting appointments in the above-mentioned jurisdictions [save for Mr Seboka and Mr van Wyk] for our urgent consideration as to whether we are prepared to issue a FFC [fidelity fund certificate] in terms of section 5(1B) of the Sheriffs Act No 90 of 1986.'

[6] On 1 April 2022, the Deputy Minister issued letters of appointment to Mr Seboka and Mr van Wyk as acting sheriffs in their respective areas of jurisdiction for the period 1 April 2022 to 28 February 2023. These appointments were fiercely resisted by the Board. However, it would not commit to indicating whether it was prepared to issue Mr Seboka and Mr van Wyk with fidelity fund certificates. The attitude of the Board prompted Mr Seboka and Mr van Wyk to approach the court again, on an urgent basis, and on 20 May 2022 Van Zyl AJ granted an order in their favour as follows:

'1. . . .

2. It is declared that the first applicant [Mr Seboka] 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 [Mr van Wyk] is the Acting Sheriff: Tlokwe (Potchefstroom) Higher and Lower Courts for the period 1 April 2022 to 28 February 2023.

4. It is declared that the applicants [Mr Seboka and Mr van Wyk] are not prohibited from performing any functions assigned to a sheriff by or under any law due to the first respondent's [the Board's] failure to issue to each of the applicants [Mr Seboka and Mr van Wyk] a fidelity fund certificate pursuant to the provisions of the Sheriffs Act 90 of 1986.

5. It is declared that the first respondent's [the Board's] failure to issue fidelity fund certificates to the applicants in the prescribed form is unlawful.

6. The first respondent [the Board] is directed forthwith to issue each of the applicants [Mr Seboka and Mr van Wyk] 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 [Mr Seboka and Mr van Wyk] cease to hold office.

7. The applicants [Mr Seboka and Mr van Wyk] are directed to return the fidelity fund certificates to the first respondent [the Board] within 30 (thirty) ordinary days after they cease to hold office.

8. The first respondent [the Board] shall pay the costs of this application.'

[7] Aggrieved, the Board approached Allie J and Van Zyl AJ for leave to appeal against their respective judgments. Both Allie J and Van Zyl AJ granted the Board leave to appeal to the full court.

The appeal before the full court

[8] It was common cause at the hearing of the appeal before the full court that Mr Seboka and Mr van Wyk had since vacated their positions as acting sheriffs. It was further common cause that the Deputy Minister had since been relieved of his delegated duties due to irreconcilable differences between him and the Board. It was, therefore, agreed by all concerned that the appeal had become moot as between the parties. However, the Board insisted that the full court should determine the merits of the appeal as it was in the interest of justice to do so for two reasons, first, because the Board was of the view that it was hamstrung in exercising its statutory powers to regulate the sheriffs' profession and second, there were conflicting judgments regarding the interpretation of s 30 of the Act.

[9] Unpersuaded, the majority judgment found that the appellant had failed to establish a proper basis for it to consider the merits of the appeal. The minority judgment, on the other hand, held the view that it would have exercised its discretion to entertain the appeal as there were, inter alia, conflicting judgments on the interpretation of s 30(1)(*c*) of the Act. I consider the issue of mootness first.

Mootness

[10] Section 16(2)*(a)* of the Superior Courts Act 10 of 2013 provides:

'(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.'

[11] A cause of action will be moot only if its resolution will have no practical effect.[4] The general principle is that courts do not decide issues of academic interest only.[5]A caveat to that principle is that a court has a discretion to enter into the merits of an appeal, notwithstanding the mootness of the issues on appeal, if there is a discrete issue of public importance that would affect matters in the future, and on which adjudication by the court is required.[6]

[12] As it did before the full court, the Board persisted in its contention that it was in the interest of justice that we should consider the merits of the appeal despite its mootness for the following reasons: first, in order to resolve the impasse caused by conflicting judgments in the Western Cape Division of the High Court (Western Cape Division), second, because the orders granted by Allie J and Van Zyl AJ are inconsistent with existing authority in the Western Cape Division and lastly, because the judgments in the Western Cape Division are in conflict with those of the North West Division of the High Court (North West Division) and the Gauteng Division of the High Court (Gauteng Division) on the interpretation of s 30 of the Act.[7]

Judgments of the North West Division and Gauteng Division

[13] The judgments in the North West Division and Gauteng Division emanated from events that occurred subsequent to the judgments of Allie J and Van Zyl AJ. Both Mr Seboka and Mr van Wyk continued to practice as acting sheriffs without fidelity fund certificates. That prompted the Board to approach the North West

---

[4] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) para 24.

[5] *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another* 2005 (1) SA 47 (SCA) para 41.

[6] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5.

[7] Section 30 of the Act is quoted in paragraph 38 of the dissenting judgment.

Division for an order interdicting Mr van Wyk from performing functions of a sheriff without a fidelity fund certificate.[8] That court interpreted s 30 of the Act to mean that it was impermissible for an acting sheriff to perform the functions of a sheriff without a fidelity fund certificate.

[14] Following on the order of the North West Division, the Minister issued letters removing Mr Seboka and Mr van Wyk as acting sheriffs in their respective areas of jurisdiction. Mr Seboka and Mr van Wyk subsequently challenged the Minister's decision by way of review in the Gauteng Division.[9] In dismissing that review application Van der Westhuizen J reasoned as follows regarding the interpretation of the word 'or' in s 30(1)(*c*) of the Act:

'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. 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 whole, it would make no sense not to require an acting sheriff to hold a Fidelity Fund Certificate.'

Judgment of the Western Cape Division (Sher J)

[15] The Board refers to a further judgment of the Western Cape Division which is in conflict with the judgments of Allie J and Van Zyl AJ. In *Ntsibantu v The Minister of Justice and Correctional Services*[10] (*Ntsibantu*) the applicant

---

[8] See *South African Board for Sheriffs v Stephanus Johannes Van Wyk and Others* (UM 169/2022) (20 September 2022) (*Van Wyk*).
[9] *Seboka and another v Minister of Justice and Correctional Services and others* (2022-39227) [2022] ZAGPPHC 966 (9 December 2022) (*Seboka*).
[10] *Ntsibantu v The Minister of Justice and Correctional Services* (156/18) [2018] ZAWCHC 51 (26 April 2018).

(Mr Ntsibantu) had been appointed as sheriff for the area of the Western Cape. Following numerous complaints from attorneys regarding certain irregularities committed by Mr Ntsibantu, including his failure to keep proper records of trust moneys, the Board took a decision to disqualify him from holding a fidelity fund certificate for the year 2017. Sher J found, inter alia, that the court had no power to issue a provisional fidelity fund certificate because such power lies with the Board.

Conflicting judgments

[16] The context in which each of the various courts considered the issues raised in this appeal is important. The order granted by Allie J in the Western Cape Division emanated from the Board's refusal to respond to the Deputy Minister as to whether it would issue fidelity fund certificates for the appointment of Mr Seboka and Mr van Wyk. Contrary to the issues that served before Van Zyl AJ and the North West and Gauteng Divisions, Allie J was not concerned with the interpretation of s 30 of the Act, which regulates the prohibition of performance of functions of sheriffs in certain circumstances. Allie J was concerned with the provisions of s 5(1B)(*a*) of the Act, in the context of the Board's continued refusal to advise the Deputy Minister whether it was prepared to issue fidelity fund certificates to the persons concerned. Allie J accepted the authority of the Board in relation to issuing fidelity fund certificate and was at pains to emphasise such acceptance, but found that there was a need for the court to intervene because of the Board's failure to make a decision. She reasoned:

'. . . I am persuaded that there is a need for this Court to intervene, on a limited basis of course. I find that the first respondent's failure to indicate in writing that it would issue, or that it would in principle issue a Fidelity Fund Certificate to each of these applicants, subject to the prescribed conditions set out in the Act, is unlawful.

It is not the refusal to issue the Fidelity Fund Certificate. It is the refusal to indicate in writing to the ministry that they would issue Fidelity Fund Certificates in principle, to these applicants that this Court is declaring unlawful.

This Court is not in a position to in fact prescribe to and take over the function of the board and to in fact, prescribe precisely who a Fidelity Certificate should be issued to. What this Court is saying is that the board must indicate in writing, as I have said previously, in principle, whether they will issue a Fidelity Fund Certificate and for a period, obviously that is a period the minister determines.'

[17] Section 5(1B)*(a)* of the Act provides:

'The Minister may only appoint a person referred to in subsection (1) [that is, as an acting sheriff] 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 Board that it is prepared to issue a fidelity fund certificate to that person.*' (emphasis supplied.)

The words 'subject to' in s 5(1B)*(a)* clearly mean that the Minister's appointment of an acting sheriff is not complete or final until confirmation is received from the Board that it will issue a fidelity fund certificate.

[18] Allie J was therefore correct in concluding that the conduct of the Board, in simply refusing to communicate to the Deputy Minister whether it would issue fidelity fund certificates to Mr Seboka and Mr van Wyk, was unlawful. The application before Allie J was essentially a review of a failure to make a decision. The order compelling the Board to 'confirm . . . that it agree[d] in principle . . . to issue the Fidelity Fund Certificates' must be understood in this context. The Board has not offered any explanation for its persistent non-response to the Deputy Minister's correspondence or its failure to express its refusal to issue the certificates. Its conduct in fomenting the stalemate that compelled Mr Seboka and Mr van Wyk to approach the court is unacceptable. Not only the Deputy-Minister but also Mr Seboka and Mr van Wyk were entitled to a decision from the Board and the reasons therefor.

[19] Be that as it may, as Allie J emphasised, the decision of the Deputy Minister to appoint Mr Seboka and Mr van Wyk was never challenged and could

not be ignored. Neither had the policy decision taken by the Board not to issue a fidelity fund certificate to retired sheriffs. Regrettably, within this context of strained relations between the Deputy Minister and the Board, the administration of the sheriffs' profession was compromised, as the full court found.

[20] The issue before Van Zyl AJ, however, was different from that which served before Allie J. Van Zyl AJ was concerned with the validity of the appointments of Mr Seboka and Mr van Wyk as acting sheriffs in circumstances where the Board had refused to issue fidelity fund certificates to them, after they had paid to the Board contributions as required in terms of s 30(1)*(c)*(ii) of the Act. The learned judge interpreted s 30 (1)*(c)* to mean that an acting sheriff does not need to hold a fidelity fund certificate to perform the functions of a sheriff as defined in the Act. She held that:

> 'The Act expressly provides that an acting sheriff needs to comply with one of the two requirements posed: 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 s 30(a) and (b).
>
> It is common cause in the present matter that [Mr Seboka and Mr van Wyk] have paid their contributions to the Board.'

[21] The conclusion reached by Van Zyl AJ is clearly in conflict with those of the North West and Gauteng Divisions. My colleague, Kathree-Setiloane JA, deals more pertinently with the requirement for a fidelity fund certificate under s 30 of the Act in her dissenting judgment. I agree with the conclusion she reaches on that issue. Indeed, although the full court considered that the issues had morphed in the applications that served before the North West and Gauteng Divisions, such that those courts dealt with additional factors not presented before Allie J and Van Zyl AJ, it is clear that the issue whether an acting sheriff must be in possession of a fidelity fund certificate to perform the duties of a sheriff,

remains live and is likely to have undesirable impact on the functioning of the Board and acting sheriffs. A decision of this Court is necessary. In this judgment I conclude that the appeal against the order of Allie J cannot succeed because the issues considered in her judgment do not impact on the provisions of s 30 of the Act. That Court only considered a review of the Board's failure to indicate whether it was prepared to issue a fidelity fund certificate to Mr Seboka and Mr van Wyk under s 5(1B) of the Act.

[22] In terms of s 4(1) of the Act, a person who has attained the age of 65 years (and has, for that reason, retired from active office) may be reappointed for such a period as the Minister determines, after consultation with the Board. Therefore, the age of 65 years is not, on its own, a disqualifier from further appointments as sheriff. Section 5 in terms of which the Deputy Minister sought to make the further appointments of Mr Seboka and Mr van Wyk, regulates the appointment of acting sheriffs. Within that context s 5(1) provides that the Minister may, in the prescribed manner, appoint a person as an acting sheriff, when a sheriff is: (a) unable to perform his or her functions; (b) is prohibited by any court of law from performing any particular functions in connection with a case; (c) for any reason ceases to hold office; or (d) has not been appointed for a specific area of jurisdiction of a lower or superior court. [11] In such instances the Minister appoints

[11] Section 5 of the Act provides:
'Appointment of acting sheriffs
(1) When a sheriff–
(a) is unable to perform his or her functions;
(b) is prohibited by any court of law from performing any particular function in connection with a case;
(c) for any reason ceases to hold office; or
(d) has not been appointed for a specific area of jurisdiction of a lower or superior court, the Minister may, in the prescribed manner, appoint a person to act, subject to the provisions of section 30, as sheriff–
(i) in the circumstances referred to in paragraph (*a*), until the sheriff is able to resume his or her functions;
(ii) in the circumstances referred to in paragraph (*b*), in order to perform the particular function; or
(iii) in the circumstances referred to in paragraphs (*c*) and (*d*), for such period as the Minister may determine.
(1A) The Minister may for the purposes of a particular suit and on the conditions that he or she may determine, appoint a person or another sheriff to act as sheriff–
(a) if objection is made against the service or execution of any process by the sheriff on the grounds that he or she has an interest in the suit or that he or she is related to a party to the suit; or
(b) if the Minister for any other reason considers it necessary.
(1B) The Minister may only appoint a person referred to in subsection (1)–

an acting sheriff until the sheriff is able to resume her functions, or for a specific function, or such a period as the Minister may determine.[12]

[23] As stated, s 5(1B) implies that a fidelity fund certificate is a pre-requisite for the appointment of acting sheriffs under s 5(1). The words 'subject to' in that section mean that the appointment of a sheriff or acting sheriff by the Minister (or Deputy Minister in this case) is dependent on confirmation from the Board that a fidelity fund certificate will be issued to the appointee. As articulated by Kathree-Setiloane JA, in her dissent, 'the words "subject to" establish the dominance of the phrase "written confirmation from the Board that it is prepared to issue a fidelity fund certificate to that person" over the power of the Minister to appoint an acting sheriff'. She states, in this regard, that 'prior to appointing a person as an acting sheriff, the Minister must obtain written confirmation from the Board that it is prepared to issue a fidelity fund certificate to that person'. Although the Minister may make an appointment which is conditional upon the issuance of the required certificate, the Minister is still required to get written confirmation from the Board that it is prepared to issue a fidelity fund certificate to the appointee concerned. Confirmation from the Board is a jurisdictional requirement for the validity of the appointment of an acting sheriff under s 5(1) of the Act.

[24] It is clear therefore that the appointment of an acting sheriff under s 5 is a joint task performed by the Minister (or Deputy Minister in this case) and the Board. The appointment cannot be finalised and become effective if one of these parties does not perform its function under the section. The Board's failure to

---

(a) 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 Board that it is prepared to issue a fidelity fund certificate to that person; and
(b) on the conditions that he or she may determine.
(2) The provisions of section 4(2) and (3) shall apply *mutatis mutandis* in respect of an acting sheriff.'
[12] Section 5(1)*(d)*(i)–(iii) of the Act.

make a decision as required under s 5(1B) constituted an administrative action as defined in terms of s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It had an external effect on Mr Seboka and Mr van Wyk in that their appointment by the Deputy Minister was rendered ineffective. It was therefore reviewable under s 6 of PAJA because a mandatory procedure prescribed by s 5(1B) of the Act was not complied with. Allie J was therefore correct in reviewing the conduct of the Board and declaring it unlawful.

[25] The Board contends that Allie J ordered it to issue a fidelity fund certificate contrary to the relevant provisions of the Act. A careful reading of the judgment does not support this contention. Paragraph 2 of her order seems to follow the language used in s 5(1B). And when read in context, the reasoning of the court is clear. Curiously, the Board understands its responsibility under this section, yet nowhere in its papers does it provide a reason for its failure to act accordingly.

[26] For these reasons, even though the Board must succeed in this appeal against the judgment of Van Zyl AJ, a fair and just costs order is that each party should pay its own costs.

[27] I have already expressed my agreement with Kathree-Setiloane JA's interpretation of subsections 30(1)*(a)* and *(b)* of the Act in her dissenting judgment. I agree that these subsections prohibit sheriffs or their deputies from performing any functions assigned to a sheriff unless they are holders of fidelity fund certificates, and have obtained professional indemnity insurance to the satisfaction of the Board to cover any liability which they may incur in the course of the performance of their duties. I also agree with Kathree-Setiloane JA that: 'The purpose of these requirements is primarily to protect the public and the Board against financial losses resulting from the theft or misappropriation of

money or property entrusted to a sheriff during the course of carrying out his or her functions under the Act'. This is regulated by s 35 of the Act.[13]

[28] If I may add, s 31 regulates applications for fidelity fund certificates. It provides:

'31 Applications for fidelity fund certificates

(1) A sheriff may apply on the prescribed form to the Board for a fidelity fund certificate.

(2) An application referred to in subsection (1) shall be accompanied by the prescribed contribution.

(3) . . ..'

In terms of s 31 therefore, applications for a fidelity fund certificate must be accompanied by a contribution. This must apply to both permanent and acting sheriffs. An acting sheriff appointed under s 5(1) performs the same functions as a sheriff appointed in terms of s 2(1) of the Act. It is important to highlight that, even though certain provisions in the Act regulate matters pertaining to acting sheriffs separately from permanent sheriffs, the definition of 'sheriff' in s 1 of the Act includes, for purposes of Chapter II, III, IV or V, an acting sheriff.[14] As stated, acting sheriffs are also required to open and manage trust accounts. It is from the interest earned on such trust accounts that the contribution payable under ss 26(1)*(b)* and 30(1)*(c)*(ii) is payable.

---

[13] Section 35 of the Act provides:
'**Liability of Fund**
Subject to the provisions of this Chapter, moneys in the Fund shall be utilized to compensate any person who, after the commencement of this Act, suffers any loss or damage-
(a) as a result of-
(i) the failure of a sheriff to pay out or deliver to any such person any money or property over which he acquired control by virtue of his office, or the proceeds of the sale of such goods; or
(ii) the act or omission of a sheriff or his deputy sheriff in connection with-
(aa) the service or execution of any process;
(bb) the arrest of any person; or
(cc) subject to section 55, the rescue or escape of any person arrested by him or committed to his custody; and
(b) for which the sheriff, the sheriff and his deputy sheriff jointly or his deputy sheriff is liable in law.'

[14] For example, ss 5 and 30.

[29] For the above reasons, I conclude that the full court was correct in dismissing the appeal against the judgment and order of Allie J. I am, however, not persuaded that the full court was correct in dismissing the appeal against the judgment and order of Van Zyl AJ.

[30] In the result, I make the following order:

1 The appeal is upheld in part.

2 Each party shall pay its own costs.

3 The order of the full court is set aside and replaced with the following order:

'(a) The appeal against the order of the Western Cape Division of the High Court (Allie J) is dismissed with costs.

(b) The appeal against the order of the Western Cape Division of the High Court (Van Zyl AJ) is upheld.

(c) The order of Van Zyl AJ is set aside and replaced with the following order:

(i) The application is dismissed with costs.'

N E CHILI

ACTING JUDGE OF APPEAL

Kathree-Setiloane JA (dissenting):

[31] I have considered the judgment of Chili AJA, representing the majority. I raise no objection to the order upholding the appeal against Van Zyl AJ's

decision. I am, however, unable to concur with the order dismissing the appeal against Allie J's judgment. I likewise disagree with the costs order requiring each party to pay its own costs in the appeal.

[32] The facts underlying this appeal are not in dispute, and I accept those set out in paragraphs one to seven of the majority judgment. I nevertheless add the following facts, which are relevant to my dissent. During the litigation between the parties in the high court, Mr Seboka and Mr van Wyk continued performing the functions of a sheriff without a fidelity fund certificate. In and during April 2022, the Board charged them with improper conduct for alleged violation of certain provisions of the Act and the Sheriffs' Code of Conduct. In addition, the Board requested the Deputy Minister to terminate their 31 March 2022 appointments or suspend them in terms of s 50 of the Act[15] pending the outcome of the appeals in the high court.

[33] On 19 August 2022, the Deputy Minister responded to the Board confirming that the Minister had, on 11 August 2022, relieved him of the delegated functions and powers in terms of the Act with immediate effect.[16] In order to protect the Fidelity Fund for Sheriffs (the Fund),[17] on 31 August 2022, the Board instituted two urgent applications, one in the Gauteng Division and the other in the North West Division, against Mr Seboka and Mr van Wyk respectively. The Board sought to interdict Mr Seboka and Mr van Wyk from performing the functions of a sheriff without a fidelity fund certificate pending the outcome of the appeals against the Allie J and Van Zyl AJ orders.

[15] Section 50(1) of the Act provides:
'**Suspension of sheriff**
(1) The Minister may suspend a sheriff from his office at any time before the sheriff is charged with improper conduct in accordance with this chapter, or after he has been so charged.'
[16] *Seboka* fn 9 above para 9.
[17] '**"Fund"** means the Fidelity Fund for Sheriffs established by section 26(1).'

[34] On 14 September 2022, the application in the Gauteng Division was struck from the roll for want of urgency.[18] On 15 September 2022, the application against Mr van Wyk came before Hendricks JP in the North West Division: In *Van Wyk*[19] Hendricks JP made, inter alia, the following order:

'3. … [Mr van Wyk] is interdicted from performing the functions of a Sheriff in terms of the Sheriff's Act 90 of 1986, without a valid Fidelity Fund Certificate issued by the South African Board for Sheriff's (SABFS).'

In making that order, Hendricks JP said:

'… The gist of the contentions on behalf of [Mr van Wyk] is that the provision [section 30(1)(c)] as it stands makes it plainly clear that in the case of the appointment of an Acting Sheriff, (s)/he should be the holder of a FFC or have paid the prescribed contributions to the Board. Emphasis was placed on the use of word 'or' meaning in the alternative. This subsection of the Act should not be read in isolation and disjunctively with what is contained in section 5(1B) which empowers the Deputy Minister to attach conditions for the appointment of an Acting Sheriff. It must be read conjunctively.'

[35] Mr van Wyk's application for leave to appeal was refused by Hendricks JP and the subsequent application for leave to appeal to this Court also failed. During September 2022, following the Minister's withdrawal of the Deputy Minister's delegated powers, the Board requested the Minister to suspend and/or remove Mr Seboka and Mr van Wyk as acting sheriffs, on the basis that they were in breach of their appointment letters. On 22 September 2022, the Minister wrote to Mr Seboka and Mr van Wyk requesting reasons why they should not be removed as acting sheriffs.[20] On 10 October 2022, the Minister recalled their acting appointments and subsequently appointed two other persons as acting sheriffs in the respective areas of jurisdiction.

---

[18] *South African Board for Sheriffs v TF Seboka and two Others* (Case No: 2022-020856).

[19] *Van Wyk* fn 8 above.

[20] The full court judgment incorrectly states that the Board's request for removal was made to the Deputy Minister as opposed to the Minister. Also see *Seboka* fn 10 above (per Van der Westhuizen J) paras 29 and 30.

[36] On 18 October 2022, Mr Seboka and Mr van Wyk instituted an urgent review application in the Gauteng Division seeking to review and set aside the decision of the Minister to remove them as acting sheriffs. In this application: *Seboka*,[21] Van der Westhuizen J dismissed their application with costs on the scale as between an attorney and client. In so doing Van der Westhuizen J held as follows:

'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. 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.'

Mr Seboka and Mr van Wyk did not appeal the decision of Van der Westhuizen J.

[37] In and during April 2023, the parties agreed to consolidate the appeals against the orders of Allie J and Van Zyl AJ. They were heard by the full court on 19 July 2023. The majority dismissed both appeals on the basis of mootness, as Mr Seboka and Mr van Wyk had since vacated their position. It concluded that there was no reason to consider the merits because there were no conflicting

---

[21] *Seboka* fn 9 above para 20.

judgments on the issues on appeal. The full court distinguished the related matters referenced above, on the basis that they 'were presented with additional facts for different remedies'. The minority held that it would have exercised its discretion to entertain the appeal as there were, inter alia, conflicting judgments on the interpretation of s 30(1)*(c)* of the Act.

Conflicting judgments

[38] The primary issue for determination, before Van Zyl AJ, was whether the Act requires an acting sheriff to hold a fidelity fund certificate to perform the functions of a sheriff. Section 30 of the Act provides:

'**30 Prohibition of performance of functions of sheriff in certain circumstances**

(1) A sheriff or his or her deputy shall not perform any functions assigned to a sheriff by or under any law unless–

(a) the sheriff is the holder of a fidelity fund certificate; and

(b) the sheriff obtains 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; or

(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.

(2) The Board may prescribe, in connection with indemnity insurance referred to in subsection (1)*(b)*, the minimum cover 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 therefrom.

(3) The Board may, on such conditions as it may determine, exempt a sheriff appointed under section 5(1A) from the provisions of subsection (1)*(b)* or *(c)* of this section.'

[39] Van Zyl AJ interpreted s 30(1)*(c)* to mean that an acting sheriff does not need to hold a fidelity fund certificate to perform the functions of a sheriff as defined in the Act. He stated as follows:

'The Act expressly provides that an acting sheriff needs to comply with one of the two requirements posed: he must either be the holder of a fidelity fund certificate, <u>or</u> 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 s 30(a) and (b).

It is common cause in the present matter that [Mr Seboka and Mr van Wyk] have paid their contributions to the Board.'

[40] This interpretation of s 30(1)*(c)* is in conflict with the interpretation attributed to it by Van der Westhuizen JA in *Seboka*, and Hendricks JP in *Van Wyk*. Taking into consideration the conflicting judgments on the interpretation of s 30(1)*(c)* of the Act, it is in the interests of justice to determine the appeal against the judgment and order of Van Zyl AJ, albeit that the issues are moot. Mootness is, however, not a bar to determining an appeal. An appeal court has the discretion to determine an appeal that is moot where it is in the interests of justice to do so.[22] Considerations that would weigh in favour of determining an appeal that is moot are, inter alia, that: (a) the issue is a discrete legal one of public interest that would affect matters in the future on which the adjudication of the court is required,[23] and (b) there are conflicting judgments by different courts, 'especially where an appeal court's outcome has binding implications for future matters'.[24]

[41] Not only are there conflicting judgments on the interpretation of s 30(1)*(c)* of the Act, but the issue for determination in the appeals is a discrete legal one that turns on the interpretation of two core provisions of the Act: s 5(1B) and

---

[22] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 11. See also *Road Traffic Management Corporation v Tasima (Pty) Ltd* [2020] ZACC 21; 2020 (10) BCLR 1227 (CC); (2020) 41 ILJ 2349 (CC); [2020] 12 BLLR 1173 (CC); 2021 (1) SA 589 (CC) para 127.
[23] *Centre for Child Law v Hoërskool Fochville and Another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) (*Centre for Child Law*) para 14
[24] *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and Another* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) para 49; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) para 27.

s 30(1)*(c)*. The interpretation of these two provisions is integral to the question of whether an acting sheriff must hold a fidelity fund certificate to perform the functions assigned to a sheriff. A determination of this issue would, in my view, achieve legal certainty on this question, as well as on the statutory powers of the Board to issue fidelity fund certificates. Significantly in this respect, the orders of Allie J and Van Zyl AJ are far-reaching with grave implications for the statutory powers of the Board. It is, therefore, in the interests of justice to resolve the appeal against the order of Allie J, as the interpretation of s 5(1B) of the Act will have a direct bearing on the correctness or otherwise of her order.

The merits

[42] The principles of statutory interpretation are well-established.[25] *In Cool Ideas 1186 CC v Hubbard and Another*,[26] the Constitutional Court held that:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
(a) that statutory provisions should always be interpreted purposively;
(b) the relevant statutory provision must be properly contextualised; and
(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'

[43] The starting point in determining whether an acting sheriff is required to hold a fidelity fund certificate to perform the functions of a sheriff is s 5 of the Act.[27] In terms of this section, the Minister may, in the prescribed manner, appoint

---

[25] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18 and *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.
[26] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.
[27] Section 5 of the Act fn 11 above.

a person as an acting sheriff, when a sheriff is: (a) unable to perform his or her functions; (b) prohibited by any court of law from performing any particular function in connection with a case; (c) for any reason ceases to hold office; or (d) has not been appointed for a specific area of jurisdiction of a lower or superior court.

[44] Section 5(1B)*(a)* of the Act provides that the Minister may only appoint a person as an acting sheriff in terms of s 5(1) of the Act 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 Board that it is prepared to issue a fidelity fund certificate to that person. This provision imposes two jurisdictional requirements that the Minister must meet before appointing a person as an acting sheriff in terms of s 5(1) of the Act. In relation to the first requirement, the Deputy Minister had filed an affidavit contending that only the Chief Magistrate has to be consulted. This, as correctly contended for by the Board, was erroneously accepted by Van Zyl AJ in her interpretation of s 5(1B)(*a*) of the Act, as it is inconsistent with its express wording.

[45] Properly construed, the head of the court who should be consulted will depend on the level of the court in respect of where the appointment is to be made. If the vacancy for an acting sheriff is in the high court, then it will be the relevant Judge President who must be consulted. If, on the other hand, the vacancy is in the district court, then the Chief Magistrate of the district concerned must be consulted.

[46] Concerning the latter requirement in s 5(1B)*(a)* of the Act, the use of the phrase 'subject to' signifies that the appointment of an acting sheriff by the Minister is dependent on obtaining written confirmation from the Board that it is prepared to issue the person concerned with a fidelity fund certificate. The words

'subject to' establish the dominance[28] of the phrase 'written confirmation from the Board that it is prepared to issue a fidelity fund certificate to that person' over the power of the Minister to appoint an acting sheriff. Construed in context, the words 'subject to' in s 5(1B) establish that prior to appointing a person as an acting sheriff, the Minister must obtain written confirmation from the Board that it is prepared to issue a fidelity fund certificate to that person. The latter is a jurisdictional requirement. The Minister cannot appoint an acting sheriff without such confirmation. This effectively means that if the Board says it is not prepared to issue the person concerned with a fidelity fund certificate, the Minister cannot make the appointment.

[47] This interpretation of s 5(1B)(*a*) is consistent with its purpose which is to ensure that: (a) the appointment of acting sheriffs is made with the input of the judicial head of the court in respect of whose area of jurisdiction the appointment is to be made; and (b) the appointed individual is suitable for the position, meets the requisite professional and financial standards, and is not disqualified from holding a fidelity fund certificate. The power to issue a fidelity fund certificate vests with the Board in terms of s 32 of the Act.[29] Section 32(1) of the Act provides that the Board will issue a fidelity fund certificate if it 'is satisfied, after consideration of an application referred in s 31,[30] that the sheriff is, having regard to the provisions of s 33,[31] a suitable person to hold a fidelity fund certificate'. If

---

[28] *S v Marwane* 1982 (3) SA 717 (A) at 747H.
[29] Section 32 of the Act provides:
'**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.'
[30] Quoted at paragraph 28 above.
[31] Section 33 provides:
'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;

a sheriff or acting sheriff possesses any of the disqualifying factors specified in s 33 of the Act, the Board shall not issue that sheriff or acting sheriff with a fidelity fund certificate.

[48] In *Ntsibantu*[32] Sher J held that the legislature conferred the power to issue fidelity fund certificates on the Board and not the courts, and that 'the courts should respect this lest they make themselves guilty of over-reaching'. He said as follows in this regard:

'If one considers the relevant provisions which confer upon the Board the power to issue such certificates it is apparent that they are not there to be granted simply for the asking and the Board is required to consider a number of issues before doing so. In this regard it has to be satisfied upon due consideration of an application for the issue of a fidelity fund certificate . . ., that the sheriff is a "suitable" person to hold such a certificate. To be so satisfied it is required to satisfy itself that the sheriff is not subject to any of a number of disqualifying factors which are set out in s 33. In this regard the section provides that the applicant must comply with a range of requirements pertaining to citizenship and permanent residence, age, solvency, mental status qualifications and experience and to having a "clean record".'[33]

(*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.
(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.'

[32] *Ntsibantu* fn 10 above para 28.

[33] *Ntsibantu* fn 10 above para 29.

[49] The factors that the Board may consider in deciding whether to issue a fidelity fund certificate to a sheriff or acting sheriff are not limited to the disqualifying factors in s 33. The Board may consider other relevant factors as well. For instance, if there are pending complaints against a sheriff or an acting sheriff that raise an issue about their fitness and propriety, it is within the remit of the Board to refuse to issue a fidelity fund certificate. Ultimately, it is for the Board to decide whether a sheriff or acting sheriff should be issued with a fidelity fund certificate and not the court. A court may only step in under specific circumstances – namely, when it is undisputed that the applicant for a fidelity fund certificate has met all the required formal, professional, educational, accounting and ethical standards, and the refusal to issue the certificate was driven by factors such as, for instance, malice or bad faith.[34] In this case, it is common cause that there were no such factors present.

[50] Allie J recognised, in her judgment, that a court should not usurp the functions of the Board on the issuance of a fidelity fund certificate. Yet she made an order that did exactly that. Allie J inter alia ordered the Board to confirm to the Deputy Minister, in writing, that it agrees in principle to issue Mr Seboka and Mr van Wyk with fidelity fund certificates, should he appoint them. This order is not competent, as the power to confirm whether or not it was prepared to issue Mr Seboka and Mr van Wyk with fidelity fund certificates vested with the Board. Importantly, in this context, Allie J made it clear in the judgment that she could not discern '. . . on what basis the Board can refuse to indicate that it has no objection to the issuing, in principle, of a fidelity fund certificate to each of the applicants', namely Mr Seboka and Mr van Wyk.

[34] *Seboka* fn 9 above para 28.

[51] To the extent that urgent relief was required from Allie J in favour of Mr Seboka and Mr van Wyk, the appropriate order would have been: (a) declaring unlawful the Board's failure to confirm in writing to the Deputy Minister whether or not it was prepared to issue fidelity fund certificates to them; and (b) directing the Board to immediately provide such written confirmation. When the Minister (or a duly delegated official) nominates a candidate for appointment as an acting sheriff under s 5(1B) of the Act, the Board's role is not simply to comply and rubber-stamp the appointment. Unfortunately, Allie J's order was aimed at achieving precisely that.

[52] Van Zyl AJ likewise erred in holding that, '[b]ecause the Deputy Minister is clothed with the legal authority to appoint [Mr Seboka and Mr van Wyk] as acting sheriffs, the Board must obey this decision or approach a court of law to set the appointments aside'. As has been indicated, the Minister's power to appoint an acting sheriff is conditional upon written confirmation from the Board that it is prepared to issue the appointee with a fidelity fund certificate. In the absence of such confirmation, the Deputy Minister exceeded his powers and acted in breach of the principle of legality by appointing Mr Seboka and Mr van Wyk as acting sheriffs. Van Zyl AJ therefore erred in holding that their appointments by the Deputy Minister were lawful, and in subsequently issuing orders declaring them to be acting sheriffs.

[53] Van Zyl AJ's order declaring the Board's failure to issue fidelity fund certificates to Mr Seboka and Mr van Wyk unlawful is equally misguided. So too is the consequential order directing the Board to issue such certificates, to each of them, for the duration of their appointments. This overreach into the domain of the Board is incompatible with the principle of separation of powers.[35]

---

[35] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 48.

[54] This brings me to the question of whether an acting sheriff is required under the Act to hold a fidelity fund certificate. Section 30(1) of the Act prohibits a sheriff or their deputy from performing any functions assigned to a sheriff unless they are holders of a fidelity fund certificate, and they obtain professional indemnity insurance to the satisfaction of the Board to cover any liability which they may incur in the course of the performance of their duties. The purpose of these requirements is primarily to protect the public and the Board against financial losses resulting from the theft or misappropriation of money or property entrusted to a sheriff during the course of carrying out his or her functions and duties under the Act.

[55] By the annual issuance of a fidelity fund certificate to sheriffs, the Board essentially confirms that the particular sheriff has met the specific requirements, including maintaining proper bookkeeping and audit compliance, paying all prescribed contributions into the Fund, and not being subject to any disqualifications contemplated in s 33 of the Act. The certificate acts as a licence to operate, and provides professional credibility to the holder.

[56] The definition of the term 'sheriff' in s 1 of the Act includes for purposes of Chapter II, III, IV or V an acting sheriff. The provisions of s 4(2) and (3) in Chapter I also apply to an acting sheriff.[36] An acting sheriff appointed under s 5(1) also carries out the same functions as a sheriff appointed in terms of s 2(1) of the Act. A sheriff is also required to open and manage a trust account in which to deposit monies received from, amongst others, sales in execution, litigation settlements, etc.[37] However, s 30(1)(*c*)*(i)* and *(ii)* of the Act provide that in the

---

[36] These provisions deal with the circumstances in which a sheriff or acting sheriff may vacate office or be removed from office by the Minister in consultation with the Board.
[37] Section 22 of the Act.

case of an acting sheriff, they must either hold a fidelity fund certificate or have paid the prescribed contribution to the Board.

[57] It was contended, on behalf of Mr Seboka and Mr Van Wyk, that the conjunction 'or' must be given its ordinary meaning as according a choice, to an acting sheriff, between holding a fidelity fund certificate or paying the prescribed contribution to the Board which is paid into the Fund in terms of s 22 of the Act. These contributions are paid into the Fund which the Board is required to establish in terms of s 26 of the Act. In terms of s 35 of the Act, the primary purpose of the Fund is to compensate members of the public who may suffer pecuniary loss due to, amongst others, the dishonesty of a sheriff contemplated in the section.[38]

[58] In accordance with the established principles, s 30(1)*(c)*(*i*) and (*ii*) must be construed contextually and with due regard to the purpose of a fidelity fund certificate as contemplated by the Act.[39] To interpret 'or' as having its ordinary meaning (indicating a choice), as opposed to 'and' will result in an absurdity for the following reasons. It will mean that sheriffs are prohibited, in terms of s 30(1)*(a)* of the Act, from performing the functions assigned to a sheriff unless they hold a fidelity fund certificate, but an acting sheriff is not. Yet they perform the same functions and expose members of the public and the Board to the same risk. To construe 'or' as giving acting sheriffs a choice would, therefore, defeat the legislative purpose of s 30(1)(*c*)(*i*) of the Act and render it nugatory.

[59] As aptly described in *Ntsibantu*,[40] a fidelity fund certificate is, in effect '. . . a certification by the Board to the public at large that the holder thereof is

---

[38] Section 35 of the Act fn 14 above.
[39] *Endumeni* fn 26 above para 18.
[40] *Ntsibantu* fn 11 above para 39.

competent and may be trusted and that in the event that he/she were to make themselves guilty of some misconduct, misappropriation or culpable neglect which results in loss, either their personal professional indemnity insurance or the Sheriff's Fidelity Fund will make good such loss'. In essence, the fidelity fund certificate instils public confidence in the judicial process and the office of the sheriff. It ensures that the public has guaranteed recourse if a sheriff or an acting sheriff breaches their position of trust by, for instance, stealing monies. This mitigates the risk of having to pursue lengthy and uncertain civil proceedings against a sheriff or an acting sheriff as the case may be. To attribute the ordinary meaning to 'or' will also render nugatory the requirement in s 5(1B)*(a)* of the Act which makes the appointment of an acting sheriff by the Minister subject to written confirmation from the Board that it is prepared to issue the person to be appointed with a fidelity fund certificate.

[60] Thus, on a purposive and contextual reading of s 30(1)*(c)* of the Act, an acting sheriff is prohibited from performing the functions assigned to a sheriff unless the acting sheriff is the holder of a fidelity fund certificate. To read 'or' as 'and' is eminently sensible and constitutionally compliant, as it ensures that sheriffs and acting sheriffs are treated equally under the law in terms of s 9(1) of the Constitution. Accordingly, Van Zyl AJ erred in holding that an acting sheriff may in terms of s 30(1)*(c)* perform the functions of a sheriff without a fidelity fund certificate as long as he/she has paid the prescribed contribution.

Costs

[61] Were I in the majority, I would order that the costs of the appeal in this Court and in the full court follow the outcome. The full court held that the Board ought to have known that the appeals were moot after 9 December 2022, but it erred in reaching that conclusion. As for the costs in the high court, Allie J imposed a punitive costs order against the Board on the basis that 'there was no

basis upon which the [Board] ought to have opposed this matter'. The relief originally sought by Mr Seboko and Mr van Wyk was for a declaratory order that the Board's failure to issue them fidelity fund certificates was unlawful, together with a direction that the Board immediately issue such certificates. Allie J did not grant that relief because it was not competent. The Board was therefore entitled to oppose the application. Having regard to the order I would grant if I were in the majority, Mr Seboko and Mr van Wyk would achieve only partial success. In these circumstances, a fair and just order would be that each party bear its own costs.

[62] For these reasons, I would conclude that the full court erred in dismissing the appeals against the judgments and orders of Allie J and Van Zyl AJ. The appeal against the full court judgment and order should accordingly be upheld with costs.

[63] In the result, I would make the following order:

1 The appeals are upheld with costs including those of two counsel.

2 The order of the full court is set aside and replaced with the following orders:

'(a) The appeals against the orders of Allie J and Van Zyl AJ are upheld with costs.

(b) The order of Allie J is set aside and replaced with the following order:

(i) The failure of the first respondent to confirm in writing to the second respondent, in terms of s 5(1B) of the Sheriff's Act 90 of 1986 (the Act), whether or not it is prepared to issue fidelity fund certificates to the first and second applicants is declared unlawful;

(ii) The first respondent is directed to confirm in writing to the second respondent, in terms of s 5(1B) of the Act, whether or not it is prepared to issue fidelity fund certificates to the first and second applicants, should they be appointed as acting sheriffs.

(iii) Each party is to pay its own costs.

(c) The order of Van Zyl AJ is set aside and replaced with an order dismissing the application with costs.'

F KATHREE-SETILOANE

JUDGE OF APPEAL

Appearances:

For appellant:	J G Wasserman SC and T V Mabuda
Instructed by:	Herold Gie Attorneys, Cape Town
	McIntyre van der Post, Bloemfontein
For first and second respondent:	M G Roberts SC
Instructed by:	Moolman and Pienaar Incorporated, Potchefstroom
	Pieter Skein Attorneys, Bloemfontein.