

MEMORANDUM

SHERIFF VRYBURG APPLICATION

Herewith a few pointers to consider which I hope will assist in your preparation.

1. Judicial basis of money payable – to sheriff

1.1. Magistrates Court Rule 34(i)

The fees and charges to be taken And in the case of any other sheriff those proscribed in Part II of the said Table and Annexures.

(The use of taken instead of will be payable to the sheriff is unusual. Consider: To take fees and charges, presupposes it must already be available, thus paid to the sheriff prior to service.)

Downside: The wording of MCR 34(2), you may require this account to be taxed and vouched before payment.

Consider: Does it indicate payment only after service.

1.2 Uniform Rules of Court:

URC 68(1) The fees and charges contained in the appended tariff shall be chargeable and allowed to sheriffs.

Consider: Again unusual use of words – shall be allowed and chargeable.

2. Obligation to do serve/execute:

2.1. Magistrates Court Rule 8(1) and (2)

Process to be served by sheriff without unreasonable delay

2.2 Superior Court Sec 43 Superior Courts Act 2013

The sheriff must, subject to the rules execute all sentences; judgment writs; summonses etc.

Consider: Sec 43(4) Refusal by the sheriff to act is subject to review by the court ex parte.

3. Judicial basis of sheriffs claim to be paid

3.1 Reason for importance to determine judicial basis:

It might make a difference to the form of lien of the sheriff either.

- a. debtor creditor lien based on debtor or creditor relationship or;
- b. lien based on enrichment

The debtor creditor lien covers the amount of the debt whereas the enrichment liens only cover improvement cost, storage cost or preservation cost.

All liens become effective ex lege.

3.2 Possible judicial basis of indebtedness to sheriff.

3.2.1 Implied contract

Consider: By instructing the sheriff to serve or execute the creditor practically agrees to pay prescribed fees of the sheriff. The judicial basis is thus ex contractu and the debtor creditor lien for the amount of debt is covered by lien.

3.2.2 Ex Lege

If the obligation to pay the sheriff is ex lege, because of the wording of MCR 34(1) or URC 68(1), it might mean that sheriff is only entitled to lien based on enrichment (The quantum is more difficult to prove)

Unless:

Consider: Does a debtor creditor lien cover all debtor creditor relationships whether created by contracts, delicts, ex lege etc.

(Case law I could find only refer to debtor creditor relationship created ex contractu)

4. Will the sheriff have a lien.

Subject to what have been said above.

4.1 If sheriff have debtor creditor lien enough authority exist to cover position of sheriff to be covered under lean.

See attached case of: BOTHA V MCHUNO & CO 1992 (4) SA 740 (N)

See also vd Merwe Sakereg p717 attached. (Other textbooks also refer to these positions)

Consider: MCR 8(3) The sheriff must in terms of rules deliver a return of service to the court. Will lien entitle sheriff not to notify the court.

Consider: Documents served can also be withheld in brought principle applied in Botha Case above.

5. Payment of a deposit before service:

Consider: The sheriff as officer of the court has an absolute obligation to serve process. (See MCR 8(1) and Superior Court Act Sec 43(1)

Authority to ask for payment in advance.

I could find no authority but in the ancient common law.

Attached page from The Selective Voet being commentary on the Pandects p107. According to case law in footnote it has been accepted in our law.

6. My view:

Sheriff has to perform and cannot refuse. Becomes entitled to payment on bases of implied contract based on fees and tariff (34(1) and 68(1)) Lien in favour thus ex contractu for debt in terms of tariff (or debtor creditor relationship can also excats, ex lege and debtor creditor lien this still excot.)

Common law will have to be stretched to allow for deposit.

Consider: Does a trade usage exist.

7. Apple cart overturned

After all the above wisdom I found the attached judgement that upsets many of the above arguments. I do forward my view to maybe assist in your preparation.