



Reportable:	Yes/No
Circulate to Judges:	Yes/No
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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO.: 424/2019
Date heard: 05-03-2021
Date delivered: 25-02-2022

In the matter between:

Mathome Training Development (PTY) LTD

Plaintiff

and

**Finsch Diamond Mine Training Center
TNC Mining (PTY) LTD**

**First Defendant
Second Defendant**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The second defendant, TNC Mining (Pty) Ltd (TNC), has raised a special plea of prescription to the plaintiff's, Mathome Training Development (Pty) Ltd, claim for services rendered alternatively damages as a result of breach of contract. It is not in dispute that the plaintiffs had entered into a Service Level Agreement (SLA) with the first defendant Finsch Diamond Mine Training Centre, during 2013 and in terms of which, in a nutshell, the plaintiff would provide mining training services to TNC.

2. In terms of clause 4.1 of the SLA the work would commence on 1 July 2013 until the end of the contract term of TNC with the first defendant or until the plaintiff's contract with TNC came to an end, whichever event occurred first.
3. In terms of Clause 5.1 of the SLA, the fee for any training intervention, which includes all charges for the work to be done would be for the account of TNC.
4. The plaintiff alleges in its particulars of claim that TNC summarily and without proper cause terminated the agreement on 3 March 2016 at which time there was an amount outstanding for services rendered by the Plaintiff.
5. On 26 February 2019 the plaintiff caused the summons to be issued out of this court. On 27 February 2019 the sheriff served the summons on TNC by affixing it to the outer postbox of the *domicilium citandi et executandi* chosen by the first defendant, which in terms of the SLA is P.O Box 7, Lime Acres. The sheriff's return of service also states that *"the same copy was served on the 27th February 2019 via registered post to P.O Box 07 Lime Acres, 8410. O.D Nnosang collected the parcel on the 6th March 2019 as informed by Post Office officials."*
6. TNC's special plea reads as follows:

"1.1 The Plaintiff's claim is based on a contract which was concluded on 4 December 2013. The contract was cancelled by the Second

Defendant on 3 March 2016 on which date, the Plaintiff's claim fell due;

- 1.2 *The Plaintiff's summons was served on the Second Defendant on 8 March 2019, which is more than three years after the date on which the claim arose;*
 - 1.3 *In the premises, the Plaintiff's claim is prescribed in terms of Act 68 of 1969.*
 - 1.4 *In the alternative to the above, the Plaintiff's claim is premised on monthly invoices payable on receipt, prescription commenced to run in respect of each invoice when same became due, there was a three-year prescriptive period in respect of each such debt.*
 - 1.5 *The summons was served on 8 March 2019, more than three years after the date on which the last invoice was received being 3 March 2016;*
 - 1.6 *Therefore the plaintiff's claim has been extinguished by prescription in terms of section 11(d) of the Prescription Act 68 of 1969."*
7. It will be noted from the special plea that proper service in terms of Rule 4 was not placed in issue. It however became an issue during argument before me.
 8. Ms Carstens, who appeared for TNC, contended that despite the plaintiff being aware of the address of the principal place of business of TNC, as can be gleaned from the Particulars of Claim, the plaintiff elected to serve on the *domicilium citandi et executandi* chosen by the first defendant who in turn only handed the summons to TNC on 8 March 2019. The argument is further that TNC was not even a party to the SLA but had entered into its own agreement with the plaintiff.

9. As mentioned, issues complained of in the above paragraph were not raised in the special plea and would have been best addressed in a Rule 30 application for the setting aside of the service as an irregular step, had TNC chosen to do so. See *Scott and Another vs Ninza* 1999 (4) SA 820 (E) and for a contrary view, though not decided, see *Prism Payment Technologies v Altech Information Technologies (Pty) Ltd and others* 2012(5) SA 267 (GSJ)).
10. Be that as it may, the question to be decided is whether the summons has been served timeously on TNC in order to interrupt prescription. Rule 4(1)(a)(iv) which relates to service at a chosen *domicilium* reads as follows:

"(4)(1) (a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

(i)

(ii)

(iii)

(iv) if the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen;"

11. Section 15(1) of the Prescription Act 68 of 1969 reads as follows:

"5 Judicial interruption of prescription.-

(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

12. It appears to be common cause that the alleged debt became due on 3 March 2016 and in terms of s 11(d) of the Prescription Act would have prescribed after 3 years, therefore on about 3 March 2019. TNC's argument is that since service of the summons was effected at the earliest on 6 March 2019 when the first defendant collected it or 8 March 2019 when it was forwarded to TNC, the plaintiff's claim has prescribed.

13. The difficulty encountered in this matter is that though Rule 4(1) (a)(iv) allows for service at a chosen *domicilium citandi*, the defendants chose a Post Office Box as their *domicilium*. In *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (AD) it was held at 5 J – 6 D that:

"It is a matter of frequent occurrence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: see Pretoria Hypotheek Maatschappij v Groenewald 1915 TPD 170.) It is a well-established practice (which is recognized 15by rule 4(1)(a)(iv) of the Uniform Rules of Court) that if a defendant has chosen a domicilium citandi, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found (Herbstein & Van Winsen, The Civil Practice of the Superior Courts of South Africa 3rd ed., p 210. See Muller v Mulbarton Gardens (Pty) Ltd. 1972(1) SA 328 (W) at 331 H-333 A, Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W) at 847 D-F.) It is generally accepted in our practice that the choice without more of a domicilium citandi is applicable only to the service of process in legal proceedings.(Ficksburg Transport (Edms) Bpk v Rautenbach & h Ander (supra)333 C-D). Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in principle be the same as the choice of a domicilium citandi et executandi (Cf the Ficksburg

Transport case ubi cit.), namely that service at the address chosen is good service, whether or not the addressee is present at the time."

14. Ms Carstens has referred me to the matter of *Absa Bank Limited v Mare and Others* (A56/2019)[2020] SAGPHC 372 (20 August 2020) where the court found, having accepted that Ms Mare was present at the property chosen as her *domicilium citandi* which was her private residence, that there was no proper service in terms of Rule 4(1)(a)(iv) in circumstances where the sheriff had affixed the summons to the grass, when the obvious methods of service would have been by handing the summons to her personally, or to an employee, if there was somebody present or by slipping it under or affixing it to the front door or placing it in a post box, if there was one (at paragraph 27).

15. The court in Mare's case *supra*, at paragraph 26 thereof, recognised however that "*the manner in which a process may be delivered or left at a domicile in terms of r 4 (1)(a)(iv) is not prescribed and depends on the prevailing circumstances.*"
(Own underlining)

16. *In casu*, and having chosen a Post Office box as domicile, it is difficult to imagine a situation where the sheriff would be able to hand over the process to a person at the *domicilium*, neither slipping it under the front door nor affixing it thereto. The sheriff, literally interpreting the Rule, delivered a copy of the summons at the chosen *domicilium* by affixing it to the postbox. Had this been the only form of service, it would most likely be found not

to be good service in terms of the Rule in light of the *Mare* judgment. However the sheriff went further and sent the summons by registered mail to the chosen *domicilium*.

17. Rule 4(i)(a)(iv) allows that service be affected “by *delivering or leaving a copy thereof at the domicilium so chosen.*” Section 7 of the Interpretation Act 33 of 1957 which deals with the meeting of service by post states as follows:

“7. Meeting of service by post. Where any law authorizes or requires any document to be served by post, whether the expression “serve”, or “give”, or “send”, or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

18. In *A to Z Bazaar (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 (AD), the meaning of “*delivery*” (albeit of a notice or statement) was discussed and given its ordinary meaning of “*to hand over, transfer, commit to another’s possession or keeping.*” In relation to delivery by post, the court stated that “*The post may be used, but only when the statement actually reaches “P.O Box 2648, Pretoria, is the delivery completed”* (at 477 C and 477 H thereof).
19. The fact that the first defendant decided to collect the summons on 6 March 2019 and only forward it to TNC on 8 March 2019, does in light of the above not mean that the summons was only served on either of those days. Legal service took place when

the summons reached P.O Box 7, Lime Acres, which would most likely be 27 February 2019 when the sheriff attended on the Post Office in Lime Acres to affix the summons to the postbox, or shortly thereafter. TNC's special plea of prescription thus stands to be dismissed.

The following order is made:

The special plea of prescription is dismissed with costs.



CC WILLIAMS
JUDGE

For Plaintiff: Adv. W Coetzee SC
Raphela Attorneys Inc.
c/o Mosikare Attorneys

For 2nd Defendant: Adv. T Carstens
Higgs Attorneys
c/o Engelsman Magebane Inc.