



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES
Of Interest to other Judges:	YES
Circulate to Magistrates:	YES

Case no: **1889/2024**

In the *ex parte* application of:

SHERIFF BLOEMFONTEIN WEST

Applicant

CORAM: JP DAFFUE J

HEARD ON: 11 APRIL 2024

DELIVERED ON: 01 JULY 2024

This judgment was handed down electronically by circulation to the applicant's representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16h30 on 1 July 2024.

Introduction

[1] The sheriff of Bloemfontein West, Mr CH de Wet, is the applicant in this *ex parte* application. He serves as sheriff for both the lower courts as well as the High Court in the Bloemfontein West area. On 2 February 1983 he was appointed as sheriff in terms of s 34(1)(a) of the now repealed Supreme Court Act 59 of 1959. His present appointment as sheriff is in terms of Chapter 1 of the Sheriffs Act 90 of 1986. I shall herein later refer to him as the sheriff.

[2] The sheriff and his staff have been experiencing difficulties since November 2023 in that magistrates in the Bloemfontein magisterial district (the Bloemfontein magistrates) are not prepared to accept certain returns of service of process effected on close corporations and companies. The burning issue is the service of process on these entities when there are no employees present at either the registered office, or

principal place of business, in situations when these premises are kept closed. According to the sheriff the manner in which he and his deputies have been effecting service of process in such instances have not become acceptable since approximately November 2023, although literally thousands of such services have been accepted as valid over the years. The same problem is not experienced in the Free State Division of the High Court in Bloemfontein. In order to obtain clarity, the sheriff seeks declaratory orders.

The relief sought

[3] The sheriff seeks the following relief:

'1. It is declared that it is lawful service (and/or sufficient service) for purposes of Rule 9(5) of the Magistrate's Court Rules in cases where a Close Corporation's or Company's registered address or place of business is kept closed, should the Applicant when effecting service of process on such Close Corporation or Company, affix a copy of the process to the outer door or principal door or security gate of the registered address or such place of business or place such copy in the post box at such registered address or place of business.

2. It is declared that it is lawful service (and/or sufficient service) for purposes of Rule 9(3)(e) of the Magistrate's Court Rules in cases where there is no employee at a Close Corporation or Company's registered office or at its principal place of business within the Court's jurisdiction, should the Applicant when effecting service affix a copy of such process to the main door of such office or to the main door of such registered office or place of business, or in any manner provided by law.'

The problems faced by the sheriff

[4] This matter was set down for hearing in the unopposed motion court. Legal submissions were made in the founding affidavit, but Adv Benade, acting for the sheriff, did not present me with any heads of argument and/or further submissions and/or authorities other than that set out in the founding affidavit. He submitted that the sheriff's case has been made out clearly and conclusively and concluded that declaratory orders as requested should be granted. According to the sheriff the Bloemfontein magistrates have decided to follow the judgments in *Magricor (Pty) Ltd v Border Seed Distributors CC*¹ (*Magricor*) in the Eastern Cape and *Barens en 'n ander v Lottering*² (*Barens*), a judgment by the full bench in the Western Cape. I reserved judgment.

¹ (1072/2020) [2021] ZAECGHC 2 (12 January 2021).

² 2000 (3) SA 305 CPD.

The applicable rules of court

[5] Sub-rule 9(3)(e) of the Magistrate's Court Rules reads as follows:

'(3) All process shall, subject to the provisions of this rule, be served upon the person affected thereby by delivering a copy thereof in one or other of the following manners:

(e) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there is no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law.' (my emphasis)

Sub-rule 4(1)(a)(v) of the Uniform Rules of Court (the High Court Rules) dealing with High Court practice is a mirror image of sub-rule 9(3)(e).

[6] Sub-rule 9(5) of the Magistrate's Court Rules reads as follows:

'(5) Where the person to be served keeps his or her residence or place of business closed and thus prevents the sheriff from serving the process, it shall be sufficient service to affix a copy thereof to the outer or principal door or security gate of such residence or place of business or to place such copy in the post box at such residence or place of business.' (my emphasis)

The High Court Rules do not have a corresponding sub-rule.

[7] It is necessary to deal with a preliminary issue. The sheriff's version, relying on an example of a typical return of service, is incorrect.³ In terms of this return of service the sheriff served the process 'by affixing a copy thereof to the principal door of the registered address of [the company] which is kept locked and thus prevents alternative service.' This is in order, but reliance is placed on sub-rule 9(3)(e), alternatively sub-rule 9(6). The reference to sub-rule 9(6) must be a typographical error in that the reference should be to sub-rule 9(5). Sub-rule 9(6) deals with service of an interpleader summons which may be effected upon the particular attorney of the party to be served and is accordingly irrelevant *in casu*.

Recent amendments to the rules

[8] It is apposite to mention that the Rules Board recently amended the High Court and the Magistrate's Court Rules. The Minister of Justice and Constitutional Services approved the amendments. The amendments to the Magistrate's Court Rules were promulgated in the Government Gazette of 8 March 2024 and those of the High Court on 12 April 2024. Although the Rules Board found it necessary to amend some of the High Court and the Magistrate's Court Rules pertaining to service of process, notices

³ Founding affidavit para 6.3, read with annexure B thereto.

and other documents, it did not amend either Magistrate's Court sub-rule 9(3)(e) or the High Court sub-rule 4(1)(a)(v) pertaining to service of process on a close corporation or company.

[9] As a matter of interest, the sub-rules applicable to service at the *domicilium* address of a person have been amended. Magistrate's Court sub-rule 9(3)(d) now reads as follows:

'if the person so to be served has chosen a *domicilium citandi*, by delivering a copy thereof at the *domicilium* so chosen: Provided that, where possible, service at the *domicilium* so chosen shall be effected by delivering a copy of the process to a responsible person apparently not less than 16 years of age: Provided further that the sheriff shall set out in the return of service the details of the manner and circumstances under which [such] service was effected;' (I underlined the relevant part which does not appear in the amended High Court sub-rule).

[10] Before the amendments to the two sub-rules the sheriff was only required to deliver a copy of the process at the *domicilium* so chosen. Now, where possible (in the case of the amended Magistrate's Court Rule), the process shall be delivered at the *domicilium* to a responsible person apparently not less than 16 of age. These amendments clearly indicate that the Rules Board was not satisfied with the mere delivery of process at the *domicilium*. More is now required. It is also apparent that the Rules Board was quite satisfied with the wording of sub-rules 9(3)(e) and 9(5). I accept that its members were fully aware of the judgments pertaining to these sub-rules, in particular the *Magricor* judgment, which I shall soon discuss.

Audi alteram partem and access to courts

[11] It remains a fundamental principle of our law that, 'as a general rule, no court may make an order against anyone without giving that affected person/entity the opportunity to be heard.'⁴ Therefore, the *audi alteram partem* principle still applies in this country. It affords the defendant/respondent (herein after referred to as the affected person/entity) an opportunity of denying or admitting their indebtedness. Notice of legal proceedings should be provided to the affected person/entity, failing which the presiding officer will not be provided an opportunity to hear them. Our law makers have acknowledged decades ago that it is not always possible to give personal

⁴ *Snyders and Others v De Jager* CCT 186/15 [2016] ZACC; 2017 (5) BCLR 604 (CC) (21 December 2016) para 9.

notice to affected persons/entities and consequently, our rules of court provide for various forms of notice. These will be discussed later herein.

[12] In line with the *audi alteram partem* principle, s 34 of our Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

Evaluation of the sheriff's submissions and authorities

[13] As mentioned, the sheriff seeks declaratory orders pertaining to sub-rules 9(3)(e) and 9(5) of the Magistrate's Court Rules. Insofar as I am called upon to interpret the aforesaid two sub-rules, I shall follow the unitary approach applicable to the interpretation of statutes and contracts. Several judgments have seen the light since *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*,⁵ citing it with approval. In *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa (AmaBhungane)*,⁶ the most recent judgment of the Constitutional Court on the topic, *Endumeni* was again referred to with approval. I quote from *AmaBhungane*:⁷

'[36] As always, in interpreting any statutory provision, one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.' (my emphasis; footnotes omitted)

[14] I shall firstly deal with service in terms of sub-rule 9(3)(e) and thereafter with the sheriff's submissions in respect of sub-rule 9(5). In adjudicating the application I accept that it is trite that the rules exist for the courts and not the other way around.⁸ Having said this, I also accept that if a court is absolutely prohibited by the rules, it is bound to follow the rules. However, if there is a construction which can assist the

⁵ [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

⁶ (CCT 385/21) [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) (20 September 2022).

⁷ *Ibid* para 36.; See also *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28; *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) para 52; and *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) paras 65 & 66.

⁸ *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783 A – B, cited with approval in *Arendsnes Sweefspoor CC v Botha (Arendsnes)* 2013 (5) SA 399 (SCA).

administration of justice, a court shall be entitled to adopt that construction. Shongwe JA stated the applicable principle as follows:⁹

'Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this — see *Simmons, NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 906. Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case; in essence it is a matter of fairness to both parties (see *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363G – H).'

Discussion relating to sub-rule 9(3)(e)

[15] According to the sheriff the Bloemfontein magistrates follow the *Magricor* judgment of the Eastern Cape in respect of sub-rule 9(3)(e) and the *Barens* judgment of the full bench in the Western Cape pertaining to sub-rule 9(5). In *Magricor* the court held that the jurisdictional requirements for service by affixing a copy of the process to the main door of a company's registered office or principal place of business 'are (a) that a responsible employee of the company must be present at such office or place of business; and (b) that such employee must be unwilling to accept service.'¹⁰ (my emphasis)

[16] Insofar as I intend to embark upon a process of reasoning culminating in a finding that differs from judgments in other divisions, I remind myself of the age-old *stare decisis* doctrine. The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectation, as well as to uphold the dignity of the court.¹¹ Having accepted this, it is trite that a judge of one division of the High Court is not bound by the decision of a single judge or the full bench of a different division of the High Court. Such decisions have 'persuasive force' only.¹²

[17] Once I have provided a historical background in respect of service of process on companies in particular, I shall return to the *Magricor* judgment. Nearly a century ago s 57(1) of the Companies Act 46 of 1926 (later repealed) stipulated that every company ought to have a registered address at which all process might be served. In an application for a winding-up order the service was not in accordance with rule 21(a)

⁹ *Arendsnies Sweefspoor CC v Botha (Arendsnies)* 2013 (5) SA 399 (SCA) para 18.

¹⁰ *Magricor loc cit* paras 13, 17 18 & 19.

¹¹ LAWSA vol 5 part 2, 2nd ed para 163; *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) paras 57, 59 & 61; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) paras 26 - 30.

¹² *Wille's Principles of South African Law*, 9th ed p 81 – 90 for a general discussion.

of the Rules of Court as at that time, but complied with the provisions of the aforesaid section. In that case the process was served upon a member of the firm of accountants who occupied the registered office of the respondent company. Although there was no compliance with the aforesaid rule, Ramsbottom J in *McGregor v Wepener and Co (Pty) Ltd*¹³ granted a provisional order for winding-up.

[18] The wording of s 170(1) of the previous Companies Act 61 of 1973 (the Act that repealed Act 46 of 1926) was in material respects the same as s 57(1) referred to in the previous paragraph. Again, litigants were allowed to ensure that service of process be effected at the registered office of an affected company. In *Chris Mulder Genote Ing v Louis Meintjies Konstruksie (Edms) Bpk*¹⁴ (Chris Mulder Genote Ing) Hartzenberg J considered the wording of sub-rule 4(1)(a)(v) of the High Court Rules and the fact that this sub-rule did not stipulate for a situation where the registered office of the company is housed in offices occupied by, for example auditors in which case, neither the partners, nor the employees of the auditor's firm could be regarded as employees of the affected company. The learned judge emphasised that s 170(1) of the 1973 Companies Act did not require that service of process at the registered office should be on an employee of the company.¹⁵ The learned judge also pointed out that litigation against the company was still possible insofar as service of process could be effected at its registered address in the absence of any other form of service.

[19] Registration of close corporations became available on 1 January 1985, being the date of commencement of the Close Corporations Act 69 of 1984. It is perhaps appropriate to mention that s 25 of this Act contains similar provisions than the two Companies Acts referred to above.¹⁶

¹³ 1948 (2) SA 1018 at 1021.

¹⁴ 1988 (2) SA 433 (T) B-D.

¹⁵ *Ibid* at 437 G.

¹⁶ Section 25 reads as follows: 'Postal address and registered office (1) Every corporation shall have in the Republic a postal address and an office to which, subject to subsection (2), all communications and notices to the corporation may be addressed. (2) Any- (a) notice, order, communication or other document which is in terms of this Act required or permitted to be served upon any corporation or member thereof, shall be deemed to have been served if it has been delivered at the registered office, or has been sent by registered post to the registered office or postal address, of the corporation; and (b) process which is required to be served upon any corporation or member thereof shall, subject to applicable provisions in respect of such service in any law, be served by so delivering or sending it.'

[20] The Companies Act 71 of 2008 has repealed the 1973 Companies Act, except insofar as Schedule 5 of the 2008 Act stipulates that chapter 14 of the 1973 Act remains applicable. Sub-sections 23(3) and (4) of Act 71 of 2008 read as follows:

'(3) Each company or external company must-

- (a) continuously maintain at least one office in the Republic; and
- (b) register the address of its office, or its principal office if it has more than one office-
 - (i) initially in the case of-
 - (aa) a company, by providing the required information on its Notice of Incorporation; or
 - (bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and
 - (ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.
- (4) A change contemplated in subsection (3) (b) (ii) takes effect as from the later of-
 - (a) the date, if any, stated in the notice; or
 - (b) five business days after the date on which the notice was filed.'

[21] The question that needs to be posed is how would it be possible to serve any process on a close corporation or a company that has closed its doors and discontinued its business activities, or changed its registered address without informing the Companies and Intellectual Property Commission (CIPC), formerly the Registrar of Companies. Clearly in such a case, it should be in order to serve at the registered address according to the CIPC's records. The CIPC keeps records of the registered offices of all close corporations and companies. It is a peremptory provision that these entities must have a registered address and in the event of a change of address the CIPC shall be notified immediately.¹⁷ It is trite that in the event of a close corporation or company failing to notify the CIPC of a change of its registered address, the office as originally registered remains the registered address of the close corporation or company for practical purposes.¹⁸

[22] In *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd (Brangus Ranching)*¹⁹ the full bench cited the *Chris Mulder Genote Ing* judgment with approval and stated as follows:

'[15] Service at the registered office of a company, in the absence of a responsible employee thereof, by delivery of the document to be served to a person at such address (not being an

¹⁷ Sub-sections 23(3) and (4) of the Companies Act 71 of 2008.

¹⁸ See the *dictum* of De Waal JP in *Geldenhuis Deep Ltd v Superior Trading Co (Pty) Limited* 1934 WLD 117 at 119, referred to often and more recently by Shongwe JA in *Arendsnes Sweefspoor CC v Botha (Arendsnes)* 2013 (5) SA 399 (SCA) para 15.

¹⁹ 2011 (3) SA 477 (KZP) para 15.

employee of the company) willing to accept such service, has been recognised as a good and proper service which is preferable to merely attaching the process, for instance, to the outer principal door of the premises.' (my emphasis)

In *Brangus Ranching* the sheriff's return of service did not indicate that Ms Abrahams to whom the process was delivered, was a responsible employee of the defendant company, but rather a person apparently in charge of the premises housing that company's registered address at the time of delivery.²⁰

[23] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*²¹ the applications were served on the applicants' registered address, that being the address of their former auditors. They changed auditors, but the registered address had not been changed. When default judgment was obtained against them, the applicants applied for rescission on the basis that the orders were erroneously sought or granted. They did not succeed in the court *a quo* and their application to the Supreme Court of Appeal was dismissed.

[24] In *Magricor* default judgment was granted in the absence of a notice of intention to defend. The summons was served by affixing a copy to the main entrance of the registered address and principal place of business of the defendant. The sheriff recorded that he found the 'defendant to be absent'. The defendant applied for rescission of the judgment in terms of High Court rule 42(1)(a) on the basis that the judgment was erroneously granted. The court held that there was indeed an error in the procedure causing the service to be improper. Consequently, the application for rescission succeeded. Several points were taken in order to rescind the judgment, *inter alia* that the alleged service was effected during the luncheon hour when the employees of the defendant were enjoying a normal lunch break. These were dismissed, but the court held as follows:²²

'In my view, the absence of employees of a company from the registered office or principal place of business does not permit the sheriff to effect service by affixing the process to the company's main door at its registered office or principal place of business. For that kind of service to be effected the employees of the company must be unwilling to accept service.' (my emphasis)

The learned judge came to this conclusion notwithstanding the fact that he was fully aware of the judgment of the Supreme Court of Appeal in *Arendsnes*. For the reasons

²⁰ *Brangus Ranching loc cit* para 11.

²¹ (2007) SA 87 (SCA) paras 24 & 25.

²² *Magricor loc cit* para 19.

contained herein I am not prepared to follow the approach in *Magricor* which is clearly wrong.

[25] The reliance in *Magricor* on the judgment in *Chris Mulder Genote Ing* is misplaced. Earlier in the same paragraph quoted by the learned judge, Hartzenberg J stated in *Chris Mulder Genote Ing* that it is from a practical view point more logical when service has to be effected at an auditor's firm or similar firm, to deliver the document to a person who identifies him or herself and who is prepared to accept service, rather than to affix the process to the door of the office. Fact of the matter is that *Chris Mulder Genote Ing* is authority that litigation against companies does not become impossible merely because a company has *de facto* ceased to conduct business. Service at the registered office may be effected.²³

[26] It cannot be argued that because the Rules Board insisted on the insertion of the word 'willing' that no effective service can take place at a close corporation's or company's registered office or principal place of business when its doors or security gates are locked and no employees are present. In my view, there is no *lacuna* in the rules which needs to be rectified by the Rules Board. In any event, one may assume that the members of the Rules Board are *au fait* with all judgments relating to service either in terms of the High Court, or the Magistrate's Court Rules.

[27] The word 'willing' must be seen in proper context. The learned judge in *Magricor* should have considered the words 'no such employee' in proper context with reference to the authorities quoted herein. If a close corporation or company has discontinued its business operations and effectively closed the doors of its registered office and/or principal place of business within the jurisdiction of a court, and accordingly leaving no personnel on the premises, it would in my view be sufficient to affix a copy of the process to the main door and/or security gate of such office or place of business. I prefer a sensible interpretation to one that is absurd and which will lead to an unbusinesslike outcome.

[28] In *Arendsnes*, Shongwe JA writing for the majority, reiterated that close corporations and companies 'should not be permitted to register an office address

²³ *Chris Mulder Genote Ing loc cit*, 436 H.

where it has no purpose or business and by so doing, frustrate services of summons and other court process upon it.'²⁴ The learned Justice of Appeal quoted the same *dictum* of the court in *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd*²⁵ which I referred to in paragraph 22 *supra* with approval. It is not repeated again.

[29] Leach JA, who agreed with the majority judgment in *Arendsnies*, felt obliged to make certain further comments which I whole-heartedly and with the necessary respect support. I quote the following:

'[26] Although the appellant had earlier conducted business at its registered address, by the time service took place it had long since ceased all business activities, was dormant and had no employees or representatives on the premises. Mr Pretorius, upon whom service was effected, was employed not by the appellant but by a different enterprise. ...

[27] In considering [the appellant's] argument, it must be remembered that even where peremptory formalities are prescribed by statute, not every deviation from the literal prescription results in nullity. The question always remains whether, in spite of the defect, the object of the statutory provision has been achieved — see *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22. In this regard, it is important to note that s 25 of the Close Corporations Act 69 of 1984 obliges a close corporation to have a reregistered address while s 25(2)(b) provides that 'subject to applicable provisions in respect of such service in any law', process which is required to be served upon a corporation may be served by being delivered to the corporation's registered office or by being sent by registered post to the registered office or postal address of the corporation. The clear intention of the legislature in providing for this was to ensure that a close corporation would have a known address at which process could be served, inter alia, to ensure that a third party who might wish to sue it knows where to serve and does not have to end up chasing ghosts in a situation such as this where the corporation has become dormant.

[28] Essentially service at the registered address of a corporation is sufficient to amount to service on the corporation. As was correctly conceded by counsel for the appellant, as a regular practice the courts accept as effective the service of a summons upon an employee of a firm of accountants or auditors whose office is used as a corporation's registered address, but sought to distinguish those cases from the present on the basis of a link between the accountants or auditors and the corporation which is missing in the present case. In my view this misses the point. The importance is the fact that service at the registered address of the corporation, even if not on one of its employees, is regarded as substantial compliance with the rules.

[29] In the present case the summons was delivered to a responsible person at the registered address of the appellant. If no-one had been present on the premises, there would have been strict compliance with the rule had the summons been affixed to the door. In my view the action of handing it to a responsible person at the premises, after explaining the exigencies of the matter, amounted to substantial compliance with the rule. It resulted in the summons being delivered to the registered

²⁴ *Arendsnies loc cit* para 16.

²⁵ 2011 (3) SA 477 (KZP) para 15.

address of the appellant, that being the purpose not only of the rule which authorises the fixing of a summons to the door of the premises, but also of s 25 of the Close Corporations Act.

[30] The court a quo expressed the view, with which I agree, that a corporation 'which fails to ensure that there is a responsible person present at the premises appointed as its registered address, does so at its peril' and should not be allowed to bemoan its lot should the process not come to its attention'. Be that as it may, there was substantial compliance with the rule relating to service upon a corporation, and the high court correctly dismissed the special plea.' (my emphasis)

Although *Arendnes* dealt with service at the registered address of a close corporation, I maintain that a sensible interpretation of sub-rule 9(3)(e) should lead to the same conclusion in respect of the principal place of business within the court's jurisdiction. If no employee can be found on the business premises of a close corporation or company, the process may be affixed as provided for in the sub-rule.

Discussion in respect of sub-rule 9(5)

[30] Sub-rule 9(5) differs from the situation in sub-rule 9(3)(d) pertaining to service at the *domicilium* address. Sub-rule 9(5) provides for a process to be served at the residence or place of business of the person which is kept closed.

[31] The sheriff is of the view that insofar as the words 'person' and 'corporation and company' are used intermittently in rule 9 the reference to 'person' in sub-rule 9(5) should include 'corporation or company'. I do not agree. Sub-rule 9(5) stipulates that if a person to be served keeps their residence or place of business closed and thus preventing the sheriff from serving the process, same may be affixed as provided for in that sub-rule. No doubt the reference to a person can only be to a natural person, bearing in mind the reference to residence and the words 'his or her'. Having said this, it is in my view not necessary to rely on this sub-rule when service on a close corporation or company is to be effected.

[32] According to the sheriff, the Bloemfontein magistrates also rely on the *Barens*²⁶ judgment, a judgment by the full bench in the Western Cape, dealing with service in terms of sub-rule 9(5). In that judgment the court held, relying on the wording of sub-rule 9(5), that it should be shown in the sheriff's report that the person to be served keeps the door or gate of their residence closed with the intention of preventing the sheriff from effecting service. Therefore, the court held that a sheriff confronted by a locked door or gate must, before proceeding to affix the process to it, first determine,

²⁶ *Loc cit*; see footnote 2 above.

if necessary by inquiry and investigation, whether there are grounds for assuming that the door or gate is kept closed in order to prevent service.²⁷ The court reiterated that processes have to be served in accordance with the rules and the habit of resorting to 'easy' service by affixing processes to the intended recipient's door or gate without any enquiry or investigation is unacceptable.²⁸

[33] This judgment is distinguishable from the issue to be considered *in casu*, insofar as it dealt with service on a person, being a natural person and not a legal person. In my view the judgment is clearly wrong and should not be followed. I do not agree with it for the following reasons. In *Barens* it was common cause that the defendant worked and resided in Calvinia at the time, but that his family still stayed at the immovable property in Wellington registered in his name. He visited his family over weekends. The summons was affixed to the front door of the defendant's Wellington home. The defendant became aware of the summons, defended the matter and filed a special plea, relying on prescription, the reason being that no valid service took place. In that case the summons was served nine days before the claim prescribed. The magistrate upheld the special plea, and save for interfering with the costs order, the High Court dismissed the appeal, therefore agreeing with the magistrate. The full court's reliance on *Santam Insurance Co Ltd v Vilakasi*²⁹ was misplaced. In that case the Appellate Division held that if a summons was served before the expiration of the applicable 60 day period (to allow the insurance company time to consider the claim) the claim was unenforceable. Consequently, the plaintiff's exception to the special plea of prescription was dismissed. *Barens* also referred to s 15(1) of the Prescription Act 68 of 1969 and the judgment of the Appellate Division in *Du Bruyn v Joubert*.³⁰ In this judgment the court merely referred to the two requirements to interrupt prescription, to wit (a) the existence of an enforceable right against the debtor in respect of which prescription is already running and (b) service of process on the debtor instituting legal proceedings for enforcement of the right. In my view this judgment is no authority for the conclusion arrived at in *Barens*.

[34] It is not strange that persons keep their residences and businesses closed, and/or locked whilst present, bearing in mind the crime rate in this country. Also, unlike

²⁷ *Barens* at 310 F – 311 D.

²⁸ *Ibid* at 312 A – C.

²⁹ 1967 (1) SA 246 (A) 253 H.

³⁰ 1982 (4) SA 691 (W) 696G-697A.

decades ago, when it could be expected that someone, for example the housewife, would be at home during the day, nowadays people are often away from their residences during the day and at times when service may be effected, causing the sheriff to find nobody at home. Furthermore, it is well-known that people often work from home, but are travelling to and/or visiting clients at different places such as coffee shops and/or the clients' places of employment or residences, causing them to be temporarily absent. Sheriffs are not private investigators who need to ascertain why the doors of a residence or business are kept locked, disallowing them entry to these premises. The whole purpose of the rules pertaining to service of process is to ensure as best as possible that the affected person/entity receives knowledge of the process. This occurred in *Barens*.

[35] Judges and magistrates are often confronted with applications for rescission of judgment. In many of these cases the processes commencing proceedings have been served at the *domicilium* address in terms of the rules of court (before the recent amendment), or by affixing the documents to the outer or principal door or security gate of the person's residence or place of business, or the close corporation's or company's principal place of business or registered office. It is accepted that these applications often succeed. This is what happened in *Interactive Trading 115 CC and Another v South African Securitisation Programme and Others (Interactive Trading)*.³¹ In that case the applicants applied for rescission of judgment. The first applicant was operating the business of a fuelling station on a 24-hour basis. The sheriff's return of service indicated that a copy of the process was affixed to the principal gate of the premises which remained locked and nobody could be found. Based on the evidence the judge held that the return of service could not be relied upon as it contained incorrect information.

[36] A similar situation occurred in *Ford Motor Company Manufacturing of Southern Africa v Thobakgale and others*.³² The court held that 'it is not imaginable that a huge company like Ford with such a lot of assets in the form of new cars could be left without employees in a form of security personnel and other employees who could have refused to accept service or at least direct the sheriff to the office where he could have

³¹ 2019 (5) SA 174 (LP).

³² 2023 JDR 2208 (GP).

served the documents on an individual representing the company.³³ The court continued to state that it was 'not conceivable that on 22 of April 2021 at 10h00 in the morning, which was during the week on a Thursday, there was no one on the entire premises...'

[37] I accept, based on the examples in the aforesaid two cases, that a sheriff's return of service may well be attacked for failure to comply with their duties. It is also accepted that service by affixing to an outer door or gate may be abused by some sheriffs or their deputies. Each application for rescission of judgment must be adjudicated on a case-by-case basis. It will be wrong to interpret the rules on the basis that sheriffs are prepared to cut corners and that affected persons/entities shall be protected as far as possible by insisting on an insensible and absurd interpretation of the rules that may lead to unbusinesslike results. A sensible interpretation should rather be followed.

[38] If a process is served on an affected person/entity, but it did not come to their attention, causing default judgment to be granted, such affected person/entity will always have the right to apply for rescission of judgment in an appropriate case. The High Court and Magistrate's Court Rules provide ample relief in order to ensure that the constitutional right to a fair trial is not infringed. *Magricor* dealt with rule 42 of the High Court Rules. Section 36(1)(b) of the Magistrate's Court Act 32 of 1944, read with Magistrate's Court sub-rule 49(8) contains a similar provision. A party that cannot rely on a judgment erroneously granted may always apply for rescission of the judgment if they can show good cause.³⁴

Conclusion

[39] It must be emphasised that if a court is not satisfied with the effectiveness of any service of process, it may order that such further steps be taken as it deems fit.³⁵ The sheriff has not convinced me that the word 'person' in sub-rule 9(5) should be interpreted to mean 'close corporation' or 'company'. I shall therefore refrain from granting a declaratory order as applied for in prayer I of the notice of motion. However,

³³ *Ibid* para 11.

³⁴ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 and more recently, *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11; see also Magistrate's Court Rule 49 and High Court Rule 31(2)(b).

³⁵ Magistrate's Court sub-rule 9(20).

I am satisfied that sub-rule 9(3)(e) is worded wide enough to sufficiently cater for the problem. The sheriff has made out a proper case for the declaratory relief I intend to grant.

Order

[40] The following order is granted:

1. It is declared that, in the case of a corporation or company, if no responsible employee is found at its registered office or principal place of business within the court's jurisdiction which is kept closed, it would be lawful and sufficient service for the purposes of sub-rule 9(3)(e) of the Magistrate's Court Rules if the sheriff or their deputy affixes a copy of the process to the main door or security gate of such office or place of business, or in any manner provided by law.
2. There shall be no order as to costs.



JP DAFFUE J

On behalf of the Applicant:
Instructed by:

Adv HJ Benade
Symington De Kok Attorneys
BLOEMFONTEIN