



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 7742/2021

In the matter between:

WEBRAM FOUR (PTY) LTD

Plaintiff

and

TRANSFORMATION CAPITAL GROUP (PTY) LTD

First Defendant

MICHAEL ESLICK

Second Defendant

REGINALD BATH

Third Defendant

Coram: **JONKER AJ**

Heard: 21 August 2025

Delivered: Electronically on 27 August 2025

JUDGMENT

JONKER AJ:

INTRODUCTION

[1] This matter comes before me on three special pleas raised by the defendants challenging: (i) the validity of service of summons on the second defendant; (ii) the premature institution of proceedings in light of a statutory demand under Section 345 of the Companies Act 61 of 1973 ("the Companies Act"); and (iii) the Court's jurisdiction over the third defendant.

FACTUAL BACKGROUND

[2] On 7 May 2021, the plaintiff instituted action against the first defendant as principal debtor, and the second and third defendants as surety and co-principal debtor in respect of monies owing pursuant to an agreement of lease and deeds of suretyships concluded in November 2019.

[3] Service of the summons on the first and third defendants took place on 14 May 2021. The sheriff attempted service on the second defendant at his residential address on 14 May 2021, 8 June 2021 and 18 June 2021, without success. In a last attempt, on 22 July 2021, the return recorded as follows:

"On this 22nd day of July 2021 at 13:03 at 4 Central Road, Sunset Beach I served the Combined Summons together with particulars of claim, Annexures "POC1" to "POC9" in this matter on the following manner: A copy of the document was left with the security at the entrance gate. Defendant was contacted telephonically. Defendant confirmed residency and requested a copy of the above document be left with the security at the gate."

[4] The return records that, after four failed attempts, service was effected on the security guard at the entrance of the estate where the second defendant resided. This was also the *domicilium citandi et executandi* chosen by the second defendant in the suretyship agreement, although the summons and return did not expressly record that fact. Moreover, the return records that there was an apparent telephonic instruction from the second defendant to leave a copy of the summons with the security guard.

[5] All defendants entered an appearance to defend on 20 May 2021 and raised the three special pleas, while also pleading over on the merits. I turn to address each of the special pleas.

THE FIRST SPECIAL PLEA: NON-SERVICE ON THE SECOND DEFENDANT

Submissions made by the Second Defendant

[6] The second defendant contends that the summons was not properly served on him, rendering the proceedings defective and premature.

[7] Moreover, he disputes the correctness of the sheriff's return of service.

[8] He testified that he never received a copy of the summons and only became aware of the action when his co-defendants were served in May 2021, at which point attorneys were instructed. This was done prior to service on the second defendant on 22 July 2021.

[9] The second defendant testified that the security at his residential complex is outsourced and that the guards, in general, may not accept any documentation at all. He denied receiving any documents that were left with the security guard. The second defendant testified that he could not recall any telephonic communication with the Sheriff, specifically on 22 July 2024, or that the Sheriff had phoned his wife.

[10] Under cross-examination, the second defendant's evidence shifted. He initially testified that he could not recall whether the sheriff had phoned him but later maintained that he did not think he was called. Ultimately, his evidence moved from uncertainty to a firm denial that the sheriff had contacted him.

[11] The second defendant contends that service of the summons was not validly effected in accordance with the rules and was therefore improper. He argues that, as a result, prescription was not interrupted as contemplated by the Prescription Act 68 of 1969 ("the Prescription Act"), and that the claim has since prescribed given the lapse of time between the filing of the special plea and the hearing of argument. He

further urges the Court to develop the common law in this regard, relying on the Constitutional Court's judgment in *Molaudzi*¹.

Legal Analysis

[12] Rule 4 of the Uniform Rules of Court regulates how legal process must be served in South Africa. The relevant applicable provisions read as follows:

“(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) ...(not applicable to the facts);

(ii) by delivering a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like to the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age. For the purposes of this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, 'residence' or 'place of business' means that portion of the building occupied by the person upon whom service is to be effected;

(iii) ...(not applicable to the facts);

(iv) if the person to be served has chosen a domicilium citandi, by delivering a thereof to a person apparently not less than sixteen years of age at the domicilium so chosen: Provided that if no person is present at the domicilium, the sheriff may leave a copy at the aforesaid domicilium;

(v) ...(not applicable to the facts);

(vi) ...(not applicable to the facts);

(viii) ...(not applicable to the facts);

(ix) ...(not applicable to the facts);

Provided that where service has been effected in accordance with subparagraphs (ii); (iii); (iv); (v) and (vii) of subparagraph (a), the sheriff shall

¹ *Molaudzi v S* 2015 (8) BCLR 904 (CC).

in the return of service set out the details of the manner and circumstances under which such service was effected."

(my underlining)

[13] A sheriff's return of service is prima facie proof of its contents in terms of section 43(2) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act").

[14] The central issue is whether the sheriff's return has been rebutted by the second defendant's evidence and whether service on the second defendant was effected in compliance with the rules of court.

[15] The second defendant testified that he could not recall being contacted by the sheriff and therefore concluded that no such call had been made. This evidence does not disprove the return of service and is insufficient to rebut the prima facie proof it constitutes. Although the second defendant confirmed that he did not personally receive the summons from the security guard, this does not establish that the sheriff failed to leave a copy with the guard on duty.

[16] In *Kemp*², the court held that service on a security guard at the entrance to a security complex constitutes valid service, given the practical difficulties sheriffs face in gaining access to such complexes to serve process directly on the debtor's unit.

[17] This principle was further developed in *Sipho Sibeko*³ where Crutchfield J stated as follows:

"given the difficulties of a sheriff or his deputy accessing a security complex in the absence of the occupant for the purposes of service in terms of rule 4, service of process by way of it being handed to the security guard at the complex, a responsible employee older than 16 years, is valid and effective service on the debtor."

² *Kemp v Knoesen* [2007] JOL 19194 (T).

³ *Sipho Sibeko v Shackleton Credit Management (Pty) Ltd* [2022] ZAGPJHC 1036.

[18] In the present matter, the sheriff made diligent efforts to effect service, as demonstrated by four unsuccessful attempts. This evidence was not rebutted. Service was ultimately effected by leaving the summons with a security guard at the entrance to the second defendant's residential complex. The guard, a responsible employee whom the court accepts was at least 16 years of age, duly accepted service of the combined summons. The fact that the guard was employed by the complex rather than by the second defendant does not, given the difficulties of access to such complexes in the absence of occupants, render the service ineffective.

[19] The sheriff's return of service stands as prima facie proof of the facts it records, including the allegation that the second defendant authorised telephonically that the documents be left with security. Although the second defendant disputed this, his evidence was equivocal and ultimately insufficient to rebut the presumption of correctness. Quite the contrary. While the second defendant could not specifically recall whether he received a call from the sheriff and therefore denied it, he could not exclude the possibility that the sheriff did in fact serve the summons on the guard that day. His evidence that the guard did not hand him a copy of the summons does not nullify service. I conclude that there was proper service of the summons on the second defendant in terms of rule 4(1)(a)(ii).

[20] In any event, even if service through the guard were to be questioned, the second defendant's residential address was also his chosen *domicilium citandi et executandi*. Service at that address would therefore remain valid as contemplated by rule 4(1)(a)(iv).

[21] In the matter of *Amcoal Collieries*⁴ the Supreme Court of Appeal held that a person's *domicilium citandi et executandi* can be chosen in a contract, and that service of process at that address is good service, even if the person is not present at the time.

⁴ *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A).

[22] The fact that service was not on the second defendant personally does not render it invalid. In *Mare*⁵, the court made it clear:

“Where a domicilium has been chosen, the debtor bears the risk of non-receipt of the process. The creditor is entitled to effect service at that address, and the debtor cannot complain if the summons does not come to his attention.”

[23] The principle was reaffirmed in *Viker X*⁶, where the court held that:

“Service at the domicilium is effective, even where practical barriers such as security gates or receptionists necessitate service on an intermediary. The law does not require proof that the summons reached the debtor’s hands.”

[24] The concept of *domicilium citandi et executandi* is fundamental to South African civil procedure. By nominating his residential address as his *domicilium* in the suretyship agreement, the Second Defendant elected that legal process could be served at that address even if it was left at the security gate with the guard.

[25] In *Arendsnes*⁷ the Supreme Court of Appeal (SCA) dealt with similar facts and had to decide whether the service of the summons on the defendant was good and served to interrupt the running of prescription against the plaintiff.

[26] The facts in that case were shortly the following: The Sheriff attempted service of the summons on 12 December 2006 (first attempt) but was told that the defendant had ceased trading on the premises and only a restaurant operated by a Mr Vermaak, the son in-law of the sole member of the defendant, remained. However, the defendant never deregistered the corporation, and therefore, its registered office remained the premises as described in the return of service. After being informed that the business had been closed, the sheriff consulted the plaintiff’s attorneys telephonically and was instructed to serve the summons at the premises

⁵ *Absa Bank v Mare* (A56/2019) [2020] ZAGPPHC 372 at para 31.

⁶ *Investec Property Fund Limited v Viker X (Pty) Limited and Another* (2016/07492) [2016] ZAGPJHC 108

⁷ *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA).

because the property remained the registered office of the defendant. On the second attempt, the summons was served on a Mr Pretorius, an employee of the restaurant on the premises. It was common cause that Mr Pretorius never handed the summons over to the defendant and that he was not employed by the defendant. The defendant contended that it never received a copy of the summons from the sheriff or Mr Pretorius and therefore contested that the summons was properly served.

[27] The SCA considered Section 15 of the Prescription Act and confirmed that for prescription to be interrupted, three requirements must be present: (a) there must be a process; (b) the process must be served on the debtor; (c) by that process, the creditor must claim payment of the debt.

[28] The SCA held that, where service is placed in dispute, the court is required to determine whether service was good and legally recognised or substantially compliant with the rules of service. The cause of action and the consequences resulting from the process served are irrelevant to the question whether proper service took place.⁸

[29] The SCA held that service of the summons complied in substance with the requirements of rule 4(1)(a)(v), with the result that prescription was duly interrupted in terms of section 15(1), read together with section 15(6), of the Prescription Act. The Court further reiterated the trite principle that “*the rules exist for the courts, and not the courts for the rules*”.⁹ It accordingly found that the plaintiff’s claim had not prescribed in terms of section 12 of the Prescription Act and upheld the decision of the court *a quo*, dismissing the special plea with costs.

[30] The facts in the present matter bear close similarity. Although the address in question was not the registered address as contemplated in Rule 4(1)(a)(v), it constituted the defendant’s residential address within the meaning of Rule 4(1)(a)(ii). In addition, it was the second defendant’s chosen *domicilium citandi et executandi* in

⁸ *Supra* para 13.

⁹ *Supra* para 18.

terms of the deed of suretyship, thereby bringing it within the ambit of Rule 4(1)(a)(iv).

[31] For the reasons set out above, I am satisfied that service was validly effected on the second defendant at the address reflected in the summons, which also constituted his chosen *domicilium citandi et executandi*. The service of the summons substantially complied with the provisions of Rule 4(1)(a)(ii) and (iv), and prescription was accordingly interrupted in terms of s 15(1), read with s 15(6), of the Prescription Act. Considering this conclusion, it is unnecessary for this Court to engage with the argument relating to the development of the common law, and this Court accordingly declines to do so.

[32] The first special plea is accordingly dismissed.

THE SECOND SPECIAL PLEA: PREMATURE PROCEEDINGS DUE TO SECTION 345 DEMAND

Submissions made by the defendants

[33] The defendants contend that a letter of demand sent by the plaintiff on 6 May 2021 specified that the demand was made in terms of Section 345 of the Companies Act, affording the plaintiff 21 days to make payment before legal proceedings could commence. They argue that this created a statutory "freeze" period analogous to section 129 of the National Credit Act 34 of 2005 ("National Credit Act").

[34] The evidence reveals that the demand letter contained two distinct demands: (i) a demand to pay immediately or legal action would be taken, and (ii) a section 345 demand to pay within 21 days, failing which the debtor would be regarded as unable to pay debts for purposes of a winding-up order.

Legal Analysis

[35] Section 345 of the Companies Act relates to demands in the context of winding-up proceedings and the establishment of a company's inability to pay its debts. It does not create a moratorium on civil litigation for debt recovery.

[36] The defendants' attempt to draw an analogy with section 129 of the National Credit Act is misplaced. Section 129 prescribes specific procedural requirements and time periods within the framework of credit legislation, forming an integral part of the credit provider's cause of action. By contrast, section 345 of the Companies Act serves a wholly different function: it provides a statutory basis for inferring a company's inability to pay its debts in the context of winding-up proceedings.

[37] The dual nature of the demand letter is significant. The immediate demand for payment with the threat of legal action constituted a valid demand that entitled the plaintiff to institute proceedings immediately upon non-compliance. The section 345 component was included for different purposes and did not override or suspend the immediate demand.

[38] A creditor is not precluded from pursuing civil litigation for debt recovery merely because it has also made a section 345 demand in contemplation of potential winding-up proceedings. These are separate and distinct remedies that may be pursued concurrently.

[39] I conclude that the summons was capable of valid service at the time it was served and that the plaintiff cannot be said to have acted prematurely in issuing summons upon non-payment. This remains so notwithstanding that service of the summons occurred within the 21-day period contemplated in the s 345 component of the demand.

[40] Accordingly, the second special plea is dismissed.

THE THIRD SPECIAL PLEA: LACK OF JURISDICTION

Submissions made by the Defendants

[41] The defendants further contend that this Court lacks jurisdiction in respect of the third defendant. It is submitted that the third defendant resides in Centurion, which falls outside the territorial jurisdiction of this Court. They argue that the plaintiff's reliance, under the heading "Jurisdiction," on section 21(2) of the Superior Courts Act is incorrect and misplaced. According to the defendants, that provision finds no application to the parties and accordingly provides no jurisdictional basis vis-à-vis the third defendant.

[42] It is common cause that the deeds of suretyship were concluded in Cape Town, as expressly alleged in the particulars of claim. This was confirmed in the evidence of the second defendant, who testified that the deeds were indeed so concluded.

Legal Analysis

[43] Section 21(1) of the Superior Courts Act provides that a division has jurisdiction in respect of all persons residing or present within its area of jurisdiction and in respect of all causes of action arising within its area of jurisdiction.

[44] Section 21 (2) of the Superior Courts Act state that:

"(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division."

[45] This section extends the jurisdiction of a division of the High Court to persons outside the ordinary jurisdiction of the division concerned, once a division of the High Court has jurisdiction in an action or proceedings the subsection can be invoked to join to that cause a defendant not resident within the area of jurisdiction of that division.

[46] The subsection applies to all cases where a party seeks to join another party to a cause in respect of which the court concerned has jurisdiction whether the action is about to commence or has already commenced.¹⁰ The section avoids the inconvenience and expense of a multiplicity of actions.

[47] Jurisdiction is also determined by reference to the pleadings and the cause of action alleged, not the substantive merits of the case. The question is whether, on the face of the pleadings, a cause of action has been established that falls within the court's jurisdiction. As confirmed in *My Vote Counts*¹¹ jurisdictional challenges must be assessed on the pleaded facts and established legal principles. The recent decision in *Obiang*¹² reaffirmed that courts must determine jurisdiction based on the pleadings rather than delving into the merits.

[48] As dealt with above, section 21 of the Superior Courts Act provides that a high court has jurisdiction over in relation to “*all causes of action arising ... within its jurisdiction.*” The grounds upon which the High Court will exercise jurisdiction were explained as follows by the court in *Skydive Mossel Bay*¹³ at para [53].

*“The jurisdiction of the High Court, therefore, under section 21 of the Act, is also determined by reference to the common law. And in such a determination regard must be had to: (a) the jurisdictional connecting factors, or rationes jurisdictionis, recognised by the common law; and (b) attachment to found or confirm jurisdiction. According to the learned authors, at A2-103 to 104, which also finds application in this case: “The jurisdictional connecting factors or rationes jurisdictionis recognized by the common law include residence, domicile (ratio domicilii), the situation of the subject-matter of the action within the jurisdiction (ratio rei sitae), cause of action (ratio rei gestae) **which includes the conclusion or performance of a contract (ratio contractus)** and the commission of a delict within the jurisdiction (ratio delicti).” (Footnotes omitted and emphasis added.)”*

¹⁰ *Mossogass v Eskom* 1995 (3) SA 156 (W) at 158A.

¹¹ *My Vote Counts v Speaker of National Assembly* 2016 (1) SA 132 (CC).

¹² *Obiang v Janse van Rensburg and Others* (714/2023) [2025] ZASCA 30.

¹³ *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* (5651/2014) [2019] ZAWCHC 166; [2020] 1 All SA 857 (WCC) (4 December 2019).

[49] The suretyship agreement was concluded in Cape Town, which falls within this Court's area of jurisdiction. The cause of action against the third defendant as surety arises from this agreement concluded within the court's jurisdiction. This was also pleaded in the plaintiff's particulars of claim.

[50] The fact that the third defendant resides in Centurion does not deprive this Court of jurisdiction where the cause of action arose within its territorial jurisdiction. Section 21(2) of the Superior Courts Act specifically contemplates jurisdiction over non-resident defendants in respect of causes of action arising within the Division's area.

[51] The particulars of claim adequately plead that the Court has jurisdiction by virtue of Section 21(2) of the Superior Courts Act and by reference to the conclusion of the suretyship agreement in Cape Town. This is sufficient to establish the jurisdictional basis.

[52] Accordingly, this Court has jurisdiction over the third defendant, the cause of action having arisen from the suretyship agreement concluded within this Court's area of jurisdiction.

[53] The third special plea is therefore dismissed.

CONCLUSION AND COSTS

[54] All three special pleas raised by the defendants are without merit and are dismissed. The matter may now proceed on the merits of the claim.

[55] Both parties sought costs in the event of success. The defendants' special pleas were unsuccessful. In the circumstances, costs should follow the result.

ORDER

[56] The following order is made:

1. The first special plea regarding non-service of summons on the second defendant is dismissed;
2. The second special plea regarding premature proceedings is dismissed;
3. The third special plea regarding lack of jurisdiction is dismissed;
4. The defendants are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, as taxed or agreed in accordance with scale B;

E JONKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: Adv G Quixley

For defendants: Adv GV Meijers