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IN THE HIGH COURT OF SOUTH AFRICA

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

27/08/2026
Date

Signature

CASE NO: A114/2025

In the matter between:

MAMABOLO JOHN NWEDAMUTSWU N.O

1ST APPELLANT

TAKALANI STANFORD NWEDAMUTSWU N.O

2ND APPELLANT

And

D-KON DEVELOPMENT

RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and all be uploaded on Caselines.

ORDER

On appeal from a single Judge of The Gauteng Division of the High Court, Pretoria (Mokose J, sitting as court of first instance):

1. The appeal is upheld.
2. The order of the Court a quo, granted on 22 June 2023, dismissing the appellants/defendants' special plea, is set aside, and substituted with an order upholding the defendants' special plea of prescription as follows:
“(a) The plaintiff's action is dismissed with costs.
3. The respondent is ordered to pay the costs of the appeal; such costs to include the costs of the appellants' application for leave to appeal at the Court a quo, as well as the application for special leave to appeal at the Supreme Court of Appeal.

JUDGMENT

CORAM: MOLOPA-SETHOSA J, LENYAI J AND MOSHOANA J

Introduction

[1] This appeal raises the question whether the respondent's claim became prescribed under The Prescription Act 68 of 1969.

[2] On 22 June 2023 Madam Justice Mokose (“Mokose J”) sitting in the High Court Gauteng Division, Pretoria, delivered a judgment in which she dismissed the appellants' special plea of prescription.

[3] The appellants now appeal to the Full Court of the Gauteng Division, Pretoria against the judgment and orders of Mokose J. It is opposed by the respondent.

Background

[4] On or about 12 September 2013, at Pretoria, the respondent (D-Kon Construction-plaintiff at the Court a quo), represented by D P Kirstein, and the Tshevenga Trust ("The Trust"), represented by the first appellant (first defendant at the Court a quo), entered into a written agreement also known as the Joint Building Contracts Committee Series 2000, Edition 5, ("JBCC") in terms of which the respondent would render construction services to the Tshevenga Trust [building of a dwelling house], at the first appellant's special request and instance; the 1st appellant being one of two Trustees of the Trust. The other Trustee was his wife, who passed away in 2015. The 2nd appellant was appointed as Trustee in her stead.

[5] The respondent rendered Construction services to the trust in terms of the agreement aforesaid, albeit the appellants aver that the construction of the dwelling remains incomplete.

[6] The respondent avers that the certified amounts due in terms of the payment certificates, C1-C17 attached to Attached to the provisional sentence summons, amounts to R36,486,898.01.

[7] Further, that an amount of R31,946 578.30 has been paid, but that there is an outstanding amount in respect of certificates 1 to 18 (and in particular, certificates 15 to 18), that amounts to R4,540,319.72.

[8] The respondent issued payments certificates in respect of payment for services rendered to the Trust.

[9] When payment was not forthcoming, the respondent issued letters of demand to the Trust on 7 August 2014, 3 October 2014 and 7 October 2014 in terms of the agreement, informing the Trust that the agreement would be terminated should the outstanding amounts due not be paid within 10 days.

[10] The respondent duly terminated the contract in writing on 23 October 2014 due to the Trust's failure to pay the outstanding amount certified in full and/or only partially paid within the agreed time periods provided for in terms of the agreement.

[11] Provisional Sentence Summons was then issued against the Trust on 23 March 2016. Two (2) Trustees-the two appellants herein, were cited as 1st and 2nd defendants in their official capacities [*Nomine Officio*, N.O.]

[12] Summons was served on only one trustee; the 1st appellant/defendant and not served on the 2nd appellant/defendant. No opposing affidavit was filed by the

appellants, so the respondent/plaintiff proceeded to obtain default judgment against the two (2) Trustees/appellants on 06 May 2016.

[13] The trustees/appellants successfully launched a rescission application on the basis that there was no proper service on the Trust. The application for rescission was granted on 22 December 2017, setting aside the Default Judgement granted on 06 May 2016. Thereafter, [from 22 December 2017 to October 2019], there was no action on the part of the respondent/plaintiff.

[14] In October 2019 the respondent then served Provisional Sentence Summons (same one issued on 23 March 2016) on the two Trustees/defendants/appellants this time.

[15] The appellants/Trustees/defendants raised a special plea of prescription on the basis that the debt arose in October 2014 when the plaintiff terminated the agreement, and that service of the provisional sentence summons 5 years later, in October 2019, renders the matter to have prescribed. The respondent contends that the matter has not prescribed.

[16] The parties agreed that the special plea of prescription should be adjudicated first.

High court findings

[17] Mokose J found that the form of service, [on only one of the trustees], was not perfect, but that substance had not been affected, and the special plea of prescription was therefore dismissed with costs.

[18] The appellant applied for leave to appeal the judgement and order by Mokose J, but leave to appeal was refused by Mokose J. The appellant then petitioned the Supreme Court of Appeal and leave to appeal was granted by the Supreme Court of appeal.

The law

[19] **Section 10** of the Prescription Act 68 of 1969 (The Act”) provides:

“10 Extinction Of death debts by prescription

(1) Subject to the provisions of this chapter and of chapter Roman Figure 4,, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt...

Section 11 provides that

11 Periods of prescription of debts

.....

- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

12 **when prescription begins to run**

- (1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

Section 15 of the Prescription Act reads as follows:

15 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.
- (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
- (3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the

parties postpone the due date of the debt, from the day upon which the debt again becomes due.

- (4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.
- (5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.
- (6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced. (Emphasis added.).

“
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For interruption to be valid, it is clear from the above provisions that proper service of the summons is essential. Given the summons were issued, citing the two trustees, but only served to one trustee (first defendant), in my view, this constitutes improper service. It follows that improper or incomplete service upon the trustees does not interrupt prescription.

[20] The appeal raises the question whether the respondent's claim became prescribed in terms of section 11 (d) read with section 12 of the Act; after the summons were served in October 2019, five years after the cause of action arose.

The parties' submissions

[21] The appellants contend that the respondent's claim has prescribed in terms of section 11 read with section 12 of the Act, in that the provisional sentence summons was only properly served on the trustees, representing the Trust, during October 2019, more than five years after the course of action arose in October 2014.

[22] The respondent contends that the action has not prescribed, and that in bringing an application for the rescission of judgment, the appellants have effectively entered appearance to defend, [my underlining].

[23] This assertion by the respondent cannot be correct; it cannot be that the rescission of judgement order is effectively appellants' notice of intention to defend. The respondent after the appellants obtained an order for rescission of the default judgment, stayed for almost 2 years [to be exact, one year 10 months] thereafter, without taking any action whatsoever, but then proceeded to go and serve the provisional sentence summons on both trustees, as they did, because; obviously the respondent was aware that for service to be proper when an action has been instituted against a trust, all trustees must be cited and must be individually served with the process as they represent the Trust. The respondent cannot be heard to be saying that rescission of judgement amounts to leave to defend, it cannot be, hence the step taken by the respondent, albeit late, to serve the provisional sentence summons on both appellants as Trustees of Tshevenga Trust to try to remedy the problem of proper service on the Trust. Unfortunately for the respondent service was out of time.

[24] The respondent tries to turn a blind eye to fact that the initial service of the provisional sentence summons in March 2016 on one, out of two, trustees, amounts to no effective service on the Trust. It is trite that a trust is not a separate legal persona, but a unique (*sui generis*) legal institution and acts through its Trustees *Nomine Officii*; See *Mariola and Others v Kaye- Eddi N.O. and Others* 1995 (2) SA 728 (W) @731C-F.

[25] The trust is represented by the trustees. Each trustee must be cited in their official capacity and served individually to properly bring the trust before the court. Failure to serve both trustees means that service of process on the trust is legally incomplete. As already mentioned hereabove, a trust does not have an independent legal personality and must act through its trustees. Thus, all Co-trustees must act and must be joined as parties when a trust sues or is sued.

[26] Both trustees/appellants having been served five (5) years after the cause of action arose, were steadfast that the matter had prescribed, and that there was interruption of prescription.

[27] In our law, prescription can be interrupted by the service of a summons, but the service must be valid. The initial service was improper due to the second trustee not being served; prescription was thus not effectively interrupted. The initial service of the provisional sentence summons in March 2016 has not interrupted prescription. Non-service or improper service of the provisional sentence summons means that

the provisional sentence summons was never officially delivered to the trustees/appellants according to the rules of court. If the service was defective, it is logical that prescription wouldn't have been effectively interrupted. The plaintiff waited 5 years before re-serving the summons on both trustees as required by the law; this undue delay is not even explained by the respondent and is unreasonable.

[28] In *Land and Agricultural Development Bank of SA v Parker and others* 2004 (4) All SA 261 (SCA) at para 15, the Supreme Court of Appeal emphasized the joint action requirement, which entails that trustees must act together. It was stressed that, for the trust estate to be bound by the acts of trustees, all trustees must be cited and must act jointly. In this regard, failure by the plaintiff to serve all trustees renders the 2016 service defective. The trustee who was served with the provisional sentence summons cannot unilaterally file a notice of intention to defend or a plea on behalf of the trust without the knowledge and consent of the unserved trustee. The trust was therefore not at any stage properly before the court, and as such the defective service could not interrupt prescription. [My underlining]

[29] It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person. It has been held that if proceedings had begun without due notice to the defendant, the subsequent proceedings are null and void, any judgment is of no force and effect and may be disregarded without the necessity of a formal order setting it aside, *Dada v Dada* 1977 (2) SA 287 (T) at 288C–E.

[30] Service of the provisional sentence summons having been served on one Trustee, and not on the other, the service basically was defective, and there was no proper and effective service on the Trust.

[31] As already indicated, the Court a quo found that the summons was served in good time on the 2nd appellant/Trustee as well. The appellants contend that the Court a quo erred and misdirected itself in this regard. I do not agree with the court a quo that service was effected on the second appellant in good time. On the facts before us there clearly was no service on the second appellant, and it is for that reason, amongst others, that rescission of judgement was granted on 22 December 2017, as, effectively, there was no service on the Trust. For this reason, I am of a considered view that the Court a quo erred and misdirected itself, and that the appeal must succeed.

[32] The case cited by the Court a quo, viz. Imperial Bank Limited v Barnard N.O. and Others 2013 (5) SA 612 (SCA) at para 9, is in my considered view, distinguishable. The Imperial case was dealing with an amendment of summons, which had already been served properly on the defendants. Here, from the beginning, there was no proper and effective service of the process initiating legal proceedings against the Trustees. The legal requirement of serving both/all Trustees was not complied with from the beginning. The service was irregular and defective. In my considered view only proper timeous service on one's opponent can be said to interrupt prescription. Here, as already indicated, there was no interruption of prescription.

[32] In this case, after the judgment was rescinded, proper service of the provisional service summons had to be timeously effected de Novo on both Trustees/appellants. It is trite that each of the trustees must be cited individually and be served individually with the Court process.

[31] Judgment in this matter was rescinded and the default judgment granted on 6 May 2026 was set aside. It was incumbent upon the respondent to serve the provisional sentence summons within a reasonable time, and not to wait for (1) year ten (10) months before serving the same provisional sentence summons it issued in March 2016, knowing very well that the course of action arose in October 2014.

[32] On the date the provisional sentence summons was properly served on the two (2) trustees/the appellants, i.e. in October 2019, it had been five (5) years from the date when the course of action arose, as correctly contended by the appellants.

[33] On the facts before us, the prescription point raised by the appellants in the special plea was good, and the respondent's claim for payment of money has prescribed; the appeal thus ought to be upheld.

In the result, the following order is made:

1. The appeal is upheld.
2. The order of the Court a quo, granted on 22 June 2023, dismissing the appellants/defendants' special plea, is set aside, and substituted with an order upholding the defendants' special plea of prescription as follows:
“(a) The plaintiff's action is dismissed with costs.
3. The respondent is ordered to pay the costs of the appeal; such costs to include the costs of the appellants' application for leave to appeal at

the Court a quo, as well as the application for special leave to appeal at the Supreme Court of Appeal.

L M MOLOPA-SETHOSA J
JUDGE OF THE HIGH COURT
I CONCUR

MMD LENYAI J
JUDGE OF THE HIGH COURT

Summary: Service of process- when is prescription interrupted by a service of process? Proper constitutional interpretation of section 15(1) of the Prescription Act of 1969. Where a return of service by the sheriff confirms service on a debtor (Trustee(s)) in accordance with Rule 4 of the Uniform Rules of the High Court, prescription is interrupted. Service of process on the one Trustee is sufficient to interrupt the running of prescription. Knowledge of claim by the one Trustees before the completion of the prescription period is sufficient to interrupt the running of prescription. Prescription of the claim must be proven by way of evidence by the pleader.

Held (1): The appeal is dismissed. Held (2): The appellant to pay the costs of the appeal.

DISSENTING JUDGMENT

MOSHOANA, J

Introduction

[1] I dissent. Before us served an appeal seeking to set aside the judgment and order delivered by our sister Mokose J on 22 June 2023. Leave to appeal was granted by the Supreme Court of Appeals (SCA) on 12 November 2024 per Molefe JA and Koen AJA. Mokose J had dismissed a special plea of prescription as raised before her by the appellant. I had the singular privilege and honour to have carefully considered the majority judgment from the inventive hand of my sister Molopa-Sethosa J. With considerable regret, for reasons outlined below, I part ways with the order arrived at by the majority judgment. Had I commanded the majority, the order I propose at the end of this judgment would have been made.

[2] Regarding background facts, I shall graciously accord with the facts as recorded in the majority judgment. I have no qualms with the rendition of the facts. However, I wish to highlight certain crucial facts which are common cause but have been omitted from the factual rendition in the majority judgment. Those are that, prior to the action instituted in March 2016, a similar action was instituted against the Trust

under case number 97792/15 on 8 December 2015. On 2 March 2016, after the Trust had delivered an answering affidavit, the said action was withdrawn. The notice of withdrawal specifically stated that the withdrawal was against the two Trustees. There was no indication that the second Trustee was not served with this withdrawn action. Contrary to the statement in the majority judgment, that the second Trustee was not served in March 2016, as set out in the written judgment of Meyer J, a return of service was made by the sheriff evidencing that on 31 March 2016, service was effected on the second Trustee. The contents of the return of service shall be set out later in this judgment. Without any further ado, I shall immediately turn to the reasons why I differ with the majority judgment.

Analysis

[3] The plinth of this appeal is the proper interpretation of section 15(1) of the Prescription Act.¹ Section 15(1) provides as follows:

“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”.

[4] The germane issue in this appeal is the phrase *service on the debtor*. In this instance, it is common cause that the debtor is the *Tshivenga Trust* (“the Trust”). It is also common cause that at the pertinent time, the Trust had two Trustees namely: John Mambolo Nwedamutswu and Takalani Stanford Nwedamutswu (hereinafter “Trustees”). In common law, a Trust is neither a legal entity nor a juristic person. A Trust is actually the Trustees acting in their capacities as such. For the purposes of the Income Tax Act and the Companies Act,² a Trust assumes a different personality. For the purposes of this appeal, the Trust assumed the status afforded to it in common law.

[5] Accordingly, service on the debtor shall, in the present instance, mean service on the two Trustees. The Prescription Act does not define the word “service.” In law, service means the delivery of legal documents. In the present appeal, it is common

¹ Act 68 of 1969 as amended.

² Income Tax Act 58 of 1962 and Companies Act 71 of 2008.

cause that the respondent issued a provisional sentence summons (process) against the Trustees in their capacity as Trustees of the Trust. Once a process is issued, such a process ought to be delivered to the debtor.

[6] Although, similar process was first issued on 8 December 2015, the relevant process for the purposes of the present appeal was issued out of this Court in 2016. Rule 4 of the Uniform Rules of Court deals with service of processes. It suffices to mention that various manners of service of processes are suggested in the rule. Thus, it is unnecessary for the purposes of this judgment to extract the whole text of the rule. Only portions relevant to this appeal shall be extracted.

4. Service

(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) By delivering a copy thereof to the said person personally...

(ii) By *delivering a copy thereof* at the *place of residence*...

(ix) If two or more persons are sued in their joint capacity as trustees...*service shall be effected upon each of them in any manner set forth in this rule.*

Provided that where service has been effected in accordance with paragraphs (ii); (iii); (iv); (v); and (vii) of subparagraph (a), *the sheriff shall in the return of service set out the details of the manner and circumstances under which such service was effected.*

(d) It shall be the *duty of the sheriff* or other person serving the process or documents to explain the nature and contents thereof to the person upon whom service is being effected *and to state in his return* or affidavit or the signed receipt that *he has done so.*

[7] It is perspicuous from the text of the rule that a litigant is not permitted to serve a process of Court on his/her or its own. He/she or it must direct the process to the sheriff for the purposes of service. Sheriffs are appointed in terms of section 2 of

the Sheriffs Act.³ Subrule 4(d) makes it abundantly clear that it is the duty of the sheriff to (a) explain the nature and contents of the document and (b) state in his return that he has done so. Moreso, it is the function of the sheriff when so appointed to serve court processes. Section 3 of the Sheriffs Act stipulates the functions to be performed by a sheriff. Section 43(1)(a) of the Sheriffs Act specifically provides that a Sheriff shall be guilty of improper conduct if he is negligent or dilatory in the service or execution of any process.

[8] Of particular significance in this appeal, is the contents of the return of service relating to the one Trustee, the second defendant. The return by an officer of the Court, might I add, reads thus:

“That on the 31 March 2016 at 1709 at 6[...] U[...], Cnr B[...] & A[...] Streets, Arcadia, Pretoria, 001 being the place of residence of the respondent, a copy of the Summons Provisional Sentence was served by affixing it to the principal door at the given address.”

[9] Undoubtedly, the sheriff, in his capacity as an officer of the Court, informed the appellant that he had served the process in the manner stated by him in the return of service. This, the sheriff is required to do in terms of the provisions of rule 4. This must have meant that the sheriff performed his duties. *Ex facie* the return of service, the second defendant was duly served. It is thus unsurprising that this Court, in its judiciously exercised discretion, entered a default judgment in favour of the respondent. The Court must have been satisfied at that point that service was lawfully effected, having been informed by an officer of the Court that it was the case. I do accept that this manner of service is not satisfactory. However, the cardinal question is, was the process served onto the second defendant as contemplated in the rules? The answer is to my mind an unequivocal yes. The wrong question to ask, in the face of a return of service from an officer of the Court, is whether there was certainty that the second defendant physically received the process or not? Or, better still, that the second defendant indeed resided at that mentioned address. To my

³ Act 90 of 1986 as amended.

mind, these are questions to be raised in the rescission of a judgment or order if judgment was obtained on the strength of such a return of service.

[10] In *Mohawk Council of Kanesatake v Sylvestre*,⁴ the Supreme Court of Canada, persuasively and instructively expressed itself as follows:

“Prescription is therefore interrupted when a notice of execution by seizure is filed in court and served on the debtor by the bailiff at the behest of the creditor in keeping with the rules in the CCP... The purpose of the rule on interruption based on the judgment creditor’s initiation of the judicial application is to ensure that creditors are not sleeping on their rights. The filing and service of a judicial application for seizure interrupts prescription because these steps reliably indicate the creditor’s intention to make good on their claim before the expiry of the prescription, which is the purpose of the law of extinctive prescription. The sanction of prescribing the judgment creditor’s right at the expiry of the prescription period is justified as a consequence of the creditor’s negligence and as a means to promote stability in debtor-creditor relations.”⁵

[11] In my considered view, the *Mohawk* judgment, with which I plentifully agree, buttresses the point that service on the debtor by the bailiff (Sheriff) in line with the rules completes the interruption of prescription. Taking of steps (filing and service) reliably indicates the creditor’s intention to make good on their claim before the expiry of the prescription, which step serves the very purpose of the law of extinctive prescription.

[12] It became common cause before us that on 20 October 2016, the Trust launched an application for the rescission of the judgment obtained by default by the respondent. This Court, as well as the Court below, were not favoured with a copy of the affidavit in support of the rescission application. This Court only gleaned from the written judgment of Meyer J, delivered on 22 December 2017 that the second defendant testified, for the purposes of obtaining a rescission, that the address

⁴ *Mohawk Council of Kanesatake v Sylvestre* 2025 SCC 30 (CanLII).

⁵ See above n 3 at pages 59-69.

mentioned by the sheriff in his return was no longer his place of residence since 1999. I must pause to state that a Court judgment is not evidence but an opinion of a Court regarding a matter that served before a judge. For the purposes of the special plea of prescription, the appellants led no evidence to support the version that in 1999, he left the place of residence, and his girlfriend remained. In *Hoosein v Dangor*,⁶ the Court stated the following regarding the word ‘residence.’

“The concept “residence” has been considered in a number of court decisions in the past... In *Robinson v Commissioner of Texas* 1917 TPD 542 at 547-548 Bristow J observed that perhaps the best general description of what is imported by the term “residence” is that it means a man’s home or one of his homes for the time being, though exactly what period or what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule. Physical presence at a place for a prolonged period would constitute residence. Bristow J further observed that when the intention is to prolong one’s presence beyond the possible limits of a casual visit, and that intention is not abandoned, it would seem that the intention to prolong one’s presence beyond the possible limits of a casual visit, that intention would constitute residence, the intention of course being gleaned from all the circumstances of the case. *A person’s intention is not necessarily conclusive.* The objective facts must be looked at to decide the question of factual evidence.”

[13] The full bench of this Division in Johannesburg in a matter of *Sandile Msimango v Francis Peters*,⁷ grappled with the issue of service of a process at the place of residence. The defendant in that case contended that service upon him was invalid because he had been residing in the United Kingdom since June 2015 and was not resident in South Africa at the time of service. Gleaning from the written judgment of our brother Meyer J, similarly, the second defendant allegedly contended that he ceased residency at the address the sheriff left the process at, in 1999. Thus, suggesting that as of 31 March 2016, when the service was effected, he no longer resided at the house, he referred to be the house of the “girlfriend”. It must

⁶ *Hoosein v Dangor* 2009 JDR 1212 (WCC) at para 7.

⁷ *Sandile Msimango v Francis Peters* [2022] ZAGPJHC 418.

be assumed for the purposes of this appeal that before 1999 the address was his residence, if the Bristow J test were to be applied.

[14] Having reviewed the relevant authorities, the learned Ossin AJ in *Msimango* had the following to say:

“[125] At the end of the day, both Hoosein and Barens hold that the question as to what constitutes a person’s residence is a factual inquiry, and that whilst a place of permanence would be regarded as a person’s residence, that does not exclude other places as also constituting a person’s residence”.⁸

[15] As stated before, the second defendant on his own version as shared with Meyer J, he at some point resided there. It is of course unclear from the Meyer J judgment whether the alleged girlfriend owner of the house was still his girlfriend in 2016. At the ultimate end, Ossin AJ reached the following conclusion:

“[130] I am of the view, therefore, that, for purpose of rule 9(3)(b), the Hyde Park house⁹ is to be *regarded as defendant’s residence*.”

[134] Accordingly, I am of the view that the learned Magistrate was correct when he found that *summons was validly served on the defendant as required by rule 9(3)(b)*.

[16] To my mind, this Court as a Court of appeal is not bound by the findings of a single judge. In particular, this Court must disagree with a finding made by my brother Meyer J that there was no proper service of the process. The learned brother reached that conclusion on the strength of the evidence before him that the place of residence is the house of the girlfriend, and the second defendant left the premises in 1999. If this evidence is discounted, which in my considered view, it should be in the context of interruption of prescription, what will remain is the return of service, which evidences a service of process. Regard being had to rule 4, it is difficult to comprehend a legal conclusion that there was no proper service. The fact that he

⁸ See above n 6 at para 125.

⁹ This being the house the defendant had not been at for four years.

allegedly left, what was undoubtedly his place of residence in 1999, does not discount the fact that service was effected by an officer of a Court, in accordance with the rules, at that place in 2016. Before Mokose J, the second defendant advanced no evidence that he left the service address in 1999. Even if he did, in my view, that would have only answered the question that he did not receive the process, a question quintessentially relevant to the rescission application as opposed to the interruption of prescription. Accordingly, other than the return of service, there was no other objective evidence before Mokose J to counter the contents of the return of service, which remains a *prima facie* proof of its contents – service of the process was effected at the second defendant's place of residence.

[17] Meyer J was faced with a rule 42(1) application and not a special plea of prescription. The rule concerns itself with an order or judgment obtained in the absence of an affected party. The rule has nothing to do with the service of process for the purposes of interrupting prescription. There are many instances where a judgment or order may be obtained in the absence of an affected party even where a service effected in any of the manners prescribed in rule 4 has occurred. It does not axiomatically follow that because an affected party was absent when the judgment is obtained, he or she was quintessentially not properly served.

[18] In *Santam Insurance Company Ltd v Vilakasi*,¹⁰ Holmes JA had the following to state with regard to service which interrupts prescription:

“In my opinion it is clear that the *service referred to in sec. 6 (1) (b)* must be a service whereby *action is instituted as a step in the enforcement of the claim or right*. The underlying reason why such a service interrupts prescription is that *the creditor has thereby formally involved his debtor in court proceedings for the enforcement of his claim. That effect is absent where, as here, the claim is statutorily unenforceable by proceedings commenced by a summons served prematurely*”¹¹

¹⁰ *Santam Insurance Company Ltd v Vilakasi* 1967 (1) Sa 246 (A).

¹¹ See above n 9 at para 253H.

[19] Trollip AJA, as he then was, penned a dissenting judgment. He effectively disagreed with a conclusion reached by the majority that premature service of summons did not interrupt prescription. However, the erudite Trollip AJA, felicitously stated the following, which is, in my fervently held view, relevant to the present appeal.

“If, as I think the sub-section means that not only can summons be issued prematurely (as *Reddinger’s* case held), but it can also be *served prematurely*, then it follows that such ‘service’ would constitute “service of a process whereby action is instituted” within the meaning of sec. 6 (1) (b) of the Prescription Act...”.¹²

[20] In the present appeal, there is no doubt that the respondent instituted an action against the Trust. The only cause of disagreement is whether, as stated by the sheriff, the second defendant received the process. I interlude to remark that it is plain from the majority judgment that the return of service of 31 March 2016 was not taken into account by the majority. The majority judgment, regrettably, departed from a wrong premise that there was no service on the second defendant, a fact disproved by the contents of the return of service. The question that the process was received is different from the one that asks whether service was effected in accordance with the rules after the action was instituted. The question whether the second respondent received the copy of the process as served by the sheriff is only relevant to the question of awareness when a judgment or order is sought to be made. That pertinent question served before my brother Meyer J and not before Mokose J. At the proper time, I shall, in this judgment demonstrate what was before Mokose J and who bore the onus to substantiate such a case.

[21] In *Sheriff Bloemfontein West*,¹³ the learned Daffue JP, correctly made the following apt observations:

“[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

¹² See above n 9 at para 260D.

¹³ *Sheriff Bloemfontein West* [2024] ZAFSHC 205.

country. Also, unlike decades ago, when it could be expected that someone, for an 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 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 businesses 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.

[35] Judges and magistrates are often confronted with applications for rescission of judgment. In many of these cases the process commencing proceedings have been served at the domicilium address in terms of the rules... or by affixing the documents to the outer or principal door or security gate of the person's residence or place of business... it is accepted that these applications often succeed.

[37] I accept, based on the examples in the aforesaid cases, that a sheriff's return 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... 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 did not come to their attention, causing default judgment to be granted, such affected person/entity will always have a right to apply for rescission of judgment in an appropriate case."

[22] At the end, the learned Daffue JP, made the following order:

“It is declared that, in the case of a corporation or company, if no responsible person is found at the registered office or principal place of business within the court’s jurisdiction which is kept closed, it would be lawful and sufficient... if the sheriff or their deputy affixes a copy of a process to the main door or security gate of such office or place of business, or in any manner provided by law”.¹⁴

[23] In *Barens en Ander v Lottering*,¹⁵ Erasmus AJ stated the following:

“Die landdros het bevind dat betekening nie behoorlik geskied het nie en dat die ‘beste manier van diening’ nie gevolg is nie. Daar moet beklemtoon word dat dit nie gaan oor die beste manier van betekening nie, maar of betekening ooreenskomstig die voorskrifte van die Reels geskied het. Wat verontrustend is, is die landdros se waarneeming dat daar tydens die afgelope jare’ ‘n neiging is om die ‘maklike’ manier van betekening aan te gryp en dagvaardings sonder navraag of ondersoek eenvoudig aan deure vas te heg”¹⁶

[24] In light of the above, I reach a conclusion that the second defendant was served in 2016, as such, prescription was interrupted within the meaning of section 15(1) of the Prescription Act. There is a return of service from the sheriff evidencing that the process was served. To the extent that Mokose J found that prescription was interrupted, she, in my considerably held view, did not err. It bears mentioning that regard being had to the provisions of section 15(2), the prescription interruption did not lapse in this instance because, the appellant successfully prosecuted its claim and obtained judgment albeit not a final one. The granting of a rescission of a default judgment does not mean that the claim was not successfully prosecuted. As it shall

¹⁴ See above n 12 at para 40.

¹⁵ *Barens en Ander v Lottering* 2000 (3) SA 305 (C).

¹⁶ See above n 14 at para 312B. Translation [The magistrate found that there was no proper service and that the best manner of service was not followed. **It must be emphasized that this is not about the ‘best manner of service’ but whether service occurred in accordance with, or as prescribed by the Rules of Court.** What is disconcerting is that the magistrate’s observation that it seems that a practice developed over the last years to follow the easy way of service by affixing to doors without any investigation or enquiry].

be demonstrated later, even the withdrawn action did interrupt the running of prescription in this instance.

[25] Section 23 of the Superior Courts Act specifically provides that a judgment entered by default in terms of the rules is deemed to be a judgment of a Court. This Court does accept that entering of a default judgment may not be a final judgment, since it is susceptible to alteration by the same Court that entered it. Section 15(2) denotes that interruption of prescription shall lapse and be deemed not to have been interrupted once a final judgment is set aside. In the present matter a default and not a final judgment was set aside on 22 December 2017. In an instance where a default judgment is set aside by way of a rescission, the interruption that had occurred prior to obtaining a default judgment remains because the debt remains due and the process that interrupted prescription is not and cannot be set aside¹⁷. It cannot be so that once a default judgment is rescinded, a plaintiff must issue fresh process to re-interrupt prescription. The egg cannot be unscrambled. More recently the SCA in *Jomane Eiendomme (Pty) Ltd v Magistrate Van Zyl and Another*,¹⁸ rejected a proposition to the effect that upon rescission of judgment the litigation is concluded, and the creditor must institute an action anew. The learned Phatshoane AJA, felicitously stated the law to be as follows:

“[17] In considering the application for rescission and when striking appropriate balance between the competing interests, the issue of prejudice that may be occasioned by the outcome of the application must not only be considered from the debtor’s perspective but that of the creditor as well. The rescission of a judgment does not finally dispose of the matter but preserves the *status quo*.

[18]The proposition contended for by Jomane has impractical implications that could lead to unfair consequences and undermine the very purpose of s 58. For instance, it would mean that on rescission the interruption of prescription under s 15(1) of the Prescription Act 68 of 1969 would lapse. Consequently, the

¹⁷ See in this regard *Cape Town Municipality v Allianz Insurance* 1990 (1) SA 311 (C); *Neon and Cold Cathode illuminations (Pty) Ltd v Ephron* 1978 (1) SA 464 (A) and *Rademeyer v Ferreira* 2025 (2) SA 1 (CC) at para 85 majority judgment penned by Majiedt J.

¹⁸ *Jomane Eiendomme (Pty) Ltd v Magistrate Van Zyl and Another* [2025] ZASCA 109.

plaintiffs in those circumstances may be unable to pursue their claims or recover debts...”

[26] The setting aside of a judgment contemplated in section 15(2) is one that kills a final judgment forever like in a final appeal, if a final judgment was obtained. Even if I am wrong in this interpretation, regarding the present claim, prescription will, in my considered view, have to run afresh from the date of the lapse of the interruption, being, 22 December 2017. Once prescription is interrupted, the clock must stop running. For an example, if prescription is interrupted on the second year of the debt being due, during the litigation of the claim, the remaining one year to complete the three-year period stops running. On the authority of *Jomane Eiendomme (Pty) Ltd v Magistrate Van Zyl and Another*,¹⁹ it was a futile exercise to re-issue and re-serve the process in October 2019 since prescription was long interrupted.

[27] Nevertheless, Mangena AJ in *Interactive Trading 115 CC and Another v South African Securitisation Programme and Others*,²⁰ dealing with the duties of a sheriff, firmly made the following compelling observations:

“[14] What emerges from the above is that the sheriff who prepared the returns of service did not perform his duties honestly and diligently in fulfilment of his obligations to this court. The essence of the applicant’s submissions is that return of service should not be relied upon as it contains incorrect information. These are serious allegations being made against an officer of court. *The court relies on the office of the sheriff as one mechanism in the administration of justice to ensure that the process leading up to the granting of a judgment is fair and that the legal proceedings have been brought to the attention of the other party.* Sheriffs like attorneys are required to be honest in their dealings with the court. *The court should upon **mere production** of the return of service accept as correct the information contained therein.*”

¹⁹ See above n 17.

²⁰ *Interactive Trading 115 CC and Another v South African Securitisation Programme and Others* 2019 (5) SA 174 (LP).

[28] Mere production of the return of service, proving service on the second defendant, quintessentially reveals the following important facts, (a) the address is the place of residence of the second defendant; (b) the process was left at the place of residence; (c) by affixing the process at the principal door of the place of residence identified to be that of the second defendant. As the learned Mangena AJ puts it, any person familiar with the court process will know that it is a sheriff's job to serve the documents and execute the warrants issued²¹. The Full Court Division of this Court in *Absa Bank Limited v Mare and Others (Mare)*,²² expressed itself in the following terms:

“[19] A return of service, it is trite, is regarded as *prima facie* evidence of its content. Indeed s 43(2) of the Superior Courts Act 10 of 2013 expressly provides that ‘[t]he return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be *prima facie* evidence of the matters therein stated’. It follows that such evidence may be challenged by adducing the clearest evidence...”

[29] Before Mokose J, no evidence in its clearest form was led to gainsay the contents of the return of service. What stubbornly remained before Mokose J was the *prima facie* evidence of what was done by the sheriff. In *Mare* the court confirmed that:

“[26] The manner in which a process may be delivered at a *domicilium*... is not prescribed and depends on the prevailing circumstances... The duty upon the sheriff is to serve a notice or process of court at a *domicilium*... by delivering or leaving the notice or process in a manner by which in the ordinary course the notice or process would come to the attention and be received by the intended recipient, and to report to the court how the process was served and why it was served in that manner...”

[27] ... The obvious method of delivery by which in the ordinary course the summons would have come to the attention and received by her ... was by

²¹ Para 17 of the judgment.

²² *Absa Bank Limited v Mare and Others* 2021 (2) SA 151 (GP).

slipping it under or affixing it to the front door of her home, or even by placing it in a post box, if there was one.”

[30] Before I conclude, the majority judgment ignores, in my considered view, the prime fact that section 15(1) of the Prescription Act implicates section 34 of the Constitution. Such fact is of first importance when a statutory interpretation is engaged in. The implication of the order reached by the majority is that the respondents would be barred from claiming around seven million rands without the application of the law. Such constitutes a serious limitation of the section 34 right. More recently, the majority of the SCA under the magnificent pen of Makgoka JA in *Rossouw v Blignaut and Wessels and Another*,²³ with such sagacity, made the following monumental observations:

“[89] The other right is enshrined in s 34 of the Constitution, which guarantees everyone the right to access to courts and to have their disputes decided in a fair public hearing. A time-bar provision like s 3(1)(a) of the Act is a limitation of this right. It therefore inherently implicates the right guaranteed in s 34 of the Constitution and arises by default in all instances where the provision is in issue. About the s 34 right, the Constitutional Court recently made the following observation, albeit in the context of prescription, in *Le Roux and Another v Johannes G Coetzee and Seuns and Another*

‘The proposition that a claim, otherwise *valid in law and even one that is unassailable, may be extinguished if not asserted within the time provided by the law, is unsettling*. It is unsettling, as its effect is to negate the substance of the right conferred by s 34 of the Constitution...

[90] This is a *trenchant observation*. What it entails is that in every case where a court considers any provision that limits the access to courts, ... *it should anxiously reflect on this right and endeavour, to the extent possible, to vindicate, rather than negate, it. Indeed, a survey of the jurisprudence of this Court and the Constitutional Court reveals an elastic and liberal approach.*

²³ *Rossouw v Blignaut and Wessels and Another* [2025] ZASCA 146.

[31] An interpretation of section 15(1) of the Prescription Act requires anxious reflection given its brutishness to the right guaranteed in section 34. It is by now trite that Courts are impelled to interpret any law within the prism of the Constitution (section 39(2) of the Constitution, so impels). In *Hassody Katha v Primathie Pillay N.O and others*,²⁴ Steyn AJA, writing for the majority stated the legal position to be this, when interpreting a section in the Prescription Act:

“[16] Any interpretation of a statute should be in accordance with the provisions of the Constitution... In *Makate v Vodacom Ltd*, the Constitutional Court emphasised the importance of section 39(2) of the Constitution when it held:

‘Since the coming into force of the Constitution in February 1997, every court that interprets legislation is bound to read a legislative provision through the prism of the Constitution’...”

[32] If the phrase *service on the debtor* is given a restrictive meaning as the majority judgment did, a possible valid claim in law would disappear into oblivion simply because of what may appear to be an error by an officer of a Court – the sheriff. A benign and liberal interpretation would not leave the appellants devoid of rights. They can still demonstrate that the claim of the respondent is frail and perfidious at the trial of the dispute. In October 2016, the second defendant was aware of the proceedings and in seeking to vindicate his rights he applied for rescission. From that point on, it cannot be doubted that the second defendant became aware of the action. That was within the three years prescription period. The majority judgment found no persuasion in the fact that the second defendant gained knowledge at that point. I find persuasion.

[33] In *Investec Property Fund Limited v Viker X (Pty) Ltd*,²⁵ Adams AJ, as he then was, stated the following:

“[14] The purpose of rule 4 is to provide for mechanism by which relative certainty can be obtained that service has been effected upon a defendant. If

²⁴ *Hassody Katha v Primathie Pillay N.O and others* [2025] ZASCA 106.

²⁵ *Investec Property Fund Limited v Viker X (Pty) Ltd* [2016] JOL 36060 (GJ).

certain minimum standards are complied with as set out in the rule, then an assumption is made that the service was sufficient to reach the defendant's attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons. *The converse is not true – namely that if service is not effected as required by the rule, the service is not effective – in that the purpose for which service is required was fulfilled, namely, the defendant came to know of the summons.* The rules, as pointed out...set out procedural steps. They do not create substantive law. Insofar as the substantive law is concerned, the requirement is that a person who is being sued should receive notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceedings. *If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service.*

[17] There *should not be a rigorous and formalistic approach* to the rules. The court should take into account the true intention of the fairness of the rules and the realities of the situation..."

[34] I plentifully agree with Adams AJ. Even if the majority judgment could have found that the service by the sheriff on 31 March 2016 is defective, it cannot be doubted that in October 2016, the second defendant acquired knowledge that the Trust is being sued and most importantly the second defendant came to know of the process. Thus, the purpose of rule 4 had been achieved. By extension, the requirements of section 15(1) regarding service on the debtor had been met. Therefore, prescription was interrupted. The sentiments expressed by the erudite Adams AJ are congruent with the vista of the recent judgment of the Supreme Court of Appeal in *Obiang v Janse van Rensburg & Others*.²⁶ The Court, without an iota of shilly-shallying, expressed itself in the following terms:

"[35] Two further points require consideration. The first is the appellant's contention that the return of service ... was flawed because it listed an address different to that of the Embassy. Critically, the appellant does not deny that service of legal process was effected on the Embassy. ***The return of service makes clear, on its face, that the application ... was served on***

²⁶ in *Obiang v Janse van Rensburg & Others* [2025] ZASCA 30.

the Embassy ..., albeit that the Embassy address was erroneously listed as ...
*In any event, a flawed return of service does not render the underlying service of the court documents invalid, **provided they came to the attention of the party in question** – which in this case – it did.*” [Own emphasis]

[35] Undoubtedly, what matters is the gaining of knowledge of the process before the prescription period comes to pass. It was confirmed in *Blaauberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*,²⁷ that prescription penalises negligence and inactivity. In *Minister of Police v Miya*,²⁸ the Court was emphatic, although dealing with section 2(2) of the State Liability Act,²⁹ and stated the following:

“[16] I agree with the remarks made therein that the question to be considered in interpreting this section *is not about how knowledge was obtained, but whether knowledge of the action was obtained.*”

[36] Similar sentiments were expressed in *Blaauberg* when Heher JA expressed himself, whilst writing for the majority, in the following terms:

“[18] Proof of service on a person other than the one named in the process may thus be sufficient to interrupt prescription, if it should afterwards appear that that person was the true debtor. This may explain the decision in *Embling (supra)* where the defendant was cited in the summons as Aquarium Trust CC whereas the true debtors were the trustees of the Aquarium Trust. *Service was effected at the place of business of the trust and came to the knowledge of the trustees. In the light of what I have said such service was relevant to proof that s 15(1) had been satisfied and was found to be so by Van Heerden J.*”

[37] In certain circumstances, the Court decided that a mention of a debt in the financial statements of a party constituted an acknowledgement which interrupted

²⁷ *Blaauberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA).

²⁸ *Minister of Police v Miya* 2025 (3) SA 130 (SCA).

²⁹ Act 20 of 1957 as amended.

prescription³⁰. A syllogism suggests that by launching a rescission application, the process was served on the second defendant, as such prescription was interrupted thereby. Otherwise, how did he personally gain knowledge of the action against the Trust? It is fundamentally wrong, in my considered view, to conflate authority to bind a Trust with service of a process on the individual trustees within the contemplation of the rule. As confirmed by Cameron JA in *Land and Agricultural Development Bank of SA v Parker and Others*,³¹ joint action requirement entails that the trustees must act together. The erudite Cameron JA expressly stated the law to be as follows:

“[15] ... It is a fundamental rule of trust law, which this Court recently restated in *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk*,³² that *in the absence of contrary provisions in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts...*”

[38] Based on the above discussion of the authorities, I am unable to agree with the learned Acting Justice in the matter of *Klein v Newton (Klein)*,³³ when he concluded that service by affixing the summons to the gate of the property was defective. The learned Acting Justice erred in my respectful view, when he concluded that the findings in *Obiang* affirmed the court's discretion to condone service. The principle in *Obiang* is clear. Once there is evidence that a process came to attention of the debtor such is sufficient to justify proper service despite a flawed return of service.

[39] As I draw to a close, it would be remiss of me not to reflect on the forceful submission made that the fact that the process was served on one trustee should suggest that the other trustee was alerted to the process by the one trustee who was served. As a matter of law, trustees must act jointly. Undoubtedly, the trustee who was served must have brought to the attention of the other trustee the process served. Even if the bringing to the attention did not occur immediately, the fact that in October 2016, a rescission application was launched, suggests that ultimately the

³⁰ See *Restaurant Pacini inc. c. Lepage* 2021 QCCS 4205 and *Mohawk Council of Kanasatake c. Sylvestre* 2022 QCCS 3332 (CanLII) at para 84.

³¹ *Land and Agricultural Development Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA).

³² *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA).

³³ *Klein v Newton* 2026] ZAWCHC 333.

process was brought to his attention, albeit not in accordance with the rules. Taking into account the provisions of section 34 of the Constitution, it must be accepted that prescription was interrupted by the second defendant gaining knowledge of the process. For my part, it is difficult to accept that because the second defendant was not served personally, he was unaware of the process within the prescribed three years period. In *Standard Bank of South Africa Limited v Botha*³⁴, the erudite Tuchten J, whilst dealing with section 14(1) of the Prescription Act, accepted that acknowledgement of liability by one trustee interrupted prescription. Similarly, I take a view that service of process on one trustee was sufficient to interrupt prescription. The learned Tuchten J also placed premium on the teachings of the then Appellate Division in *Oloff v Minnie*³⁵, and stated the following:

“14 The Appellate Division explained that the purposes of prescription were twofold and had been so since antiquity: *to punish the supinity of a plaintiff who does not enforce his rights and to mitigate the difficulty felt by defendants who have to repel ancient claims.*”

[40] Clearly, in an instance where one trustee is served, the purpose of the prescription regime would have been achieved by such service. It is by now rested law that when a statute or a document is interpreted, that interpretation is to be approached holistically, simultaneously considering the text, context and purpose³⁶. A point to be observed at all material times is that Rules are for the Court and not the Rules for the Court. It defeats the very purpose of the prescription regime to punish the appellant with no clear evidence of supinity or any demonstrable difficulty felt by the Trustees. On the facts of this case, and the history of the action, it is extremely difficult to fathom out any lethargy on the part of the appellant nor any quandaries felt by the Trust or the trustees. The interpretation favoured and adopted by the majority judgment is not aligned to the purpose of prescription. As stated, it bears emphasis to repeat that Rules exists for a Court and not the other way around³⁷. A procedural rule should not be used to defeat the substantive purpose of section 15(1). This

³⁴ *Standard Bank of South Africa Limited v Botha* [2018] ZAGPPHC 35.

³⁵ *Oloff v Minnie* 1953 1 SA 1 (A).

³⁶ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para 65.

³⁷ See *PFE International Inc (BVI) and others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA (CC) para 30.

situation is not dissimilar to the one that obtained in *Union Government v Van der Merwe*³⁸, where interruption of prescription in favour of the principal debtor also favoured a surety. Like trustees, a principal debtor and a surety attract the same obligation or liability. It is noteworthy to state that in terms of section 11(d) of the Prescription Act, what prescribes after a three-year period is a debt.

[41] In this particular instance, there is only one debt and not two debts. The debt is one as against the Trust. It shall be absurd to suggest that when service was effected on the one Trustee, such would have only interrupted prescription as it is against that one Trustee. Equally, it shall be absurd to suggest that service on the one trustee (a representative of a debtor -Trust) whereby a creditor, the appellant herein claims payment of a debt, is meaningless in law, unless coupled with service to the other trustee. In those circumstances, it cannot be doubted that the Trust as a debtor had become aware that the appellant is claiming the debt owed to it. If it is accepted, which in my view, it should be, that service of process interrupts prescription, then service on the one trustee puts a stop on the running of prescription. It shall be absurd and patently impracticable to remotely suggest that service on the one trustee only puts a stop on the running of prescription as it is against that one Trustee and not the other. This suggested interpretation of rule 4 as it pertains to Trustees pays homage to the impel of section 39(2) of the Constitution. The interpretation is trenchant and demonstrates allegiance to the text, context and purpose of the rule. The suggested interpretation sufficiently gives a proper meaning to the phrase “joint liability” of Trustees.

[42] Let me turn to the case that was before Mokose J. In the answering affidavit, the appellant pleaded and effectively testified as follows, taking into account that in motion proceedings, an affidavit serves a symbiotic purpose, namely (a) as a pleading; and; (b) as evidence:

SPECIAL PLEA TO THE PLAINTIFF’S CASE

5 The Plaintiff’s claim is based on a written agreement known as the Joint Building Contracts Committee Serious 2000, Edition 5, concluded on or

³⁸ *Union Government v Van der Merwe* 1921 TPD 318.

about 12 September 2013 in terms of which the Plaintiff would render construction services for the Tshivhengha Trust.

6 On the Plaintiff's version, it issued letters of demand to the Defendants on or about 7 August 2014, 3 October 2014 and 7 October 2014 and subsequently terminated the agreement on or about 23 October 2014.

7 On the Plaintiff's version the claim arose before 7 August 2014

8 **During or about 8 December 2015 the Plaintiff issued a provisional sentence summons out of the above honourable court under case number 97792/2015 in terms of the same cause of action.**

9 On or about 2 March 2016, subsequent to the defendants filing an opposing affidavit, the claim was unconditionally withdrawn, and the defendants' cost was tendered on a party and party scale. Find attached hereto as annexure "AA2" a true copy of the notice of withdrawal of the action under case number 977792/2015.

10 On or about 23 March 2016 the provisional sentence summons under the case number was issued.

11 On or about 6 May 2016 default judgment was granted jointly and severally against the defendants in the amount of R5 152 079.00 together with interest thereon at 16% from 22 February 2016.

12 ***On or about 22 December 2017 the Honourable Justice Meyer rescinded the judgment finding that proper service on the trust as required in terms of Rule 4 of the Uniform Rules of Court was not effected.***

13 The provision sentence summons was subsequently served on both the defendants during October 2019 more than 5 years after the claim arose. Find attached hereto as annexure "AA3" and "AA4" copies of the Sheriff's returns of service for easy reference.

14 In the premises, the Plaintiff's claim has prescribed in terms of Section 11 read with Section 12 of the Prescription Act, Act 68 of 1969.

15 Wherefore the claim should be dismissed with cost.

[43] It is common cause that no other evidence was led in support of the special plea of prescription. The second defendant does not disclose to Mokose J that it was in October 2016, that he applied for a rescission of judgment. He does not disclose

as to when he became aware of the provisional sentence summons. Most importantly, having seen the return of service of 31 March 2016 at that time, he does not state that the premises stated therein is not his residence. He also does not disclose that the house where the sheriff left the process at belongs to his girlfriend. He does not disclose that he left in 1999 after having stayed there for how long. He only testifies about a Court judgment of 22 December 2017. As pointed out earlier, a Court judgment does not constitute evidence. It is an opinion or conclusions by another Court and not direct proof of facts in another proceedings. In *Technology Corporate Management (Pty) Ltd and others v De Sousa and others*,³⁹ the learned Wallis JA expressed the legal position as follows:

“Evidence that a party has been convicted of a criminal offence *is not evidence*, not even *prima facie* evidence, in a subsequent contested civil suit; it is the irrelevant opinion of another court. In uncontested civil proceedings the fact of the conviction constitutes *prima facie* proof. The finding of a court in civil proceedings is inadmissible in subsequent criminal proceedings and a conviction *is not evidence in subsequent criminal proceedings against someone else*.”⁴⁰

[44] It is troubling for this Court to observe that the action which was withdrawn on 2 March 2016 was served or came to the attention of the second defendant, hence an answering affidavit was filed. There is no evidence as to where the withdrawn process was served on the second defendant around 2015. However, accepting that he left the address in 1999, as he testified before Meyer J, it must have been served at a different address. Nevertheless, since then, it must follow that the second defendant and or the Trustees gained knowledge that the appellant was not seating idly but was intending to claim its rights. Might I add that the action instituted on 8 December 2015, although it did not culminate with a judgment, since the action was withdrawn, also interrupted the running of prescription. The Labour Appeal Court in *Potgieter v Samancor Chrome Limited t/a Tubatse Ferrochrome (Potgieter)*,⁴¹ after

³⁹ *Technology Corporate Management (Pty) Ltd and others v De Sousa and others* 2024 (5) SA 57 (SCA).

⁴⁰ See above n 39 at para 161.

⁴¹ *Potgieter v Samancor Chrome Limited t/a Tubatse Ferrochrome* (2025) 46 ILJ 1708 (LAC).

placing reliance on *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd (Pieman's)*,⁴² aptly stated the legal position to be as follows:

'[35] It is clear that the Constitutional Court (within the context of conciliation proceedings) interpreted section 15(1) of the Prescription Act not to require that the instituted process must culminate in a judgment in the same proceedings. It is sufficient for the party to approach recovery of the debt in staggered fashion. In this instance, it cannot be said that the proceedings initiated on 23 July 2018 were not proceedings competent in terms of section 15(1) of the Prescription Act. As mentioned above, the action was withdrawn...

[37] ... Therefore, it cannot be said that the aborted proceedings did not interrupt the running of prescription. They did.'

[45] I fully endorse the sentiments expressed in *Potgieter*. They are appropriate. Consequently, on the strength of *Potgieter*, the running of prescription in this instance was interrupted already on 8 December 2015. A trenchant point which the majority judgment completely disregarded. Nonetheless, I pertinently take a view that the judgment of Meyer J holding that there was no proper service on 31 March 2016, was not admissible evidence before Mokose J. Similarly, it does not serve as evidence of anything before the Court of appeal. It is trite that a Court of appeal, unless leave to adduce further evidence is sought and granted, is confined to the four corners of the admissible evidence that served before the Court below.

[46] A cardinal rule is that pleadings are purposed to define issues for the other party and the Court.⁴³ The special defence of prescription is facts based⁴⁴. The appellant led no satisfactory evidence to substantiate the allegation of prescription. The appellant bore the onus to prove the allegation that the claim had prescribed, and that prescription was not interrupted.⁴⁵

⁴²*Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 38 ILJ 1213 (CC) at paras 23-24 and 35-38.

⁴³ *Minister of Safety and Security v Slabbert* 2010 (2) All SA 474 (SCA).

⁴⁴ *Macleod v Kweyiya* 2013 (6) SA 1 (SCA).

⁴⁵ *Pillay v Krishna* 1946 AD 946 at 951.

[47] In summary, I conclude that the sheriff properly served the second defendant on 31 March 2016. The second defendant gained knowledge of the process in October 2016 or even earlier, at which time the claim had not become prescribed in law. The appellant bore the onus to prove that the claim of the respondent had become prescribed in law. The appellant failed to discharge that onus before Mokose J. The judgment of Meyer J did not constitute evidence before Mokose J, and it is not binding on this Court. Section 19(d) of the Superior Courts Act only empowers a Court hearing an appeal to (a) confirm; (b) amend; or (c) set aside, the decision which is the subject of the appeal and render any decision which the circumstances may require. It is the decision of Mokose J that this Court must deal with. Mokose J did not err when she held that the special plea of prescription ought to be dismissed. An appeal lies against an order of a Court and not the reasons in support of the order⁴⁶. The fact that Mokose J referred to the service of 2016 as “irregular” is of no consequences for this Court. This Court, for reasons outlined above must reach an irresistible conclusion that the service was not irregular.

[48] Because of all the above reasons, had I commanded the majority, I would have made the following order:

Order

1. The appeal is dismissed with costs, which includes the costs of the employment of two counsels to be taxed or settled at scale C for the senior and scale B for the junior.

GN MOSHOANA
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

⁴⁶ *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others* [2017] ZASCA 47.

Appearances

Counsel for the Appellants

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Instructed by

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Counsel for the Respondent

: Adv. D Van Den Borgert SC

: Adv. M Jacobs

Instructed by

: Hansen Inc.

Date of Hearing: 06 October 2026

Date of Judgment: 27 August 2026