



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Barnard v Gouws (639/2024) [2026] ZASCA 139 (16 October 2026)

Today the Supreme Court of Appeal (SCA) upheld an appeal by Ms Aletta Johanna Barnard against an order of the Gauteng Division of the High Court, Pretoria (the high court), which had dismissed her claim for damages against Dr Estelle Gouws on the ground that it had prescribed. The SCA set aside that order, dismissed the special plea of prescription and remitted the matter to the high court for the merits of the claim to be determined before a different judge. The majority judgment was written by Matojane JA, with whom Mbatha JA concurred. Goosen JA dissented.

Ms Barnard alleges that Dr Gouws, a chiropractor practising in Kimberley, administered acupuncture to her on 23 and 30 September 2015 without adequate sterilisation, and that she developed a spinal infection which required emergency surgery and left her with permanent neurological damage. Dr Gouws denies the allegations. They have not been tested in evidence, and the SCA made no finding on them.

The claim would have prescribed after three years unless prescription was interrupted. On 28 September 2018 Ms Barnard's attorney had the summons issued and instructed the sheriff to serve it that day at the residential address in Centurion which Dr Gouws's attorney had furnished for service in April 2018. The deputy sheriff's return of service recorded that he found the premises locked and affixed the summons to the principal door. Dr Gouws was in Malaysia at the time. Her husband, who arrived at the unit shortly afterwards, found no documents. On 2 October 2018 Ms Barnard's attorney informed Dr Gouws's attorney that the summons had been served at the residence, and the attorney relayed this to Dr Gouws in Malaysia the same day. Requests by Dr Gouws's attorney for a copy of the summons went unanswered, and a copy was supplied only in March 2019.

The questions of service and prescription were tried as a special plea. After the evidence had closed and while judgment was awaited, Ms Barnard applied under rule 27(3) of the Uniform Rules of Court

for condonation of her non-compliance with rule 4, which governs service. Dr Gouws objected under rule 30 that the application was an irregular step. In December 2023 the high court upheld the objection, upheld the special plea and ordered Ms Barnard to pay costs on the attorney and client scale. The high court and two judges of the SCA refused leave to appeal. The President of the SCA then referred the refusal of leave to the Court for reconsideration under s 17(2)(f) of the Superior Courts Act 10 of 2013. As amended in 2024, that provision permits such a referral where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute.

The majority declined to decide whether the existence of that threshold is a matter for the President alone or a jurisdictional fact which the Court must itself determine, since the outcome did not depend on it. It assumed in Dr Gouws's favour that the Court had to be satisfied that the threshold was met, and held that it was. A finding which extinguished, without any enquiry into its merits, the claim of a plaintiff who alleges permanent disability, and which rested on errors of law as to the onus and the effect of the return of service, would occasion a grave failure of justice. At the hearing Ms Barnard's counsel abandoned the complaint about the high court's handling of the interlocutory applications, on which the referral had been obtained. The majority held that this did not alter the position, because whether a grave failure of justice would result is an objective question which does not turn on the grounds counsel elects to pursue in argument. The challenge to the order upholding the special plea had not been abandoned.

On the merits, the majority held that the high court had wrongly placed the burden on Ms Barnard to prove service. A party who invokes prescription bears the onus of proving it, and under s 43(2) of the Superior Courts Act a sheriff's return is *prima facie* evidence of what it records. Evidence that Dr Gouws's husband did not find the summons some 23 minutes later showed only that it was not discovered, not that it was never affixed. The deputy sheriff's inability to recall a particular service five years later did not detract from the return, and no adverse inference could be drawn from the absence of a job card which may no longer have existed.

The majority further held that, by furnishing her residential address for the purpose of service, Dr Gouws had chosen a *domicilium citandi*. Under rule 4(1)(a)(iv) as it read at the time, leaving a copy of the process at a chosen *domicilium* was good service, even if the defendant was abroad or the document did not come into her hands. In the alternative, if the address was not a *domicilium*, the service was nonetheless effective because its purpose had been achieved: notice of the proceedings, flowing directly from the attempted service, reached Dr Gouws and her attorney within four days, and no prejudice resulted. Prescription was therefore interrupted on 28 September 2018. The majority expressed a view, without deciding the point, that if service had been neither compliant nor effective, Dr Gouws's absence from the country in the closing days of the prescriptive period may have delayed the completion of prescription under s 13(1)(b) of the Prescription Act 68 of 1969.

The SCA confirmed that the high court was right to set aside the late condonation application as an irregular step, and that Ms Barnard must pay the costs of the interlocutory applications. It criticised a communication made on her behalf to the office of the presiding judge without notice to the other side,

and the failure of her attorney to answer requests for a copy of the summons. The punitive costs order on the special plea was replaced with an order that Dr Gouws pay those costs on the party and party scale. Each party was ordered to bear its own costs of the reconsideration application, and Dr Gouws was ordered to pay the costs of the appeal.

In a dissenting judgment, Goosen JA held that the threshold for reconsideration had not been met. In his view, once the applicant abandoned the ground on which the referral was obtained, nothing remained of the application, and to permit reconsideration in those circumstances would open s 17(2)(f) to abuse. He considered that a domicilium had not been pleaded or established, that the service did not comply with the rules, and that service is effective only where the defendant receives, or is deemed to receive, the summons itself. Mere knowledge that a summons has been issued is not enough. He also held that the point under s 13(1)(b) had not been pleaded and turned on facts not established. He would have struck the application from the roll with costs.

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