



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 639/2024

Reportable

In the matter between:

ALETTA JOHANNA BARNARD

APPLICANT

and

ESTELLE GOUWS

RESPONDENT

Neutral citation: *Barnard v Gouws* (639/2024) [2026] ZASCA 139 (16 October 2026)

Coram: MBATHA, MATOJANE and GOOSEN JJA

Heard: 26 May 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for handing down of the judgment is deemed to be 16 October 2026 at 11h00.

Summary: Prescription Act 68 of 1969 – s 15(1) – interruption of prescription by service of process – onus resting on the party invoking prescription – s 43(2) of the Superior Courts Act 10 of 2013: return of service prima facie evidence of the matters stated in it – evidence of non-discovery of the process insufficient to rebut – Uniform Rule 4(1)(a)(iv) before its amendment – residential address furnished by the defendant's attorney for service a chosen *domicilium citandi* – leaving a copy at the *domicilium* good service – alternatively, effective service – purpose of service achieved where notice of the proceedings reached the debtor and her attorney within four days – obiter: s 13(1)(b) – debtor temporarily outside the Republic – whether absence an impediment – point of law arising on common cause facts – s 17(2)(f) of the Superior Courts Act 10 of 2013, as amended by the Judicial Matters Amendment Act 15 of 2023 – whether the qualifying criterion is a jurisdictional fact for determination by this Court left open – threshold assumed to be for this Court and found to be

satisfied – effect of the abandonment at the hearing of the ground upon which the referral was obtained – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Holland-Muter J sitting as the court of first instance):

- 1 The decision of the two judges of the court refusing the applicant's application for leave to appeal with costs is set aside and replaced with the following:
'Leave to appeal is granted'.
- 2 The appeal is upheld.
- 3 The order of the Gauteng Division of the High Court, Pretoria, dated 11 December 2023 is set aside and replaced with the following:
 - (a) The special plea of prescription is dismissed.
 - (b) The defendant is to pay the plaintiff's costs of the hearing of the special plea on the party and party scale, including the costs of two counsel where two counsel were employed.
 - (c) The defendant's application in terms of Rule 30 succeeds, and the plaintiff's application in terms of Rule 27(3) is set aside as an irregular step.
 - (d) The plaintiff is to pay the defendant's costs of the applications in terms of Rules 30 and 27(3) on the party and party scale.'
- 4 The respondent is to pay the applicant's costs of the application for leave to appeal in the high court on the party and party scale.
- 5 The respondent is to pay the applicant's costs of appeal on the party and party scale, including the costs of two counsel where two counsel were employed.
- 6 Each party is to bear its own costs in respect of the application for reconsideration in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013.
- 7 The matter is remitted to the Gauteng Division of the High Court, Pretoria for the determination of the merits of the applicant's claim for damages, before a judge other than Holland-Muter J.

JUDGMENT

Matojane JA (Mbatha JA concurring):

Introduction

[1] The question that arises in this appeal is whether the combined summons which the applicant contends was served on 28 September 2018 interrupted the running of prescription under s 15(1) of the Prescription Act 68 of 1969 (the Prescription Act) and, if it did not, whether s 13(1)(b) of the Prescription Act delayed the completion of prescription. A preliminary question concerns the basis upon which the matter is before this Court under s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Superior Courts Act).

Factual background

[2] On 23 and 30 September 2015 the respondent, Dr Estelle Gouws, administered acupuncture to the applicant, Ms Aletta Johanna Barnard, at the respondent's chiropractic practice in Kimberley, for lower back pain. Ms Barnard alleges that on 1 October 2015 she was admitted to the Kimberley Medi-Clinic with fever, severe back pain, paralysis and urinary retention, that a neurosurgeon performed an emergency laminectomy and evacuated a spinal empyema, and that she was discharged on 3 October 2015 with permanent neurological damage. Her pleaded case is that the respondent administered acupuncture negligently, without adequate sterilisation, and that this caused the damage for which she claims damages. The respondent denies these allegations. They have not been tested in evidence, and nothing in this judgment is a finding upon them. The respondent also resists the claim on the ground that it has prescribed.

[3] Towards the end of 2015 the applicant's then attorney telephoned the respondent to warn her of a potential claim and to request her clinical records. The respondent furnished those records by facsimile in July 2016. In February 2018 the attorney, by then at another firm, sent the respondent a text message advising her of

the impending action. The respondent's insurer instructed an attorney in Pretoria on her behalf.

[4] On 9 April 2018 the respondent's attorney wrote to the applicant's attorney offering to accept service of any summons at her Pretoria offices. The applicant's attorney declined, preferring to issue out of the Northern Cape Division. On 11 April 2018 the respondent's attorney furnished him with the respondent's permanent residential address at Unit 28, 84 Ireland Avenue, Eldoraigne, Centurion, and confirmed that the invitation to accept service at her offices no longer stood.

[5] On 28 September 2018, which appears to have been the last practicable day before prescription was thought to be completed, the applicant's attorney caused the combined summons to be issued out of the Gauteng Division of the High Court, Pretoria (high court) and instructed the Sheriff, Centurion West, to effect service at the residential address that day. A deputy sheriff, Mr Rhinus Gerhardus Koen, was assigned to the task (Mr Koen).

[6] The respondent's residence lies within the Ireland Hills security complex. An intercom keypad at the main gate controls access. A visitor who enters the unit number is presented with two options linked to the residents' cellular telephones: 'PHI', which connects to Mr Philip Hertzog, the respondent's husband, and 'IST', which connects to the respondent. The system generates an electronic call log. The respondent and Mr Hertzog had lived in unit 28 since 2017.

[7] The return of service recorded that at 15h22 Mr Koen attended at the address, conducted a diligent search and enquiry, found the premises locked, and was informed by 'Mr Phiri on intercom' that he could not confirm whether the respondent still resided there. He accordingly affixed the summons to the principal door of the premises in terms of Rule 4(1)(a)(v) of the Uniform Rules of Court.

[8] The respondent was in Malaysia from 26 September 2018 to attend a professional symposium and returned on 8 October 2018. Mr Hertzog was in Centurion on the afternoon of 28 September 2018. He arrived at the complex at about 15h45, entered through an unlocked side gate, walked to the main door and found no

documents. He left the following morning on a hunting trip and returned on 2 October 2018, when, having received a message from the respondent, he searched again and again found nothing.

[9] On 2 October 2018 the applicant's attorney telephoned the respondent's attorney and told her that the summons had been served at the respondent's residence. The respondent's attorney immediately messaged the respondent in Malaysia. The respondent telephoned Mr Hertzog and asked him to find the summons, and she telephoned her attorney. On 3 October 2018, the respondent's attorney wrote to the applicant's attorney requesting a copy of the summons and the return of service, noting that her client could not locate the documents. She received no reply. She wrote again on 11 October 2018, once more without success. A copy of the summons was furnished only on 18 March 2019, to the attorney who by then had come on record for the respondent.

[10] That attorney delivered a notice in terms of Rule 30 challenging the validity of the service. After protracted interlocutory proceedings, the parties agreed, by order dated 19 April 2021, that the questions of service and prescription would be determined by way of a special plea at the trial.

[11] The trial proceeded before Holland-Muter J in the Gauteng Division of the High Court, Pretoria(the high court), on 16 and 17 August and 13 and 14 September 2023. The respondent called five witnesses: the chairperson of the body corporate of the complex, Mr Hertzog, her first attorney, herself, and the attorney who succeeded to the file. The applicant called Mr Koen as her only witness. After the parties had closed their cases, and while judgment was awaited, the applicant applied under Rule 27(3) for condonation of her non-compliance with Rule 4. The respondent applied under Rule 30 to set that application aside as an irregular step.

[12] On 11 December 2023 the high court upheld the Rule 30 application, dismissed the application under Rule 27(3), upheld the special plea, and ordered the applicant to pay costs on the attorney-and-client scale. The high court refused leave to appeal, and, on 3 May 2024, two judges of this Court refused leave. The President of this Court on 23 August 2024 referred the refusal of leave to this Court for reconsideration

under the proviso to s 17(2)(f) of the Superior Courts Act. The parties were, in the same order to be prepared, if called upon to do so, to address the court on the merits of the intended appeal. Since the refusal and the referral both post-date the amendment of s 17(2)(f), the amended text governs.

Issues for determination

[13] The issues are these. First, whether the threshold in the proviso to s 17(2)(f) of the Superior Courts Act is satisfied, and what consequence follows from the applicant's abandonment of the ground on which she obtained the referral at the hearing. Second, whether leave to appeal should be granted. Third, whether the summons was served on 28 September 2018 and, if so, whether the service interrupted prescription under s 15(1) of the Prescription Act, whether by compliance with rule 4 or upon the principle that the purpose of service was achieved. Fourth, whether the respondent's absence from the Republic delayed the completion of prescription under s 13(1)(b). Fifth, whether the order for costs on the attorney and client scale can stand.

Section 17(2)(f) of the Superior Courts Act 10 of 2013

The provision and the amendment

[14] Before its amendment, the proviso to s 17(2)(f) of the Superior Courts Act read that the decision of the majority of the judges considering an application referred to in para (b), or of the court, to grant or refuse the application shall be final, 'Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation'.

[15] Since 3 April 2024 the words 'in exceptional circumstances' have been replaced by the words 'in circumstances where a grave failure of justice would otherwise result, or the administration of justice may be brought into disrepute'.

The state of the authority of this Court

[16] In *Bidvest Protea Coin Security (Pty) Ltd v Mabena (Bidvest)*,¹ a majority of this Court held, under the pre-amendment text, that the existence of exceptional circumstances was an objective jurisdictional fact which had to exist before the Court could entertain the reconsideration, and that the assessment of the President did not bind the panel. In *Schoeman v Director of Public Prosecutions (Schoeman)*,² the majority took the same view, holding that '[e]ither the President has this power or this Court does', and that on the jurisdictional fact interpretation 'this Court alone enjoys the competence' to determine the threshold 'and the President does not'.

[17] I add that the interpretive difficulty did not begin with *Bidvest*. The proviso had been considered in *Avnit v First Rand Bank Ltd (Avnit)*,³ in *Motsoeneng v Democratic (Motsoeneng)*,⁴ in *S v Liesching*,⁵ and in *Cloete v S (Cloete)*,⁶ and in the last of these the ambiguity in the provision was acknowledged. Parliament legislated against that background.

[18] Since the amendment, this Court has considered its effect on two occasions. In *Tarentaal Centre Investments v Beneficio Developments (Tarentaal Centre)*,⁷ it was held that the amendment did not alter the nature of the President's power, and in *Road Accident Fund and Others v Mautla and Others (Mautla)*,⁸ that the jurisprudence on the pre-amendment provision holds for the amended text. Those decisions bind this Court unless it is shown that they are clearly wrong.

The content of the threshold

[19] In *S v Godloza and Another (Godloza)*,⁹ the Constitutional Court addressed the

¹ *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) para 15.

² *Schoeman v Director of Public Prosecutions* [2025] ZASCA 124; 2025 (2) SACR 561 (SCA); [2026] 1 All SA 95 para 6.

³ *Avnit v First Rand Bank Ltd* [2014] ZASCA 132; 2014 JDR 2014 (SCA).

⁴ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA).

⁵ *S v Liesching and Others* 2017 (2) SACR 193 (CC) (2017 (4) BCLR 454; [2016] ZACC 41.

⁶ *Cloete and another v S and a similar Application* [2019] ZACC 6; 2019 (2) SACR 130 (CC).

⁷ *Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd* [2025] ZASCA 38; 2025 JDR 1461 (SCA).

⁸ *Road Accident Fund and Others v Mautla and Others* [2025] ZASCA 201, 2026 (4) SA 408 (SCA) para 13.

⁹ *S v Godloza and Another* [2025] ZACC 24, 2026 (1) SACR 113 (CC).

exclusivity and jurisdictional fact debate in the second judgment (Dodson AJ, Madlanga J concurring), which is a minority view. Dodson AJ said that *Motsoeneng* appears to be based on a misreading of section 17(2)(f). He found the *Schoeman* majority irreconcilable with *Liesching I*, *Liesching II*, *Avnit* and *Gwababa*. He also asked how the court could determine exceptional circumstances where the President refuses a referral. He considered himself bound by *Liesching I* and *II* to hold that the President decides exceptional circumstances to the exclusion of the referral court (paras 139-146). He would further have held three things: that inconsistent outcomes for truly similarly situated litigants create a strong prima facie case of exceptional circumstances (para 158); that Metcash does not bind once the proviso exists (paras 159-160); and that an appeal lies against the President's decision where inconsistent outcomes are in issue (para 163). None of this is the holding of the Court. Any reliance on *Godloza* against *Bidvest* or *Schoeman* should rest on the second judgment as persuasive authority only.

[20] Whether, under the amended proviso, the existence of the threshold is a matter for the President alone or a jurisdictional fact for this Court need not be decided in this matter. To hold that it is for the President alone would require this Court to depart from *Bidvest*, *Schoeman*, *Tarentaal Centre* and *Mautla*. That should not be done where the outcome does not depend on it. I shall therefore assume, in the respondent's favour, that this Court must itself be satisfied that a grave failure of justice would otherwise result or that the administration of justice may be brought into disrepute.

[21] The threshold is satisfied on the analysis which follows. An order extinguishing the claim of a plaintiff who alleges that she was left permanently disabled, founded upon a finding on service which I hold to be wrong in law and upon an approach to the onus and to the return of service which cannot be supported, would occasion a grave failure of justice. Her claim would be lost without any enquiry into its merits, and the error does not lie in a debatable assessment of the evidence. It lies in the incidence of the onus and in the legal effect of the return and of the address furnished for service.

The abandonment of the ground upon which the referral was obtained

[22] At the outset of his address, counsel for the applicant abandoned reliance on the contention that the high court had determined the applications under rules 27(3)

and 30 contrary to its own directions. That contention was the substratum of the application on which the President acted.

[23] The abandoned complaint was that the high court had acted irregularly in disposing of the interlocutory applications. What was not abandoned, and could not have been, was the attack upon the order upholding the special plea. The relief sought in the application was to set aside that order. The application under rule 27(3) was itself directed at the applicant's non-compliance with rule 4, so that the correctness of the finding on service was in issue from the outset. The applicant fully argued it before us, and the respondent met it in argument without suggesting that she had been taken by surprise.

[24] The threshold in the proviso is concerned with the consequence of leaving the refusal of leave undisturbed. Whether a grave failure of justice would otherwise result is an objective question. It does not depend on which of the grounds advanced in the application counsel elects to pursue at the hearing. Were it otherwise, the threshold would vary with the forensic choices made by counsel in the course of argument, and the Court would be obliged, before it could decide anything, to determine whether what had been abandoned was or was not the substratum of the application. That is not a workable enquiry, and the proviso does not contemplate it.

[25] What remains for decision is the relief which the applicant has sought throughout. Nor is this a case of the kind contemplated in *Avnit*, where the applicant for reconsideration does no more than repeat grounds already rejected. The grave failure of justice lies in an error of law, as to the onus and the effect of the return, upon which an untried claim was extinguished.

Leave to appeal

[26] A preliminary observation on nomenclature is necessary. The high court sat as a court of first instance. The application which the two judges refused was accordingly an application for leave to appeal under s 17(2)(b) of the Superior Courts Act, and not an application for special leave, which arises where a further appeal is sought under s 16(1)(b). The distinction does not affect the outcome, but the papers and the order of referral employ the two expressions interchangeably, and it is as well to be precise.

[27] Leave to appeal should be granted. The findings on service and on prescription are assailable for the reasons which follow, and there is a reasonable prospect of success within the meaning of s 17(1)(a)(i) of the Superior Courts Act. The questions raised as to the effect of a defective return of service, the onus borne by a party invoking prescription and the application of s 13(1)(b) of the Prescription Act to a debtor temporarily absent from the Republic are of importance beyond this matter, which would in any event constitute a compelling reason under s 17(1)(a)(ii). The consequence of the high court's order is that a claim for damages for alleged permanent paralysis is extinguished without any enquiry into its merits.

Legal framework

The Prescription Act

[28] A debt of this kind prescribes after three years: s 11(d) of the Prescription Act, read with s 12(1). Section 15(1) provides that the running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. Section 15(2) provides for the lapse of the interruption where the creditor does not successfully prosecute the claim to final judgment.

[29] The onus is not in doubt. A defendant who invokes prescription bears the onus of proving it, including the date on which the plaintiff acquired actual or constructive knowledge of the debt. An evidentiary burden shifts to the plaintiff only once the defendant has established a prima facie case; the onus does not.¹⁰

[30] That burden is discharged against the background of s 43(2) of the Superior Courts Act, which provides that the return of the sheriff or deputy sheriff of what has been done upon any process of the court 'shall be prima facie evidence of the matters therein stated'. A return is not conclusive, but a party who seeks to displace it must adduce evidence which does so.

¹⁰*Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA); *Jugwanth v Mobile Telephone Networks (Pty) Ltd* (529/2020) [2021] ZASCA 114; [2021] 4 All SA 346 (SCA); *ABSA Bank Ltd v BCF Micro Finance 1(Pty) Ltd and Others* (3522/2019) [2022] ZAFSHC 249 (23 September 2022); *Gericke v Sack* [1977] ZASCA 116.

Service under the rules and effective service

[31] Service must, as a general proposition, conform to the rules. The rules of procedure, however, are a means to an end. They exist to give practical effect to the substantive requirement that the proceedings be brought to the notice of the defendant. Where that object has been achieved, service may be effective despite non-compliance with the prescribed formalities. The proposition is stated in *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions and Others (Prism)* as follows:¹¹

‘The purpose of rule 4 is to provide for a mechanism by which relative certainty can be obtained that service has been effected upon a defendant. If certain minimum standards are complied with as set out in the rule, then the assumption is made that the service was sufficient to reach the defendant’s attention and his failure to take steps is not because he does not know 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 was pointed out by Roux J in *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W), 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...’

[32] That approach is consistent with the judgment of this Court in *Arendsnies Sweefspoor CC v Botha (Arendsnies)*,¹² where service at the registered office of a close corporation upon a person who was not an employee of the corporation was held to be good service. The Court affirmed that ‘the rules exist for the courts, and not the courts for the rules’, adopting what was said in *Trans-African Insurance Co Ltd v Maluleka*,¹³ and that in deciding whether to uphold a challenge to the validity of service a court exercises a discretion upon a consideration of the facts of each case, the matter being in essence one of fairness to both.

¹¹ *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions and Others* (2010/38713) [2011] ZAGPJHC 98; 2012 (5) SA 267 para 21.

¹² *Arendsnies Sweefspoor CC v Botha* [2013] ZASCA 86; [2013] 3 All SA 605 (SCA); 2013 (5) SA 399 (SCA).

¹³ *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A).

Section 13(1)(b) of the Prescription Act

[33] Section 13(1)(b) of the Prescription Act provides that where the debtor is outside the Republic, and the period of prescription would but for s 13(1) be completed before or on, or within one year after, the day on which that impediment ceases to exist, prescription shall not be completed before a year has elapsed after that day. In *Silhouette Investments Ltd v Virgin Hotels Group Ltd*,¹⁴ this Court held that the impediments contemplated by s 13 have in common ‘some legal or practical problem which makes it difficult or undesirable for a creditor to institute proceedings’, and that they cover ‘a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue’.

Analysis

The onus and the return of service

[34] The high court approached the matter as though the applicant bore the burden of establishing that service had been effected. That was the wrong starting point. The respondent invoked prescription, and she had to prove it. To do so, she had to displace the return of service, which was prima facie evidence that the process had been affixed to the principal door of unit 28 at 15h22 on 28 September 2018.

[35] Her evidence did not displace it. Mr Hertzog testified that he found no document at the main door when he arrived at about 15h45, and that later searches were equally fruitless. That is evidence of non-discovery. It is not evidence that nothing was affixed 23 minutes earlier. Mr Koen described his method as rolling the process and wedging it into the door frame, which is a mode of affixing from which a document may readily be dislodged by wind or removed by a passer-by. The complex was accessible to residents and their visitors, and a side gate stood unlocked.

[36] The high court's reliance on Mr Koen's inability to recall the particular service five years later was misplaced. He was positive, and not shaken, that he had attended the complex, gained access, and affixed the process at unit 28. A deputy sheriff who serves 25 to 30 processes a day cannot be expected to remember the details of each.

¹⁴ *Silhouette Investments Ltd v Virgin Hotels Group Ltd* [2009] ZASCA 40; 2009 (4) SA 617 (SCA); [2009] 3 All SA 172 (SCA).

That is the function of the return and of the job card, and an acknowledgement of the limits of unaided recollection is not an admission that the service did not occur.

[37] The adverse inference which the high court drew from the non-production of the job card was not available to it. Mr Koen testified that job cards were retained for five years, and it was not established whether this one still existed at the date of trial. There was no suggestion of deliberate suppression. An adverse inference may be drawn where a party withholds evidence which is within its power to produce. It may not be drawn from the absence of a document which may no longer exist, and it certainly cannot carry the weight of a positive finding that the service never occurred.

[38] A further matter, which the high court did not consider, also tells in the applicant's favour. The return records that a person whom the deputy sheriff identified as 'Mr Phiri' addressed him on the intercom. The keypad at the gate displays only two designations, 'PHI' for Mr Hertzog and 'IST' for the respondent. The designation 'PHI' corresponds closely to the name recorded in the return, and its appearance there is consistent with the deputy sheriff standing at the keypad and using the intercom, as he said he did. A functionary inventing an attendance would be unlikely to hit upon the abbreviation which the keypad in fact displays. The entry is an inaccurate record of the enquiry, a matter to which I return. As evidence that the deputy sheriff stood at the keypad, however, it corroborates the return.

[39] The conclusion which follows is that the respondent failed to prove that the process was not affixed at her residence on 28 September 2018. The finding of the high court to the contrary cannot stand.

Rule 4: service at the address furnished for service

[40] The return records service in terms of rule 4(1)(a)(v). That sub-paragraph, as it then read, concerned service upon a corporation or company, and it did not authorise affixing process at a residence. A return which cites the wrong sub-paragraph is not for that reason bad. The question is whether the deputy sheriff complied with a mode of service which the rules permitted. That question is answered by reference to the rule in force when service was effected.

[41] Before its amendment, rule 4(1)(a)(iv) provided that service could be effected, 'if the person so to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so chosen'. The sub-paragraph did not require that

the copy be handed to any person, and it imposed no requirement as to the age of a person to whom it was handed. In *Amcoal Collieries Ltd v Truter* this Court said:¹⁵ 'It is a well-established practice (which is recognised by Rule 4(1)(a)(iv) of the Uniform Rules of Court) that, if a defendant has chosen a *domicilium citandi*, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be abroad, or has abandoned the property, or cannot be found.'

[42] The purpose of choosing a *domicilium* is to relieve the party effecting service of the burden of proving that the process came to the notice of the person served. That person accepts the risk that it may not. Under the rule as it then read, leaving a copy at the *domicilium*, including by affixing it to the principal door, was good service. That was so even where the person served had moved, was abroad or could not be found. Rule 4(1)(a)(iv) has since been amended.¹⁶ The amendment post-dates the service in this matter and does not affect it.

[43] The question then is whether the respondent had chosen a *domicilium citandi* at unit 28. No *domicilium* was nominated in a pleading or by agreement. But on 11 April 2018 the respondent's attorney, having withdrawn the offer to accept service at her offices, furnished the applicant's attorney with the respondent's permanent residential address for the purpose of service. A *domicilium citandi* is the address which a party chooses as the place at which process may be served upon her. That is what the respondent, through her attorney, did. Having nominated the address as the place at which the summons was to be served, she cannot be heard to say that service there was bad because she was abroad, or because the copy left there did not come into her hands.

[44] It follows that the affixing of the summons to the principal door of unit 28 on 28 September 2018 was service in accordance with rule 4(1)(a)(iv) as it then read. On this basis the defects in the recording of the diligent search and enquiry are immaterial, because the sub-paragraph required neither.

[45] If I am wrong in treating the address as a chosen *domicilium*, the position is this. What the return records imperfectly is the diligent search and enquiry. The entry attributing a response to 'Mr Phiri on intercom' cannot be reconciled with an intercom

¹⁵*Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 5I-6C.

system offering only the designations 'PHI' and 'IST', and the return does not disclose what enquiry was made of whom. That is a defect in the recording of the enquiry. It does not establish that the process was not affixed, and it does not convert a service which occurred into one which did not.

[46] On this hypothesis the affixing did not comply with rule 4, which, apart from the *domicilium* provision, made no provision for affixing process at a residence. The question is whether the purpose of service was nevertheless achieved.

Effective service

[47] The second judgment accepts that service outside the letter of the rules may be effective but holds that effectiveness requires the defendant to receive the document so that she may be apprised of its contents, and that mere notice of the issue of a summons is not service. He relies upon the passage in *Prism* which states that the substantive 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'.

[48] I do not read that passage as requiring that the process pass into the hands of the defendant. The sentence contrasts the substantive requirement of notice, given by delivery of the initiating document, with the procedural steps prescribed by rule 4. The delivery contemplated is delivery at the place and in the manner reasonably calculated to bring the document to the attention of the defendant. Were actual manual receipt the criterion, service at a *domicilium citandi et executandi* under rule 4(1)(a)(iv), as it then read and substituted service by publication would both be ineffective whenever the defendant did not in fact read the document. Each is nonetheless good service, and each proceeds upon the basis that a defendant who has arranged her affairs so that process reaches a particular place is fixed with what is delivered there. The respondent had furnished the residential address for that very purpose.

[49] In *Arendsnnes*, process was handed to a person present at the registered office who was not an employee of the corporation. The service was upheld because it achieved its purpose, not because the document had come into the hands of the defendant. The judgment establishes that the enquiry is one of substance and fairness to both parties.

[50] On the assumption that the affixing did not comply with rule 4, the purpose of service was, in my view, achieved. Within four days the applicant's attorney informed

the respondent's attorney that the summons had been served at the respondent's residence. Her attorney relayed that to the respondent in Malaysia without delay. She instructed her husband to look for the process and telephoned her attorney. Her attorney wrote on 3 October 2018 asking for a copy of the summons and the return of service and recorded that her client could not find them. That is the conduct of a defendant who knows that an action has been instituted against her and is attending to it, and not of a defendant who has been kept in ignorance.

[51] The respondent was told of the intended claim by telephone toward the end of 2015. She had furnished her clinical records in July 2016. She had received a text message in February 2018 warning her of the impending action. Her insurer had instructed attorneys, and those attorneys had offered to accept service and had furnished her residential address for that purpose. She knew the identity of the plaintiff, the nature of the claim and the treatment complained of. What she lacked was the paper.

[52] The paper was not beyond her reach. The summons had been issued out of the Gauteng Division of the High Court, Pretoria, and was on the court file, open to inspection by her attorney from 28 September 2018 onwards. Her attorney twice asked the applicant's attorney for a copy and received no response. That silence is not to the applicant's credit, and I return to it when I deal with costs. But it bears upon the further prosecution of the action after prescription had been interrupted. It does not undo an interruption already effected. Section 15(1) of the Prescription Act attaches the interruption to the service of the process, and s 15(2) provides the sanction where a creditor thereafter fails to prosecute the claim to final judgment. The applicant has prosecuted her claim.

[53] I am alive to the concern that an indulgent application of this principle would leave rule 4 without content. That does not follow from this judgment. The applicant does not contend that the telephone call of 2 October 2018 was itself service. Her case is that a deputy sheriff attended the respondent's residence and performed an act of service there, and that the purpose of that act is demonstrated by what followed. A defendant who learns of proceedings months afterwards, by other means and independently of any attempted service, stands in a different position. What distinguishes the present case is immediacy and causal connection. The notice flowed directly from the attempted service of 28 September 2018 and reached the respondent before she had even returned to the country.

[54] The second judgment also contends that s 15(1) requires a juridical act which commences the action, and that a defendant's knowledge of the summons cannot take its place. I agree that knowledge alone is not service, and the applicant does not contend otherwise. Section 15(1) attaches the interruption to 'the service on the debtor of any process'. The Prescription Act does not itself prescribe the manner of service; that is left to the rules, and the rules, as *Prism* and *Arendsnes* recognise, are a means to an end. Where an act of service has been performed at the place nominated for service, and its purpose has been achieved, there has been service of process within the meaning of s 15(1).

[55] No prejudice was suggested, and none is apparent. The respondent delivered a notice under rule 30, agreed to the separation of the special plea, and defended it over four days with five witnesses. The state of the return foreclosed not one step she may have wished to take. The absence of prejudice weighs heavily in the exercise of the discretion described in *Arendsnes*.

[56] Prescription was accordingly interrupted on 28 September 2018, by service in accordance with rule 4(1)(a)(iv) or, if the address was not a chosen domicilium, upon the principle that the purpose of service was achieved. The special plea falls to be dismissed on that ground.

Section 13(1)(b) of the Prescription Act

[57] The respondent's absence from the Republic from 26 September to 8 October 2018 was common cause and was indeed part of the case which she herself led in support of the plea. What is raised is the legal consequence of facts which are not in dispute. A court is not only entitled but obliged to deal with a question of law which properly arises upon the facts, provided that the other party has had a fair opportunity of meeting it. The decision in *Fischer and Another v Ramahlele*¹⁷ concerns a court raising a new factual case of its own motion; it does not preclude argument on the legal consequences of common cause facts. The respondent addressed s 13(1)(b) fully before us, relied upon *Silhouette Investments*, and did not suggest that there was evidence which she would have led had the point been pleaded.

[58] Since the appeal succeeds upon the first ground, it is not necessary to decide the point, and what follows is obiter. I record my view because it was argued before

¹⁷ *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA).

us. The point arises only if the service of 28 September 2018 was neither compliant nor effective, and therefore only if the residential address was not a chosen *domicilium*.

[59] *Silhouette Investments* does not require that the institution of proceedings be impossible. The impediment contemplated extends to situations in which it is 'difficult or awkward, but not impossible, to sue'. The foreign incorporation of the debtor in that matter was held not to constitute an impediment because it had submitted to the jurisdiction and authorised local attorneys to accept service, so that no circumstance created a difficult or undesirable situation for the creditor.

[60] The very facility which answered the enquiry in *Silhouette Investments* had been withdrawn here. The offer of 9 April 2018 to accept service at the respondent's attorney's Pretoria offices was withdrawn on 11 April 2018 after the applicant's attorney declined it. On the hypothesis now under consideration, the residential address was not a *domicilium*, and good service there required the presence of the respondent or of a person apparently over the age of 16 years. Personal service was impossible while the respondent was in Malaysia.

[61] Service under rule 4(1)(a)(ii) upon a person apparently over the age of 16 years at the residence of the defendant is service only if such a person is found there. Nobody was at unit 28 at 15h22. Mr Hertzog was there later that afternoon, but he left the following morning on a hunting trip and returned only on 2 October 2018. The availability in principle of a mode of service that depends on the fortuity of somebody being at home does not answer whether the debtor's own absence made it difficult to sue her.

[62] On that hypothesis I would regard the respondent's absence in the closing days of the period of prescription, after the facility for service upon her attorney had been withdrawn, as an impediment within the meaning of s 13(1)(b). I should record three qualifications. The application of the section to a resident who is temporarily abroad has not, so far as I have been able to establish, been considered by this Court, and the consequence that an absence of 12 days yields a further year is substantial. Section 13 delays the completion of prescription; it does not interrupt it. Whether a step taken within the extended period interrupted prescription was not argued, and I express no view on it. I say no more on the point.

The applications under rules 27(3) and 30

[63] The application under rule 27(3), brought after the parties had closed their cases and while judgment was awaited, was an irregular step, and the high court was right to uphold the objection taken under rule 30. Counsel for the applicant was correct to abandon any complaint in that regard. The communication with the office of the presiding judge without notice to the respondent's attorney was improper, and nothing in the outcome of this appeal detracts from the criticism which the high court directed at it. The order upholding the objection under rule 30 and setting aside the application under rule 27(3) must therefore stand. The applicant must bear the costs of both applications.

Costs

[64] The order for costs on the attorney and client scale cannot stand in so far as it relates to the special plea. The dispute upon the plea concerned genuinely contested questions of fact and law, raised by a litigant who alleges serious injury and who has succeeded on appeal. Its prosecution was neither vexatious nor reprehensible, and the costs of the hearing of the special plea should follow the event on a party-and-party scale.

[65] Two aspects of the applicant's conduct call for comment. The first is the irregular application under rule 27(3) and the communication with the judge's office, which I have dealt with above and which is reflected in the order that the applicant pay the costs of the applications under rules 30 and 27(3). The second is the unexplained failure to answer two written requests for a copy of the summons and the return of service. That failure is to be deprecated. It does not, however, warrant depriving the applicant of the costs of the special plea. The respondent received a copy of the summons in March 2019 and thereafter persisted in her contention that there had been no service. The special plea would have been litigated whether or not the requests had been answered.

[66] As to the application for reconsideration, and the application for leave to appeal to this Court which preceded it, the applicant obtained relief upon a ground which she abandoned at the hearing. She succeeded on the merits, but she should not recover

the costs of applications founded on a contention she could not sustain. Each party will pay their own costs of those applications.

[67] The respondent, having resisted the appeal unsuccessfully, must pay the costs of the appeal and the costs of the application for leave to appeal in the high court, on the party-and-party scale.

Order

[68] The following order is made:

- 1 The decision of the two judges of the court refusing the applicant's application for leave to appeal with costs is set aside and replaced with the following:
'Leave to appeal is granted'.
- 2 The appeal is upheld.
- 3 The order of the Gauteng Division of the High Court, Pretoria, dated 11 December 2023 is set aside and replaced with the following:
 - (a) The special plea of prescription is dismissed.
 - (b) The defendant is to pay the plaintiff's costs of the hearing of the special plea on the party and party scale, including the costs of two counsel where two counsel were employed.
 - (c) The defendant's application in terms of Rule 30 succeeds, and the plaintiff's application in terms of Rule 27(3) is set aside as an irregular step.
 - (d) The plaintiff is to pay the defendant's costs of the applications in terms of Rules 30 and 27(3) on the party and party scale.'
- 4 The respondent is to pay the applicant's costs of the application for leave to appeal in the high court on the party and party scale.
- 5 The respondent is to pay the applicant's costs of appeal on the party and party scale, including the costs of two counsel where two counsel were employed.
- 6 Each party is to bear its own costs in respect of the application for reconsideration in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013.

- 7 The matter is remitted to the Gauteng Division of the High Court, Pretoria for the determination of the merits of the applicant's claim for damages, before a judge other than Holland-Muter J.

K E MATOJANE
JUDGE OF APPEAL

GOOSEN JA (dissenting):

[69] I have read my brother Matojane JA's judgment. I disagree with the order he proposes. In my view, this case does not meet the threshold for reconsideration. I would therefore strike the application from the roll with costs.

[70] A preliminary observation is required. My colleague has set out the factual background to the matter that is before us. It consists of a summary of the applicant's case as pleaded. The respondent denies the factual allegations. In addition, the respondent raised a special plea of prescription. That issue alone went to trial.

[71] My colleague accepts that the binding authority in *Motsoeneng*, *Bidvest*, *Schoeman and Tarentaal* requires this Court to be satisfied that the threshold for reconsideration has been met. My colleague holds that the threshold is met in this case. For the reasons set out below, I disagree.

[72] It bears repeating that the high court was dealing with the applicant's compliance with Rule 4 of the Uniform Rules in the context of a special plea of prescription. The court separated and decided that question after both the applicant and the respondent presented evidence. The applicant presented only the Sheriff's evidence of service of the summons. The respondent presented the evidence of five

witnesses. After the parties closed their cases on the issue, and while the court adjourned to consider its judgment, the applicant filed an application to condone her non-compliance with Rule 4. The respondent filed a Rule 30 application alleging that the condonation application was irregular.

[73] The high court found for the respondent and dismissed the condonation application. It upheld the special plea, finding that the claim has prescribed. The applicant filed an application in this Court seeking leave to appeal when the high court refused leave. The applicant now seeks reconsideration of this Court's dismissal of the application for leave to appeal.

[74] The application for leave to appeal, in this Court, was based on the assertion that the high court had, contrary to its own directives, determined the condonation and irregular step applications. It was contended that this material procedural irregularity meant that the court's judgment must be set aside. In her application for reconsideration, the applicant advanced the same contentions but suggested that the procedural irregularities would cause a grave injustice if the court did not reconsider the order refusing leave to appeal. In *Avnit*, this Court stated that merely repeating the grounds advanced at the stage of the application for leave to appeal generally would not suffice at the stage of reconsideration.¹⁸

[75] At the hearing, however, counsel for the applicant began his address by stating that the applicant no longer relied on the 'condonation application point'. When asked to clarify, counsel stated unequivocally that the applicant no longer suggested that dismissal of the applicant's condonation application was irregular. Counsel further explained that the basis on which the reconsideration application and the application for leave to appeal were advanced fell away. All that remained was the fact that the applicant suffered prejudice because the case was dismissed on the basis of the respondent's plea of prescription.

¹⁸ In *Avnit v First Rand Bank Ltd* para 6, where the Court said: 'An application that merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued.'

[76] In *FirstRand Bank Ltd and Another v National Bank of Abu Dhabi PJSC (Pty) Ltd*¹⁹ this Court considered the effect of a litigant's abandonment of an issue in similar circumstances. In that case, counsel abandoned the contention that the President had determined the jurisdictional threshold. The Court held that:

'Once a party abandons an issue, as FirstRand did in the present case, it is off the table as a point in dispute between the parties. It is then generally not open to a court to determine the matter on the abandoned issue, as doing so would be in the abstract. ... This runs counter to this Court's and the Constitutional Court's repeated caution against addressing issues not necessary for the disposal of cases. In *Albutt v Centre for the Study of Violence and Reconciliation* the Constitutional Court emphasised that:

"[S]ound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. . . . At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide [for example] an ancillary issue in the public interest."²⁰

[77] In this instance the abandonment went much further. The applicant abandoned the substratum of her case for reconsideration. As a result, nothing remained of the cause of action for reconsideration. My colleague suggests it does not matter because counsel's abandonment cannot absolve the court from considering whether the high court's order was not tainted by error of law. In my view, to countenance reconsideration in such circumstances would open s 17(2)(f) to abuse. It would also conflict directly with the section's purpose.

[78] It hardly needs to be stated that the applicant's filing of a condonation application after her case had been closed for trial was plainly irregular. My colleague agrees. The high court was accordingly quite correct to dismiss it. The applicant's counsel recognised this and suggested that the best he could do was to argue that the applicant would be prejudiced if an appeal was not allowed. As I understand it my colleague finds that a grave injustice would arise if the applicant's claim were to be

¹⁹ *FirstRand Bank Ltd and Another v National Bank of Abu Dhabi PJSC (Pty) Ltd* [2026] ZASCA 98, [2026] 3 All SA 485 (SCA) (*FirstRand Bank*).

²⁰ *FirstRand Bank* para 46.

extinguished without the merits being determined. I cannot agree. This puts the cart before the horse. It also ignores the fact that extinctive prescription inherently precludes consideration of the merits of a claim, even if it is a sound claim. Nothing about such a rule of law is unjust or unfair. It is an accepted consequence of rules that serve to introduce time-based legal certainty.

[80] Even if we accept that it was open to the applicant to advance an argument that a grave injustice might arise because the high court decision was palpably wrong, the argument lacks merit. My colleague has set out the facts regarding the service that occurred on 28 September 2018. On that day, the service of the summons allegedly interrupted the running of prescription of the applicant's claim. My colleague takes the view that service occurred in accordance with Rule 4(1)(a)(iv) by affixing the summons on the chosen *domicilium citandi et executandi*.

[81] The applicant never pleaded that she had chosen a *domicilium citandi*. Had it been, the respondent would no doubt have addressed it in the trial before the high court. In this Court, the applicant's counsel eschewed any reliance upon Rule 4(1)(a)(iv)²¹ or (v)²², to which the Sheriff had erroneously referred in the return of service. My colleague is not entitled to find that a *domicilium citandi* had been chosen. In any event, the evidence does not support the finding. The respondent's attorney told the applicant's attorney that the arrangement to serve at her attorney's offices had been withdrawn. That applied to her attorneys in Kimberley, who had been replaced.

²¹ In 2018, the sub-rule read as follows:

'(iv) if the person so to be served has chosen a *domicilium citandi*, by leaving a copy thereof at the *domicilium* so chosen.' (My emphasis). It was amended twice thereafter in 2024. The first amendment was introduced by *Government Notice 4477* of 8 March 2024 and took effect on 12 April 2024. Following this amendment, the sub-rule required delivery of a copy to a person apparently not less than sixteen years of age at the chosen *domicilium*. The rule then did not provide that a copy of a summons might be left at the *domicilium*.

The second amendment came by *Government Notice 5560* of 22 November 2024, which took effect on 27 December 2024. This amendment introduced a proviso (no doubt to restore the pre-amendment effect of the rule) which reads:

'Provided that if no person is present at the *domicilium*, the Sheriff may leave a copy at the chosen *domicilium*.'

²² The sub-rule reads as follows:

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

[82] What was required in this case was that service of the summons take place in accordance with Rule 4(1)(a)(i) or (ii). Those sub-rules require delivery of the summons personally to the respondent, or to a person over the age of 16 present at her residence.²³ Thus, even if Mr Koen affixed the summons at the place of residence, that service did not comply with the Rules. Furthermore, undisputed evidence showed that the respondent's husband, who arrived at the residence shortly after the alleged affixing, did not find the summons. The respondent's attorney was informed that service had allegedly occurred. The respondent was informed of this and, in turn, asked her husband to search for it. The search was in vain. The respondent's attorney then requested a copy of the summons. Despite two requests, the summons was not delivered to the respondent's attorney. The respondent's attorney received a copy of the summons only on 18 March 2019.

[83] This evidence establishes without any doubt that, until March 2019, the summons commencing the action against the respondent had not been delivered to her. At best, she knew a summons had been issued. But mere knowledge that a summons has been issued does not constitute service. Nor can a defendant's knowledge of the issue of summons relieve a plaintiff from the obligation to follow the prescribed Rules.²⁴ To hold otherwise in the context of a plea of prescription would make a mockery of the legal principles governing extinctive prescription. We are not concerned here merely with establishing whether the respondent was able, despite defective service, to deal with the ensuing action. We are concerned with whether the applicant executed an effective juridical act to commence the action before the claim was extinguished and thereby avoid the legal consequences of extinctive prescription.

²³ The Rule provides:

'(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 delivery of a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability.

(ii) by delivering a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like to a 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.'

²⁴ *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd; First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd* 1998 (4) SA 565 (NC) at 568B – C; *Sekoati v Standard Bank of South Africa Ltd* 2025 (5) SA 581 (GP) at para 26.

[84] I accept that service that does not comply with the letter of the prescribed Rules may nevertheless be deemed effective.²⁵ For service to be effective, the defendant must have received the summons or be deemed to have received it.²⁶ Only then can it be said that legal delivery has occurred, the action has commenced, and the defendant has proper notice of the case brought against her. She must be notified of the contents of the summons.²⁷ Until such legal delivery occurs, there can be no effective service and the action does not commence.

[85] My colleague turns to an alternative basis to hold that the claim has not prescribed, namely that the respondent was abroad on the day service was said to have occurred. The applicant did not rely on this in answering the special plea. Unsurprisingly, the high court was not required to consider it. My colleague suggests this is a matter of law that can be decided on common cause facts. Whether the exception applies, however, depends on a finding of fact, namely that an impediment such as that contemplated existed. This is not a question of law. The only common cause fact was that the respondent was abroad when the applicant attempted service of the summons. That fact alone does not establish that there was an impediment to service. The applicant led no evidence that the respondent's absence from the country impeded the commencement of the action. In any event, the undisputed evidence established that no such impediment existed. The respondent's husband was not abroad. Proper service could have been made upon him at the respondent's residence. His temporary absence when the Sheriff attempted service can hardly be construed as an impediment to service. In any event, a court cannot determine an issue of such critical importance on a basis not pleaded by the parties.

[86] No basis exists to find that the jurisdictional facts for reconsideration are present. This Court therefore lacks jurisdiction to reconsider our colleagues' final decision on the petition. If I had commanded the majority, I would strike the reconsideration application from the roll with costs, including the costs of two counsel.

²⁵ *Obiang v Janse van Rensburg and Others* [2025] ZASCA 30 para 28.

²⁶ *O'Donoghue v Human* 1956 (1) SA 80 (E) at 83E.

²⁷ *Odendaalsrus Munisipaliteit v Odendaalsrus Gold, General Investment & Extensions Ltd* 1958 (3) SA 111 (O) at 114E; *S v Watson* 1969 (3) SA 405 (A) at 410B; *Mouritzen v Greystones Enterprises (Pty) Ltd* 2012 (5) SA 74 (KZD) para 28.

G GOOSEN
JUDGE OF APPEAL

Appearances

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