THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case no: 471/12

In the matter between:

ARENDSNES SWEEFSPOOR CC **Appellant**

and

DALIA MARCELLE BOTHA **Respondent**

Neutral citation: *Arendsnes Sweefspoor CC v Dalia Marcelle Botha* (471/12) [2013] ZASCA 86 (31 May 2013)

Coram: **MTHIYANE DP, SHONGWE, LEACH, PILLAY and PETSE JJA**

Heard: **10 May 2013**

Delivered **31 May 2013**

Summary: **Civil Procedure – service of summons – Rule 4 (1) (a) (v) (Uniform Rules) – when sufficient to interrupt prescription in terms of section 15 (1) of the Prescription Act – service in substantial compliance with the rule.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Stockwell AJ sitting as court of first instance):

In the result the appeal is dismissed with costs.

JUDGMENT

SHONGWE JA (MTHIYANE DP, LEACH, PILLAY and PETSE JJA concurring):

Introduction

[1] On 2 January 2004 the respondent, (Dalia Marcelle Botha) (to whom I shall refer as the plaintiff) sustained bodily injuries while being transported in a cable car system operated by the appellant, (Arendsnes Sweefspoor CC) (to whom I shall refer as the defendant). She allegedly fell from the cable car when the clamps attaching the cable car to the cable became undone resulting in the cable car flipping over and the plaintiff falling about 30 metres to the ground. The plaintiff instituted a claim for damages against the defendant. The defendant, inter alia, raised a special plea to the effect that the plaintiff's claim has prescribed in terms of the provisions of s 12 of the Prescription Act 68 of 1969 (the Act). By agreement between the parties the special plea was dealt with by the court a quo as a separate issue in terms of rule 33(4) of the Uniform Rules of Court. The question to be decided by the court a quo was whether or not the plaintiff's claim against the defendant had prescribed in terms of the provisions of s 12 of the Act. The defendant contended that the plaintiff's claim is based on an incident which occurred on 2 January 2004 and that the plaintiff had to serve the summons by midnight on 1 January 2007. The defendant therefore contended that the plaintiff's claim against it be dismissed with costs. The court a quo dismissed the defendant's special plea of prescription. This appeal is against that ruling with the leave of the court a quo.

[2] The question raised in this appeal is whether the service of the summons on the defendant on 14 December 2006 was good and served to interrupt the running of prescription against the plaintiff.

[3] The facts are briefly the following. During January 2004, the defendant, a close corporation, operated the well-known Hartebeespoort Cable car system from which the plaintiff fell and injured herself, during one of the transportation trips. The premises, which was the registered office of the defendant, comprised of one building housing a ticket office, on the one wing, and a restaurant on the other. The restaurant was operated by someone else and not the defendant. The cable car business was permanently closed down by the Department of Labour, on 3 October 2005. Since that date the defendant ceased all its trading activities and had no presence there.

[4] When the sheriff attempted service on 12 December 2006, (first attempt) he was told that the defendant had ceased trading on the premises, only the restaurant which was operated by a Mr Vermaak, the son in-law of Mrs Moller, the sole member of the defendant, remained. However, when the defendant ceased trading, it never deregistered the corporation and therefore its registered office remained the premises as described in the return of service. After being informed that the cable way business had been closed the sheriff consulted the plaintiff's attorneys telephonically, and was instructed to serve the summons at the premises because the property remained the registered office of the defendant. Hence on14 December 2006 (second attempt) the summons was served on a Mr Pretorius, an employee of the restaurant on the premises. It is common cause that Mr Pretorius never handed the summons over to the defendant and that he was not employed by the defendant. The defendant contended that it never received a copy of the summons from the sheriff or Mr Pretorius and therefore contested that the summons was properly served.

[5] The plaintiff contended as follows. The summons was properly served at the defendant's registered office and registered address. The registered office and the registered address were those of the defendant at all material times. The corporation (Moller CC) which owned the property and the restaurant business that was carried on during December 2006 were essentially family businesses. Although no responsible employee of the defendant was present at the registered address, the defendant 'intentionally rendered impossible' the strict compliance with Rule 4 by not changing its registered office or address with the office of the Registrar of Companies.

The legal framework

[6] Service of processes in the high court is regulated by Rule 4 of the Uniform Rules. The relevant parts read as follows:

"4 Service

(1) *(A)* Service of any process of the court directed to the sheriff and subject to the provisions of paragraph *(a)* any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

(I)…

(ii)…

(iii)…

(iv)…

(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."

[7] The relevant subsection in this case is 4(1)*(a)(v)* which deals with service on a corporation. As we know the defendant is a corporation which is obliged by s 25 (1) of the Close Corporations Act 69 of 1984 to have a postal address and an office to which all notices may be addressed. Section 25(2) reads:

'(a) any notice , order, communication or other documents which in terms of this Act required or permitted to be served upon any corporation or member thereof, shall be deemed to have

been served if it has been delivered at the registered office, or has been send by registered post to the registered office or postal address, of the corporation; and
(b) process which is required to be served upon any corporation or member thereof shall, subject to applicable provisions in respect of such service in any law, be served by so delivering or sending it.'

[8] Section 15 of the Prescription Act 68 of 1969 is also relevant as it forms the core of the defendant's defence. It reads:
'(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'.

[9] The picture of the legal framework is completed by reference to the provisions of s 170 (1)*(b)* of the companies Act 61 of 1973 and s 23(3), read with s 220 of the Companies Act, 71 of 2008. In terms thereof companies are obliged to have a postal address and to have a registered office to which all notices may be addressed and at which all process may be served.

Discussion

[10] The service of a summons commencing action serves to interrupt the running of prescription. (see *AC Cilliers, C Loots* and *HC Nel Herbstein* and *Van Winsen* The Civil Practice of the High Court and The Supreme Court of Appeal of South Africa 50d (2009) at 354-355; also at 503 citing *Re Hartley* v *Umkanganyeki* (1889)10 NLR 49). For prescription to be interrupted three requirements must be present;

(a) There must be a process.
(b) The process must be served on the debtor.

(c) By that process, the creditor must claim payment of the debt. (See *J Saner* Prescription in South African Law (1996) at 3-112 (3). It is thus clear that the process must be served on the debtor, which service must necessarily be legally and properly effected consistent with the Uniform Rules. It is the actual service of the summons and not merely the issuing thereof that serves to interrupt the running of prescription.

[11] In the present case, it is common cause that the deputy sheriff served the summons on 14 December 2006 at the registered office on a Mr Pretorius, an employee of the restaurant on the premises, a person not less than 16 years of age, by exhibiting to him the original and handing him a copy thereof and by explaining the nature and exigency thereof. (In terms of s 36(2) of the Supreme Court Act 59 of 1959 the return of service presented by the deputy sheriff constitutes prima facie evidence of the matters therein stated).

[12] Counsel for the defendant submitted that the service was not in terms of Rule 4 (1)*(a)(v)* because first Mr Pretorius was not an employee of the defendant, second that in the absence of such employee a copy of the summons should have been affixed to the main door of the registered office. He further contended that because these two requirements were absent, the service was not a good and legally recognized one. And that the law must be consequent by declaring that the running of prescription could not have been interrupted. He contended further that the defendant had closed down the business a year before and no longer had any presence on the premises

[13] Counsel for the defendant urged this court not to create a precedent by placing form above substance which might bring about a differentiation between cases dealing with default judgments and those dealing with liquidation of companies or interruption of prescription. I do not agree. We were not referred to any authority, or practical example in support of this proposition. Service of a court process must substantially comply with the relevant rules. In my view, it does not matter whether

one is dealing with a default judgment, a liquidation case or a case dealing with the interruption of prescription. It is trite that each case must be dealt with on its own particular facts and merit. There is no differentiation or exception. The court, if service is contested, must determine whether service was good and legally recognized or substantially compliant with the rules of service. The cause of action and the consequences resulting from the process served are irrelevant to the question whether proper service took place.

[14] In *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 at 481 (KZP) Van Zyl J, (writing for the full court) in para [15] said:

'Service at the registered office of a company, in the absence of a responsible employee thereof, by delivery of the document to be served to a person at such address (not being an employee of the company) willing to accept such service, has been recognised as a good and proper service which is preferable to merely attaching the process, for instance, to the outer principal door of the premises', Van Zyl J also referred with approval to *Chris Mulder Genote Ing v Louis Meintjies Konstruksie (Edms) Bpk* 1988 (2) SA 433 (T). *Brangus* is the most recent high court judgment which, in my view, is authority for the proposition that effectiveness of the service of a court process or substantial compliance should trump the form. In other words by reason of the fact that a copy of the summons was served at the registered office of the defendant there had been substantial compliance with the requirement of *Rule* 4(1)*(a)(v).* Even though the service did not strictly comply with the Rule. I was unable to unearth any decision of this court dealing specifically with Rule 4(1)*(a)(v).*

[15] It would not be a proper exercise of a court's discretion to uphold the special plea in circumstances where there was substantial compliance with the rules. In this case the defendant had not changed its registered office with the Registrar of companies.. where else could the plaintiff have served the summons? De Waal JP in *Geldenhuis Deep Ltd v Superior Trading Co (Pty) Limited* 1934 WLD 117 at 119 said:

'Until notification of change of address is given to the Registrar of companies, the office as originally registered remains the registered office of the company for practical purposes.'(see also *Hardroad (Pty) Ltd* v *Oribi Onctors (Pty) Ltd* 1977 (2) SA 576 (W) at 578H-579G.

[16] In *Dawson & Fraser v Havenga Construction* 1993 (3) SA 397 (BGD) at 401 B-C, Hendler J said:

'The failure of Dawson & Fraser (Bophuthatswana) to change the address of the registered office can in no way be a factor which could be construed prejudicial to it'.

I agree in this regard with the reasoning of the court a quo where it reasoned that corporations should not be permitted to register an office address where it has no purpose or business and by so doing, frustrate services of summons and other court process upon it.

[17] Mr Mullins, for the defendant, conceded that it was enough to serve, for example, on a secretary employed by an auditor's firm, where the corporation gave the auditors firm's address as its registered office, even though the secretary was not employed by the corporation. But he contended that in the present case the sheriff should have affixed the summons on the main door of the premises as provided by Rule 4*(i)(a)(v).* Hartzenberg J in *Chris Mulder (supra)* reasoned that it was preferable to serve on a person who identifies himself or herself and accept service rather than by merely affixing the document to a door. And if no 'one is prepared to accept service, in that case, service <u>may</u> be effected by attaching it to a door as sub rule (v) of Rule 4(i)(a)….allows the deputy- sheriff to do' *(my emphasis).* Hartzenberg J does not suggest that service 'must' but said 'may' be effected.

[18] It is trite that the rules exist for the courts, and not the courts for the rules (see *Republikeinse Publikasie (Edms) Beperk v Afrikaanse Pers Publikasie (Edms) Bpk* 1972 (1) SA 773 (A) 783 A-B; *Mynhardt v Mynhardt* [1986] 3 All SA 197; 1986 (1) 456 (T) also *Ncoweni v Bezuidenhout,* 1927 CPD 130), where it was pertinently observed that:

'the rules of procedure of this court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.'

Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this- see S*imons* v *Gibert Harner & Co Ltd* 1963 (1) SA 897 (N) at 906. Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case, in essence it is a matter of fairness to both parties (see *Federated Employers Fire & General Insurance Co Ltd* v *Mckenzie* [1969] 3 ALL SA 424; 1969 (3) SA 360 (A) at 363 G-H).

[19] With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing. 'rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process.' And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice (see LAWSA, third Edition Volume 4 – paragraph 8-10 page 10 et sec) (see also *Kgobane & another v Minister of Justice & another* [1969] 3 ALL SA 379 or 1969 (3) SA 365 (A) at 369 F-H). Considerations of justice and fairness are of prime importance in the interpretation of procedural rules (see *Highfield Milling Co (Pty) Ltd* v *A E Wormald & Sons* [1966] 3 ALL SA 27; 1966 (2) SA 463 (E) at 465 F-G).

Conclusion

[20] In the circumstances I conclude that the approach adopted by the KwaZulu Natal High Court in the *Brangus* case (s*upra*) is correct. I also consider the service of the summons on the defendant on 14 December 2006 to be good and served to interrupt the running of prescription. The service of the summons complied in substance with the provisions of Rule 4(1)*(a)(v).* In my view the plaintiff had by midnight on 1 January 2007 served the summons upon the defendant claiming payment of the debt in terms of s 15(1) read together with s 15*(b)* of the Act.

Therefore the plaintiff's claim had not prescribed in terms of section 12 of the Act. Accordingly the court a quo correctly dismissed the special plea with costs.

[21] In the result the appeal is dismissed with costs.

J B Z SHONGWE
JUDGE OF APPEAL

LEACH JA:

[22] I have read the judgment of my colleague Shongwe JA, but although I agree with his final conclusion that the appeal should be dismissed I have reached that conclusion by a somewhat different and more direct route.

[23] It is common cause that the summons was served on 14 December 2006 at Portion 64, plot 3, Melodie Farm, Hartebeespoort district. This was the registered address of the appellant, a close corporation. The sheriff recorded in his return that he had served the summons on 'Mr Pretorius . . . a person not less than sixteen years of age, by exhibiting to him the original, by handing him a copy thereof and by explaining to him the nature and exigency thereof.' The allegations set out in the return were not disputed and, as s 36(2) of the Supreme Court Act 59 of 1959 provides that a sheriff's return 'of what has been done upon any process of the court, shall be prima facie evidence of the matters therein stated', the return can be accepted as an accurate account of what occurred.

[24] This appeal turns solely on whether service as reflected in the return is to be construed as valid service upon the appellant. If it is, the appellant's special plea of prescription is without merit and was correctly dismissed by the court a quo. If it was not, it did not interrupt the running of prescription and the appeal must succeed. On this the parties were *ad idem*.

[25] Uniform rule of Court 4(1)(*a*)(v) provides that any service of process may be effected on a corporation 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'.

[26] Although the appellant had earlier conducted business at its registered address, by the time service took place it had long since ceased all business activities, was dormant and had no employees or representatives on the premises. Mr Pretorius, upon whom service was effected, was employed not by the appellant but by a different enterprise. The appellant therefore argued that as there was no employee of the appellant upon whom service could be effected at its registered office, service on Mr Pretorius was ineffective and the sheriff ought to have affixed the summons to the main door – and, as it was not so affixed, the service was invalid.

[27] In considering this argument, it must be remembered that even where peremptory formalities are prescribed by statute, not every deviation from the literal prescription results in nullity. The question always remains whether, in spite of the defect, the object of the statutory provision has been achieved ─ see *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22. In this regard, it is important to note that s 25 of the Close Corporations Act 69 of 1984 obliges a close corporation to have a reregistered address while s 25(2)(*b)* provides that 'subject to applicable provisions in respect of such service in any law', process

which is required to be served upon a corporation may be served by being delivered to the corporation's registered office or by being sent by registered post to the registered office or postal address of the corporation. The clear intention of the legislature in providing for this was to ensure that a close corporation would have a known address at which process could be served, inter alia, to ensure that a third party who might wish to sue it knows where to serve and does not have to end up chasing ghosts in a situation such as this where the corporation has become dormant.

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

[29] In the present case the summons was delivered to a responsible person at the registered address of the appellant. If no-one had been present on the premises, there would have been strict compliance with the rule had the summons been affixed to the door. In my view the action of handing it to a responsible person at the premises, after explaining the exigencies of the matter, amounted to substantial compliance with the rule. It resulted in the summons being delivered to the registered address of the appellant, that being the purpose not only of the rule which authorises the fixing of a summons to the door of the premises, but also of s 25 of the Close Corporations Act.

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

[31] For these reasons I agree the appeal should be dismissed with costs.

L E LEACH

JUDGE OF APPEAL

APPEARANCES

For Appellant:	JF Mullins SC Instructed by: Savage Jooste & Adams, Pretoria; Webbers, Bloemfontein
For Respondent:	B Joseph Instructed by: Ronald Bobroff & Partners Inc, Johannesburg; Matsepe Inc, Bloemfontein