

RULE 9 – SERVICE OF PROCESS, NOTICE AND OTHER DOCUMENTS

The Rules Board has agreed in principle that Rule 9 of the Magistrates Courts Rules needs to be made more strict because the present law provisions with regard to service are resulting in huge numbers of default judgments being granted against defendants who have never received the summons. This, in turn, gives rise to many applications for rescission of those judgments. The right of access to the courts in terms of section 34 of the Constitution is infringed when default judgment is granted against defendants who have not had the benefit of effective service of the summons.

Ensuring effective service is also in line with the measures being introduced by government in terms of the National Credit Agreements Act to address the debt crisis in the country and protect consumers.

The two paths open to the Rules Board are either to amend the present Rule 9 OR to repeal the present Rule 9 and replace it with the provisions contained in Uniform Rules 4(1) and (2), which apply in the High Courts. Although a research project is underway in respect of service of documents to bring the rules in line with developments in other jurisdictions and in electronic communications, the Magistrates' Courts Committee of the Rules Board recommends the immediate amendment of Magistrates' Courts Rule 9 as an interim measure.

The recommended amendments will delete sections 9(5), 9(6) and 9(7), which allow the sheriff of the court to effect service by affixing the summons to the door or gate of premises, or simply leave it at the premises or in a post box. A new sub-rule will be inserted which will require the sheriff, when serving the process on any person other than the defendant, to enquire from that person whether he or she knows the defendant; whether the defendant does reside, work at or otherwise frequent the place at which the summons is being served; and whether it will be reasonably possible to bring the summons to the notice of

the defendant within three days. The sheriff will be required to record the responses to these questions on the return of service.

It is further suggested that Rule 9(3)(d), which allows service at a *domicilium citandi et executandi* should be amended to require that the summons be served on a person apparently over the age of 16 years at such address. The reason for this suggestion is that a widespread practice has developed of requiring consumers to fill in their address on agreements without explaining to them that in the fine print it is provided that such address shall be deemed to be their *domicilium citandi et executandi*. In terms of the present Rule 9(3)(d), read with the proviso to Rule 9(3), simply leaving the summons at the *domicilium citandi et executandi* constitutes good service and cannot be questioned by the court.

SUGGESTED AMENDMENT OF RULE 9

[] Expressions in **bold type in square brackets** indicate **omissions** from existing rules.

___ Expressions underlined with a solid line indicate insertions into existing rules.

9 Service of process, notices and other documents

(1) A party requiring service of any process, notice or other document to be made by the sheriff shall deliver to him the original of such process, notice or document, together with as many copies thereof as there are persons to be served: Provided that the clerk of the court may, at the written request of the party requiring service, hand such process, notice or document and copies thereof to the sheriff.

(2) (a) Except as provided in paragraph (b) or in the case of service by post or upon order of the court, process, notices or other documents shall not be served on a Sunday or public holiday.

(b) An interdict, a warrant of arrest, and a warrant of attachment of person or property under section 30bis of the Act may be executed on any day at any hour and at any place.

(3) All process shall, subject to the provisions of this rule, be served upon the person affected thereby by delivery of a copy thereof in one or other of the following manners:

- (a) To the said person personally or to his duly authorised agent;
- (b) at **[his]** the residence or place of business of the said person to some person apparently not less than 16 years of age and apparently residing or employed there;
'residence' for the purpose of this paragraph, when a building is occupied by more than one person or family, means that portion of the building occupied by the defendant;
- (c) at **[his]** the place of employment of the said person to some person apparently not less than 16 years of age and apparently in authority over him or, in the absence of such person in authority, to a person apparently not less than 16 years of age and apparently in charge at his place of employment;
- (d) if the person to be served has chosen a *domicilium citandi*, at the *domicilium* so chosen to some person apparently not less than 16 years of age and apparently residing or employed there;
- (e) in the case of a body corporate at its local office or principal place of business within the area of jurisdiction of the court concerned to a responsible employee thereof or in any other manner specially provided by law;
- (f) if the plaintiff or his or her authorised agent has given written instructions to the sheriff to serve by registered post, the process shall be so served;
- (g) in the case of a Minister, Deputy Minister or Administrator, in his official capacity, the State or provincial administration, at the Office of the State

Attorney in Pretoria, or a branch of that Office which serves the area of jurisdiction of the court from which the process has been issued:

Provided that where such service has been effected in the manner prescribed by paragraphs (b), (c), (d), (e) or (g), the sheriff shall indicate in the return of service of the process the name of the person to whom it has been delivered and the capacity in which such person stands in relation to the person, body corporate or institution affected by the process and where such service has been effected in the manner prescribed by paragraphs (b), (c), (d) or (f), the court or clerk of the court, as the case may be, may, if there is reason to doubt whether the process served has come to the actual knowledge of the person to be served, and in the absence of satisfactory evidence, treat such service as invalid.

(4) The sheriff shall, on demand by the person upon or against whom process is served, exhibit to that person the original of the process.

[(5) Where the person to be served keeps his residence or place of business closed and thus prevents the sheriff from serving the process, it shall be sufficient service to affix a copy thereof to the outer or principal door or security gate of such residence or place of business or to place such copy in the post box at such residence or place of business.]

[(6) Where the sheriff is unable after diligent search to find at the residence or *domicilium citandi* of the person to be served either that person or the person referred to in subrule (3) (b) or, in the case of a body corporate referred to in subrule (3) (e), a responsible employee, it shall be sufficient service to affix a copy of the process to the outer or principal door of such residence, local office or principal place of business or to leave a copy of the process at such *domicilium*.]

[(7) Where the relief claimed in any action is limited to an order for ejection from certain premises or land or a judgment for the rent thereof and for the costs of such proceedings and it is not possible to

effect service in the manner prescribed in subrule (3), service of process may be effected by affixing a copy thereof to the outer or principal door of such premises or on some other conspicuous part of the premises or land in question.]

(8) Service of an interpleader summons where claim is made to any property attached under process of the court may be made upon the attorney of record (if any) of the party to be served.

(9) Where two or more persons are to be served with the same process, service shall be effected upon each, except-

(a) in the case of a partnership, when service may be effected by delivery at the office or place of business of such partnership, or if there be none such, then by service on any member of such partnership in any manner hereinbefore prescribed;

(b) in the case of two or more persons sued in their capacity as trustees of an insolvent estate, liquidators of a company, executors, curators or guardians, when service may be effected by delivery to any one of them in any manner hereinbefore prescribed;

(c) in the case of a syndicate, unincorporated company, club, society, church, public institution or public body, when service may be effected by delivery at the local office or place of business of such body or, if there be none such, by service on the chairman or secretary or similar officer thereof in any manner hereinbefore prescribed.

(10) Service of a subpoena on a witness may be effected at a reasonable time before attendance is required in any manner hereinbefore prescribed but need not be effected through the sheriff.

(11) (a) Service of any notice, request, statement or other document which is not process of the court may be effected by delivery by hand at the address for service given in the summons or appearance to defend (as the case may be) or by sending it by registered post to the postal address so given.

(b) An address for service or postal address so given may be changed by the delivery of notice of a new address and thereafter service may be effected as aforesaid at such new address.

(c) Service by registered post under this subrule shall, until the contrary appears, be deemed to have been effected at 10 o'clock in the forenoon on the fourth day after the postmarked date upon the receipt for registration.

(d) Service under this subrule need not be effected through the sheriff.

(12) Where the court is satisfied that service cannot be effected in any manner hereinbefore prescribed and that the action is within its jurisdiction, it may make an order allowing service to be effected by the person and in the manner specified in such order.

(13) Where service of an *ex parte* order calling upon the respondent to show cause at a time stated or limited in the order or of an interpleader summons is to be effected upon any party, service of such *ex parte* order or interpleader summons shall be effected-

(a) in the case where the party to be so served is the State, at least 20 days;
or

(b) in the case where any other party is to be served, at least 10 days,
before the time specified in such *ex parte* order or interpleader summons for the appearance of such party.

(14) Except where otherwise provided, notice of any application to the court shall be served-

(a) in the case where the party to be served is the State or a servant of the State in his official capacity, at least 20 days; or

(b) in the case of any other party, at least 10 days,
before the day appointed for the hearing of the application, but the court may on cause shown reduce such period.

(15) (a) Unless otherwise provided, where service of process may be effected by registered post such service shall be effected by the sheriff placing a copy thereof in an envelope, addressing and posting it by pre-paid registered letter to

the address of the party to be served and making application at the time of registration for an acknowledgment by the addressee of the receipt thereof as provided in regulation 44(5) of the regulations published under Government Notice R.550 of 14 April 1960.

(b) A receipt form completed as provided in regulation 44(8) of the said regulations shall be a sufficient acknowledgment of receipt for the purposes hereof.

(c) If no such acknowledgment be received the sheriff shall state the fact in his return of service of the process.

(d) Every such letter shall have on the envelope a printed or typewritten notice in the following terms:

'This letter must not be readdressed. If delivery is not effected before 19....., this letter must be delivered to the Sheriff of the Magistrate's Court at

Alternatively, rule 9 may be replaced by Uniform Rules 4(1) and (2), which apply in the High Courts.

Uniform rules 4(1) and 4(2)

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

(iii) by delivering a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than sixteen years of age and apparently in authority over him;

(iv) if the person so to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so chosen;

(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;

(vi) by delivering a copy thereof to any agent who is duly authorized in writing to accept service on behalf of the person upon whom service is to be effected;

(vii) where any partnership, firm or voluntary association is to be served, service shall be effected in the manner referred to in paragraph (ii) at the place of business of such partnership, firm or voluntary association and if such partnership, firm or voluntary association has no place of business, service shall be effected on a partner, the proprietor or the chairman or secretary of the committee or other managing body of such association, as the case may be, in one of the manners set forth in this rule;

(viii) where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the town clerk or assistant town clerk or mayor of such local authority or to the secretary or similar officer or member of the board or committee of such body, or in any manner provided by law; or

(ix) if two or more persons are sued in their joint capacity as trustees, liquidators, executors, administrators, curators or guardians, or in any other joint representative capacity, service shall be effected upon each of them in any manner set forth in this rule.

(aA) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.

(b) Service shall be effected as near as possible between the hours of 7:00 and 19:00.

(c) No service of any civil summons, order or notice and no proceedings or act required in any civil action, except the issue or execution of a warrant of arrest, shall be validly effected on a Sunday unless the court or a judge otherwise directs.

(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 on the signed receipt that he has done so.

(2) If it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be effected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic, but whose whereabouts therein cannot be ascertained, the provisions of subrule (2) of rule 5 shall, *mutatis mutandis*, apply.