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DISPUTE RESOLUTION **ALERT**

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Give me a (lunch) break!

In the case of *Magricor (Pty) Ltd v Border Seed Distributions CC* (1072/2020) [2021] ZAECGHC, the High Court of the Eastern Cape Division was tasked with resolving a dispute where Magricor had contended that the service of summons on it by the Sheriff of the High Court was defective, as it was not in line with the provisions of Rule 4(1)(a)(v) of the Uniform Rules of Court.

A reflection on the mirror-image rule by the Supreme Court of Appeal

In terms of the law of contract, in order to be recognised as a valid and binding contract, an agreement must satisfy various requirements, including consensus or a meeting of the minds between the parties on all material aspects of the agreement. In other words, there must be a firm, complete and clear offer, or proposal to contract.

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Give me a (lunch) break!

It is trite that the purpose of service by the Sheriff of the High Court is to ensure that the documents served come to the attention of the juristic person.

In the case of *Magricor (Pty) Ltd v Border Seed Distributions CC* (1072/2020) [2021] ZAECGHC, the High Court of the Eastern Cape Division was tasked with resolving a dispute where Magricor had contended that the service of summons on it by the Sheriff of the High Court was defective, as it was not in line with the provisions of Rule 4(1)(a)(v) of the Uniform Rules of Court.

Border Seed had initially issued summons against Magricor and obtained default judgment in its favour as Magricor had failed to deliver its notice of intention to defend timeously. Magricor's main contention is that the default judgment was granted erroneously as there was an error in procedure - arguing that the service effected on it by the Sheriff of the High Court was defective (and thus Magricor not being in wilful default of filing its notice of its intention to defend).

In this case, the Sheriff of the High Court attended at Magricor's registered address (and principal place of business) and affixed the summons to the main door at 13h25 – having "*found the Defendant to be absent*". In this instance, it is confirmed that the employees of Magricor were on their lunch break.

Specifically, and more pertinent to this article, Magricor contended that the Sheriff of the High Court could not effect proper service (by affixing) whilst Magricor's employees were on their lunch break, and as such, the service of the summons on Magricor was defective.

As a point of reference, Rule of 4(1)(a)(v) deals with service of due process by the Sheriff of the High Court on a close corporation or a company, providing that service may be affected:

- "*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*".

With consideration to this Uniform Rule, the following questions are raised:

Is the Sheriff of the High Court entitled to effect service on a juristic person when its employees are on their lunch break?

In argument, Magricor raised the provisions of the Basic Conditions of Employment Act (BCEA) and argued that the Sheriff of the High Court should have waited until 14h00 prior to affixing the summons to the main door.

The High Court in this instance tackled this issue by referring to Rule (4)(1)(b), which specifically provides that service can be affected any time between 07h00 and 19h00 and concluded that the argument raised by the Magricor was flawed.

The court further ruled that the provisions of the BCEA has no application when considering the service of due process by the Sheriff of the High Court.

Give me a (lunch) break!*...continued*

As such, the High Court emphasised that the subrule prefers service on an employee of a juristic person, this is to ensure the Sheriff does not affix without making the relevant enquires regarding the whereabouts of the employees (prior to affixing).

Is personal interaction a requirement in terms of Rule 4(1)(a)(v)?

It is trite that the purpose of service by the Sheriff of the High Court is to ensure that the documents served come to the attention of the juristic person.

As such, the High Court emphasised that the subrule prefers service on an employee of a juristic person, this is to ensure the Sheriff does not affix without making the relevant enquires regarding the whereabouts of the employees (prior to affixing).

In the Magricor case, the court considered the subrules of Rule 4(1) and confirmed that the subrules make provision for two scenarios when service is carried out on a juristic person:

1. the first scenario is when service is effected on a responsible employee of the juristic person: this occurs when the Sheriff locates a responsible employee (at the juristic person's registered office or principal place of business) and such employee is willing to accept service on behalf of the juristic person; and
2. the second scenario is to affix a copy of the documents to the main door of the juristic entity's registered office or principal place of business in the event that the Sheriff was able to identity a responsible employee, however such employee was unwilling to accept service on behalf of the juristic person.

The court found that an important requirement prior to affixing is that the Sheriff must have personal interaction with the employees of the juristic person. Both the aforementioned scenarios cater for this interaction – which ultimately assists a court in determining whether the service was brought to the attention of the juristic person.

The court further considered the scenario when the registered office or principal place of business of a juristic person is locked and there are no employees present at the office. As such, it was concluded that the Uniform Rules do not make provision for a such a scenario as the word "*willing*" in the Rule 4(1)(a)(v) provides that the Sheriff must have personal interaction with the employees of the juristic person, prior to affixing.

As such, the Sheriff cannot affix when no personal interaction is made with individuals present at the given address. In the Magricor case, there were no employees present at Magricor's principal place of business due to the fact that the employees were on their lunch break.

In the result, service was thus deemed defective, not because of any specific time the attempted service took place i.e. between 13h00 and 14h00, but due to the fact that no personal interaction was made by the Sheriff of the High Court – prior to affixing to the main door.

Give me a (lunch) break!*...continued*

It is clear that the emphasis is not on the time that the service was attempted but instead whether the Sheriff was able to have such interaction with the employees prior to affixing to the main door.

It is clear that the emphasis is not on the time that the service was attempted (during normal working hours or a lunch hour) but instead whether the Sheriff was able to have such interaction with the employees prior to affixing to the main door (should there not be an employee willing to accept service).

In addition to the above scenarios, the question is raised whether there is substantial compliance with the Uniform Rules in the event that no employees of the juristic person are present at a registered address, however, there are individuals present as such address willing to accept service (who are unrelated to the juristic person). The court in *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 339 (SCA), confirms that this type of service substantially complies with Rule 4(1)(a)(v), and is "*preferable to merely attaching the process, for instance, to the outer principal door of the premises*".

In contemplation of the current COVID-19 pandemic, and the status quo where many employees are working permanently from home (and not from their employer's principal place of business or registered address), the question arises whether Rule 4(1)(a)(v) unduly burdens the Sheriff of the High Court, or a party attempting to serve due process on a juristic person – when the majority of its employees are working from home, and when personal interaction is mandatory prior to affixing.

Claudette Dutilleux and Muzammil Ahmed

A reflection on the mirror-image rule by the Supreme Court of Appeal

In this case, the Municipal Manager of the Sol Plaatje Municipality issued an invitation for proposals to operate the Kimberley and Ritchie Waste Disposal Site.

In terms of the law of contract, in order to be recognised as a valid and binding contract, an agreement must satisfy various requirements, including consensus or a meeting of the minds between the parties on all material aspects of the agreement. In other words, there must be a firm, complete and clear offer, or proposal to contract. The assent to the proposal must consequently be unequivocal and unqualified and essentially a 'mirror image' of the offer. This concept was deliberated by the Supreme Court of Appeal (SCA) in the case of *Millennium Waste Management v Sol Plaatje Municipality* (99/2019) [2021] ZASCA 35 (7 April 2021).

In this case, the Municipal Manager of the Sol Plaatje Municipality (the Municipality) issued an invitation for proposals to operate the Kimberley and Ritchie Waste Disposal Site (the Site). On 20 February 2006, Millennium Waste Management (Millennium Waste) submitted a tender, in response to the invitation. It must be noted that the invitation by the Municipality to the public to submit a tender for work to be done was not an offer that was open to acceptance by the highest tenderer. At most, it was an invitation to potential tenderers, in this case Millennium Waste, to make an offer that would be evaluated by the Municipality in accordance with the public procurement prescripts. In order for a valid contract to come into effect, the Municipality would have to, in its acceptance, mirror the offer made by Millennium Waste, unequivocally and unconditionally and this process would have had to be preceded by a proper evaluation in compliance with section 217 of the Constitution.

On 25 July 2007, the Municipality addressed a letter to Millennium Waste, stating that the offer had been accepted subject to further logistical arrangements between the parties for purposes of executing the contract. The discussions between the Municipality and Millennium Waste would conclude with a review of a draft form of the contract.

Notwithstanding the fact that these further logistical arrangements did not take place, Millennium Waste took possession of the Site on 1 October 2007, rendered services, and invoiced the Municipality for these services. When the Municipality declined to pay, Millennium Waste issued summons against the Municipality.

Therefore, the issue for determination before the SCA was whether payments were due to Millennium Waste Management under a contract, which Millennium Waste alleged had come into being when it was advised by the Municipality that its tender had been accepted.

A reflection on the mirror-image rule by the Supreme Court of Appeal

...continued

Millennium Waste further contended that the provisions in the clause did not apply to it, as it argued that it tendered only for the "*Operations*" portion of the tender.

Judgment of the Supreme Court of Appeal

The court stated that the mere notification that the tender had been accepted did not, without more, result in a contract, as the letter of 25 July 2007 made it clear that "*arrangements for the execution of the contract*" still needed to be made. In particular, the invitation contained an express clause to the effect that conclusion of the contract included, *inter alia*, a discussion to reach agreement including the content of the proposal, proposed work plan, and budget staffing. The clause made clear that only after this discussion had occurred would the agreed final terms of reference and work plan be determined, and further expressly stated that the discussions would conclude with a review of a draft form of the contact. If the parties failed to reach an agreement, the Municipality would invite the firm that received the second highest score to enter into the said discussions.

Millennium Waste further contended that the provisions in the clause did not apply to it, as it argued that it tendered only for the "*Operations*" portion of the tender. The court correctly held that there was no merit in this submission, as the tender document was submitted as 'one composite document' to be read as such, and in any event, that this submission conflicted with its entire case. The court thus reinforced the principle that a litigant cannot approbate and reprobate.

Accordingly, as the clause in the written proposal envisaged further discussions and the signing in due course of a contract, and it was common cause that this did not happen, the court held that Millennium Waste's claim rested on an unenforceable agreement to agree. Ultimately, the appeal was struck off the roll with costs.

Conclusion

The Millennium Waste decision demonstrates that in the case of a conditional acceptance of a tender resulting in a mere agreement to agree, without more, such an agreement to agree does not culminate in an enforceable contract. At best, the consequence is merely an inchoate contract. As such, the courts will not readily grant relief where a party renders services merely on the basis of such an inchoate agreement, which expressly envisions the conclusion of a contract which has not subsequently been entered into.

Thabile Fuhrmann, Nomlayo Mabhena and Jessica van den Berg

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The LEGAL 500 EMEA

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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