

# Serving the court process

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The last article in this column on Tuesday November 27 2007 dealt with magistrates' court summons, what to do when served with summons and good defences.

A reader asked clarification on the service of summons. He was being polite because as a sheriff he knows the Magistrate and High Court Acts and rules.

In the article it was stated that a summons "is a document which can be served by the landlord or tenant, either by himself or herself or through an agent, lawyer or sheriff".

A landlord or tenant or their representative issues a summons but the court rules empower a sheriff to serve it.

In terms of the magistrates' court rules the process of the court has to be carried out through the sheriff. Summons starts the court action that gives the defendant five days within which to defend the action or accept the plaintiff's claim (consent to judgment).

The person who is responsible for the (civil) summons, landlord or tenant or an attorney acting on their instructions, preserve the summons and the sheriff's return of service. The sheriff notifies in writing (return of service) the clerk of the court and the plaintiff (the party who started the action) stating the date and manner of service or the inability to effect service.

When a sheriff approaches the defendant (tenant) to attach his or her property or to eject the tenant from the dwelling, he does so under legal instruction.

A sheriff acts under the Supreme Court Act 59 of 1959 (as amended) and the Magistrates' Courts Act 32 of 1944 (as amended) and rules of the courts. He or she has to perform work as required by law, without demur, favour or delay.

If the legal instruction by way of a court order empowers him or her to eject the tenant from the dwelling and to do all things necessary to carry out the ejectment, then the sheriff is obliged to fulfil the "mandate".

Where the sheriff is unable to carry out the task or is aware that he or she would be prevented from performing such a task, the court rules empowers the sheriff to be assisted by the police.

To stop a sheriff or to reverse the action of a magistrate's court ejectment, the aggrieved party has to go to court to interdict the sheriff and to have the judgment rescinded or cancelled.

The sheriff cannot falter in carrying out a legal instruction.

Let us take the case of a tenant who was served with summons wherein the landlord claims (cause of action) arrear rentals, cancellation of the lease and prays for the ejectment of the tenant.

The tenant is not aware of the summons or ignores. The sheriff provides a return of service that indicates how the summons was served.

It will show for instance that the defendant refused to accept the summons or that it was placed on the defendant's door.

The defendant has five working days in the case of a magistrate's court summons to inform the court and the plaintiff (landlord) that he or she intends to defend the action.

If no appearance to defend is recorded; served on the plaintiff and the court, the plaintiff may proceed against the tenant as a result of a default judgment.

Should the tenant engage into negotiations with the landlord or the landlord's attorney, it would be prudent to have a withdrawal of notice of action or a settlement agreement.

It is advisable to consult an attorney when summons is served. Ignoring it or not acting in time can lead to serious consequences, to the point of being thrown out into the streets.

Presenting the sheriff with proof cannot stop the legal process under which the sheriff has to act.

The defendant will have to approach the court and in this way start a legal process to prevent ejectment or to get reinstated.

The sheriff is a "conduit" who will act for the tenant when instructed to do so through the courts.

While the sheriff serves or executes documents, issued by a magistrate's court or high court and is appointed by the Minister of Justice, the sheriff is independent and does not work for the courts.

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