

## **Service of court process by social media**

*CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* (KZD)  
(unreported case no 6846/2006, 3-8-2012) (Steyn J)

By Kim Hawkey

A recent amendment to the Uniform Rules of Court has opened the doors to the service of court documents using modern electronic technology, including social media platforms.

This amendment was put to purpose in the recent case of *CMC Woodworking Machinery*, the outcome of which represents a significant move towards embracing technological developments in the context of legal prescripts.

In this matter, the KwaZulu-Natal High Court in Durban, per Steyn J, granted an application for substituted service of a notice of set down and pre-trial directions on the respondent (the defendant in the main action) via a message on social media website Facebook, in addition to the notice being published in a local newspaper.

In reaching this conclusion, Steyn J stated:

‘Changes in the technology of communication have increased exponentially and it is therefore not unreasonable to expect the law to recognise such changes and accommodate [them]’ (at para 2).

However, the judge also cautioned that: ‘Courts, however, have been somewhat hesitant to acknowledge and adapt to all the aforesaid changes and this should be understood in the context that courts adhere to established procedures in order to promote legal certainty and justice’ (at para 2).

Therefore, despite the court’s openness to new forms of media, Steyn J emphasised that each case must be decided on its own merits and must also take into account the type of document that is to be served. The judge noted that ‘cogent reasons’ had been presented in support of the present application and that the application ‘should be understood in the context in which it was launched’.

## **Background**

Rule 4A, which was inserted into the Uniform Rules in July 2012, provides for service of process other than that initiating application proceedings, by hand delivery, registered post, electronic mail or facsimile. Further, in respect of the latter two modes of service, chapter III, part 2 of the Electronic Communications and Transactions Act 25 of 2002, which relates to communication of data messages, is applicable. (For more on the amendment, see 2012 (Aug) *DR* 49.)

Four days after the amendment became effective, the application in the current matter was launched on an urgent *ex parte* basis.

The applicant (the plaintiff in the main action) instituted action against the respondent

for R 126 700, being the purchase price of a woodwork machine. The respondent defended the action and filed both a plea and a claim in reconvention. Pleadings had closed in 2008 and the matter was set down for trial on 29 August this year. The notice of set down was served on the respondent's attorneys in May 2008. However, in April 2010, the respondent's attorneys served a notice of withdrawal as attorneys of record. Since then, the applicant attempted to serve various notices on the respondent without success and launched the present application as it viewed the respondent's 'evasive conduct as prejudicial to its case and hampering its preparation for trial'. In a supplementary affidavit before the court, the applicant advised that the documents could not be sent to the defendant's e-mail address as 'nowhere on [the respondent's] Facebook page appears either a contact telephone number or an e-mail address'.

### **Legal and procedural framework**

Generally, substituted service is ordered when the defendant is believed to be in South Africa but one of the normal forms of service cannot be effected (P Farlam & DE van Loggerenberg *Erasmus Superior Court Practice* (Cape Town: Juta 2011) at B1-27). In order for substituted service to be granted, the applicant must set out the following, as indicated by the court at para 7 –

- the nature and extent of the claim;
- the grounds on which the court has jurisdiction to entertain the claim;
- the manner of service the court is asked to authorise;
- the last known whereabouts of the person to be served;
- the inquiries that have been made to ascertain the person's present whereabouts; and
- any information that may assist the court in deciding whether leave should be granted and, if so, on what terms

(LTC Harms *Civil Procedure in the Superior Courts Service Issue 45* (Durban: LexisNexis 2012) at B4-30).

The court noted that the present application would not have been possible had it not been for the recent amendment to the Uniform Rules. In addition to the Electronic Communications and Transactions Act, the court also referred to the Companies Act 71 of 2008, which it stated had 'paved the way for a change in the *modus* of giving notice', making specific reference to s 6(10) of that Act, which allows for electronic transmission of a notice in terms of the Act.

In terms of the onus for the granting of substituted service in the manner requested, the court pointed out that the applicant bore the onus of proving that –

- service via Facebook was warranted; and
- there was a real likelihood that the notice would be brought to the attention of the respondent.

### **Decision**

The court held that the applicant had discharged this onus and therefore granted it leave by way of substituted service to serve the notice on the respondent via a Facebook message addressed to his personal inbox. In addition, the court took the precautionary step of ordering that the notice be published in a local newspaper in order 'to promote legal certainty'. The issue of costs was deferred to the main trial.

In coming to its conclusion, the court considered the nature of the Facebook website, which currently has in the region of 955 million monthly active users worldwide, and how the website had developed over the years since its establishment. The court noted that while the website was initially intended to be a social network service, it had developed 'to serve more than one purpose', including being used as a tool for tracing people and bringing information to their attention. It further noted that the website could be accessed through various connection devices, making it 'easily accessible to most persons'.

In addition, the court dealt with privacy issues and those relating to mistaken or fake identity. In respect of the former, the court was satisfied that sending a personal message to the respondent's Facebook inbox would not breach his privacy as no member of the public would be able to view this message. In respect of the latter, any concerns that the court had in this regard were laid to rest by copies of photographs of the respondent posted in his 'Facebook album', which showed that the respondent was 'without a doubt easily identifiable' (at para 12).

## **Conclusion**

While this judgment has no doubt made history in South Africa, a number of courts around the world, including in Australia and the United Kingdom, have permitted service of court documents via social media websites. And while the court in this matter did not consider these rulings in coming to its decision, it did take into account the Canadian decision in *Boivin & Associés c. Scott* 2011 QCCQ 10324 (CanLII), in which the court authorised service of motion proceedings via the defendant's Facebook account.

These decisions, including that in the *CMC Woodworking Machinery* case, reflect the need for courts to adapt to reflect developments taking place in the society in which they exist. As stated by the judge in her concluding remarks in this matter:

'This application has reminded me that even courts need to take cognisance of social media platforms, albeit to a limited extent, for understanding and considering applications such as the present.'

- A copy of the judgment can be accessed on the *De Rebus* website [www.derebus.org.za](http://www.derebus.org.za) under 'Documents'.