

June test

Part 2 – Question 41

Write a short note/essay in which you critically discuss one of the topics provided below.

TOPIC 1

The merits of the recently introduced online court filing system.

or

TOPIC 2

Does the National Credit Act oust the jurisdiction of the High Court to deal with matters falling under the National Credit Act? Or do you think that the High Court is obliged to entertain matters that fall within the Magistrate's Court purely on the basis that the High Court has concurrent jurisdiction?

or

TOPIC 3

You are instructed to prepare a note in which you set out your advice to your client, Mr A.

Mr A intends to proceed with legal action against his former business partner, Mr B. It relates to a claim for damages in the amount of R1 000 000 (one million rand). On the instructions of your client, you've arranged for the summons to be issued and sent to the relevant sheriff for service. The sheriff has been unable to serve the summons on Mr B. Mr B does not seem to have a fixed residential address and has been avoiding service by all means possible.

Your client is at his wits' end. He would like to proceed with legal action as soon as possible and enquires about the possibility of serving the summons on the defendant through Facebook. Mr B seems to be very active on Facebook.

Draft a note in which you advise your client and comment on service with reference to, in particular, service of court documents in South Africa through social media such as Facebook.

IMPORTANT: You should select ONE of these topics only.

FORMAT:

Please upload your answer in Word or Pdf format once done.

You don't need to include any footnotes.

There is no minimum word count for this question.

There is a separate link below to upload and submit your answer.

If, for whatever reason, you are unable to submit your answer for this question online and, as a last resort only, you may email it to the lecturers.

MEMO

Award 10 marks as follows:

Caselines

- = a digital/electronic case management and litigation system implemented by the Gauteng Division of the High Court, Pretoria and Johannesburg
- Involves online case creation, party/legal representative invitation, document filing and uploading and case presentation
- Enables litigants to file and upload pleadings and other documents electronically and to present their case and argument during court proceedings
- Full implementation of the CaseLines digital management system took effect on 27 January 2020
- Registrars create cases on CaseLines system and thereafter invite legal representatives to the case
- Upon invitation, legal representatives may invite Counsel to the case (where Counsel is briefed)
- Within 2 Court days plaintiff/applicant must upload the case record and other Court documents
- The responsibility to upload pleadings and other relevant documents lies with the party responsible for each particular pleading/document in line with the Rules of Court (other than urgent cases)
- Electronic uploading of pleadings and other relevant documents in terms of this clause shall amount to filing as contemplated in the Rules of Court
- Only applies in Johannesburg and Pretoria
- Issuing of documents must still take place at court

Jurisdiction

- The National Credit Act (NCA) contains no provision dealing exclusively with jurisdiction.
- Thus, the usual rules of jurisdiction apply
- Schedule 2 of the NCA provides for the amendment of section 29(1) of the Magistrate's Court Act to the effect that Magistrate's Courts may adjudicate matters falling under the NCA, however the amended section does not include a monetary cap thus it appears that the district magistrates' courts have been granted unlimited monetary jurisdiction with regard to such credit agreements
- Section 29(2)(k)(vi) of the NCA provides that a credit agreement is unlawful if it expresses, on behalf of the consumer, consent to the jurisdiction of a High Court, if a magistrate's court has concurrent jurisdiction, or
- The question arises whether it was the intention of the legislature to oust the jurisdiction of the High Court in respect of matters arising from the National Credit Act
- In *Nedbank v Mateman*; *Nedbank v Stringer*, the court answered this question in the negative
- The court said that s19 of the Supreme Court Act (now s21 of the SCA), states that a High Court has jurisdiction over any person residing or being in the jurisdiction of the court
- There is a strong presumption against the ouster or curtailment of the High Court's jurisdiction
- There must be a clear and unequivocal inference in a statute to oust the jurisdiction of the High Court
- The National Credit Act contains no provision dealing exclusively with jurisdiction
- The Eastern Cape High Court came to a different decision in June 2019 in *Nedbank v Gqirana*
- In this matter the court held that for over a century courts have accepted that a High Court will not decline to hear a matter properly before it, merely because a Magistrate's Court also has jurisdiction;
- The court took into account various considerations relating to the NCA, namely:
 - A large number of defendants/respondents in matters involving credit transactions are historically disadvantaged individuals;
 - Such individuals have previously in most instances been paying instalments in reduction of their obligations before defaulting
 - The arrears are frequently trifling in their amounts and insignificant to the Banks, but not to the debtor
 - The NCA is consumer legislation introducing a new form of protection for debtors in SA
 - The NCA seeks to balance the inequities arising from unequal bargaining power between large credit providers and credit applicants
 - The NCA further designed to render assistance and protection to the previously disadvantaged section of our population who may wish to enter the property market
- In terms of Section 34 of the Constitution every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court, or where appropriate another impartial tribunal or forum
- A proper application of the Section 34 right as read with the Magistrates' Court Act and the NCA recognising the purpose and imperative of the NCA as stated above, makes it clear that to afford equality and access to a fair hearing right to the mostly financially and previously disadvantaged persons subject to the Act, and thus proper access to justice in all NCA matters falling within the monetary jurisdiction of the Magistrates' Court (all NCA matters in fact), must be brought in the that Court save only if there are exceptional circumstances justifying otherwise (such not to include the Banks suggested advantages in High Court litigation). Put otherwise the NCA properly provides necessarily that, save in exceptional circumstances, all NCA matters be brought in the Magistrates' Court. What may constitute exceptional circumstances would have to be decided on a case by case basis

Service:

- Rules of court don't allow for service through social media/facebook.
- If service can't be effected in the normal manner provided for in the rules of court, Mr A would need to apply to permission from the court to serve in an alternative manner/substituted service – costs and time implications for client.
- Client must depose to affidavit in support of application to explain how defendant has evaded service and that the suggested method will be most effective/is warranted/is likely to come to defendant's attention. Applicant has onus to prove this.
- Case law:
 - CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens (KZD) (unreported case no 6846/2006, 3-8-2012) (Steyn J).
 - Groundbreaking decision but issue not decided by SCA as yet.
- Court may allow this in line with international developments in other jurisdictions and also technological developments. Many other jurisdictions have been similar developments.
- Changes to legislation have also paved the way ie new Companies Act, 2008 and ECTA etc.
- Constitutional issue – balancing of rights ie privacy / access to justice
- Floodgates have not been opened – each case will be decided on its own merits and having regard to the nature of the matter.
- Important:
 - Student should express a view and not simply restate facts.
 - This can / cant' / should / shouldn't be done
 - How
 - Why
- See article below
- May add:
 - This is not a divorce or status matter so personal service is not required.
 - May consider service at another address as provided for in the rules of court ie place of business or place of employment or domicilium citandi address in contract. Summons may even be dropped at defendant's feet.

Article:

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.'