

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

Case No: 6846/2006

In the matter between

CMC WOODWORKING MACHINERY (PTY) LTD **Applicant**

and

PIETER ODENDAAL KITCHENS **Respondent**

JUDGMENT

Delivered on: 3 August 2012

STEYN J

[1] In 1947 courts considered it appropriate to order that substituted service be effected by affixing a notice on the door of a court building.¹ Much, however, has happened since 1947. World War II came to an end and wireless and telephone technology developed to the extent that the telex was introduced. The fax machine followed thereafter as well as cell phone communication. Computers entered every house and office to the extent that most courts depend on electronic equipment. For example proceedings are no longer

1 See *De Klerk v De Klerk* 1947 (2) SA 1289 (T) and the order at 1290 which was:

“[I] shall allow service to be effected by affixing it ad valvas curiae.”

manually recorded but by a trained stenographer who records them digitally.

- [2] 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 it. 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. South Africa's legislature moved swiftly in recognising the evolution of communication systems.² South Africa's new Companies Act,³ which came into operation on 1 May 2011, paved the way for a change in the *modus* of giving notice. Section 6(10) of the Act reads as follows:

“(10) If, in terms of this Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost.”

2 See the Telecommunications Act, No 103 of 1996 and the Electronic Communications and Transactions Act, No 25 of 2002.

3 Act No. 71 of 2008.

The present application, in my view, would not have been possible had it not been for a recent amendment to the Uniform Rules of Court which provides for service (other than processes instituting proceedings) by way of electronic mail, registered post and facsimile. Four days after the amendment came into operation the application was launched *ex parte* on an urgent basis before me. Applicant in the notice of motion applied for substituted service to serve a Notice of Set Down and pre-trial directions on the Defendant (a sole proprietorship) by sending the Notice via a facebook message, in circumstances in which the Defendant's attorneys' withdrew and the Defendant consistently tried to evade service.⁴ After hearing the submissions of counsel and having duly considered of the application, the following order was granted:

"3. The Plaintiff is given leave by way of substituted service to serve a notice on the Defendant by way of a Facebook message addressed to the inbox of the following Facebook page:

"http:\\www.facebook.com\\#!\\Pieter.Odendaal.90"

with the following message:

'1. As you know we act on behalf of CMC

⁴ The founding affidavit lists various instances wherein attempts were made to serve notices on the respondent and all of them were unsuccessful. (See paras 6(a)-(g)).

Woodworking Machinery (Pty) Ltd who have sued you in the Durban High Court under case number 6846/2006.

2. *You are given notice that the trial of that action has been set down for hearing at 9.30 a.m. on 29 August 2012 and that if you do not appear at the Durban High Court, Dullah Omar Grove (previously Masonic Grove), off Margaret Mncadi Avenue (previously the Esplanade) on that day (and further comply with paragraph 3 of this message) then judgment may be granted against you by default.*
3. *If you intend to continue to defend this action, you are required within five working days of transmission of this message to*
 - a) *give to ourselves an e-mail address or facsimile address at which documents can be served upon you;*
 - b) *deliver by fax to fax number 0866 852382, or by e-mail to ianking@mfp.co.za or by hand to our offices described in paragraph (d) below) a discovery affidavit identifying each document which you have in your possession which you intend to use at the trial (and in that affidavit to identify any further documents which you intend to use but which are no longer in your possession);*
 - c) *and thereafter within three working days of a request by ourselves that you transmit any documents identified in such affidavit and requested by us then to deliver copies of such documents for*

inspection by e-mail or facsimile or by hand;

d) attend a pre-trial conference to be convened on 14 August 2012 at 3pm at our offices namely Mooney Ford, 7th Floor, Permanent Building, 343 Anton Lembede Street (previously Smith Street) (entry Bay Passage), Durban;

e) furnish to us by fax transmission or e-mail or by hand by 15 August 2012 a summary of the evidence of any expert witness you intend to call.'

3. A notice shall also be published in the Mercury by no later than 13 August 2012.

3. The costs of this application are reserved for the decision of the Court hearing the trial of the action on 29 August 2012."

I was satisfied that, in the given circumstances, the order should be issued without further delay. It appeared to be necessary to give reasons for the said order and what follows are the reasons for my decision.

[3] It is necessary to sketch the background to this interlocutory application, since it was pivotal to the discretion being exercised in favour of the applicant and the order being granted. The applicant bore the onus of satisfying the court

that the specific manner of service sought is warranted, since none of the normal forms of service set out in the rules could be effected. Applicant in the present application also convinced me, on the papers, that there is a real likelihood that the notice would be brought to the attention of the Respondent. Before dealing with the merits of the application and the specific relief granted, I consider it essential to summarise the history and the background that led to the application being launched.

Background

[4] The plaintiff (now applicant) in the action has sued the defendant (now respondent) for R126 700, being the purchase price for a woodwork machine. The defendant has defended the action and pleadings were exchanged. In addition the defendant filed a Plea and a Claim-in-Reconvention. The plaintiff pleaded to the Claim-in-Reconvention and all pleadings closed in 2008. Thereafter the matter was set down on the awaiting trial list by notice of the plaintiff's attorney, such notice was served on the Defendant's erstwhile attorneys on 26 May 2008. On 22 April 2010 the defendant's

attorneys served a notice of withdrawal as attorneys of record. Ever since the Notice of withdrawal of the defendant's attorneys was served the plaintiff tried to serve various notices on the defendant without any success.

The matter is set down for trial on 29 August 2012 and the applicant considered the evasive conduct as prejudicial to its case and hampering its preparation for trial.

Legal Framework

[5] Substituted service which is the form of service sought *in casu*, is described by Farlam *et al* in *Erasmus Superior Court Practice*⁵ as:

*“Substituted service is ordered when the defendant is believed to be in the Republic but one of the normal forms of service set out in the rules cannot be effected. The court then gives directions authorising some form of ‘substituted service’. Substituted service differs from edictal citation which is ordered when the defendant is or is believed to be out of the Republic, or the exact whereabouts of the defendant are unknown.”*⁶

⁵ Service issue 37, (2011). Also see Herbstein and Van Winsen ‘*Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*’ Vol 1, 5th edition (2009) at 360 where the authors state that substituted service has been generally effected by allowing for notices to be sent by registered mail or by sending a registered letter.

⁶ See Rule 4(2) *op cit* at B1-27 to B1-28.

(Original footnotes omitted)

[6] To some extent, substituted service has been considered to be more symbolic than actual service. I tend to disagree with earlier decisions that create the impression that this kind of service is symbolic in nature. The aim of this type of service remains to inform the party concerned of a particular notice. In *Pretoria City Council v Ismail*,⁷ Schreiner J stated the following:

“Substituted service is a way of achieving in law the same result as if the proceedings, notice or order, or whatever the matter may be, had been brought to the notice of the persons affected. It is not a way of establishing that such notice or other matter was actually brought to the notice or knowledge of the person affected; it takes the place of bringing such notice or other matter to his knowledge. So, in ordinary litigation, the summons may with the Court’s leave be served by posting or by publication or in some other manner; and when that is done, there is no doubt that the service is just as operative and has the same legal results as if the party who had to be served was presented with a copy of the document to be served.”⁸

(My emphasis)

Similar sentiments were echoed by Didcott J in *Hlela v*

7 1938 TPD 246.

8 *Ibid* at 252.

*Commercial Union Assurance Co of SA Ltd:*⁹

*“And what happens if, the prospective defendant being human, he is an elusive character? The Rules of Court allow the summons that is destined for him to be served on somebody else at his place of abode, business or employment. A substituted service that is a mere token of such, that is perhaps no more than symbolic, will be permitted once his whereabouts are unknown.”*¹⁰

It is trite that an application for substituted service should only succeed if the applicant has set out:

- “(a) the nature of and extent of the claim;*
- b) the grounds upon which the court has jurisdiction to entertain the claim;*
- c) the manner of service of which the court is asked to authorise;*
- d) the last known whereabouts of the person to be served;*
- e) the inquiries which have been made to ascertain the present whereabouts; and*
- (f) any information which may assist the court in deciding whether leave should be granted and, if so, on what terms.”*¹¹

[7] On 27 July 2012 the Uniform Rules of Court were amended and Rule 4A was inserted after Rule 4.¹² The amendment incorporates some of the provisions of the Electronic

9 1990 (2) SA 503 (N).

10 *Ibid* at 507E-F.

11 See D Harms ‘*Civil Procedure in the Superior Courts*’, Service Issue 44 (2011) at B-20.

12 See Government Gazette No 35450, dated 22 June 2012.

Communications Act into the Rules. The new Rule reads:

- “4A (1) Service of all subsequent documents and notices, not falling under rule 4(1)(a), in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under rules 6(5)(b), 6(5)(d)(i), 17(3) or 34(8), by:-*
- a) hand at the physical address for service provided, or*
 - b) registered post to the postal address provided, or*
 - c) facsimile or electronic mail to the respective addresses provided.*
- 2) An address for service, postal address, facsimile address or electronic address mentioned in sub-rule (1) may be changed by the delivery of notice of a new address and thereafter service may be effected as provided for in that sub-rule at such new address.*
- 3) Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002) is applicable to service by facsimile or electronic mail.*
- 4) Service under this rule need not be effected through the Sheriff.*
- 5) The filing with the registrar of originals of documents and notices referred to in this rule shall not be done by way of facsimile or electronic mail.”*

[8] Rule 4A specifically incorporates Chapter III, Part 2 of the

Electronic Communications and Transactions Act, No 25 of 2002 as being applicable to effecting service by facsimile or electronic mail. In the present application I considered sections 23 and 26 of the Act as important:

“23. Time and place of communications, dispatch and receipt.-A data message-

- a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;*
- b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and*
- c) must be regarded as having been sent from the originator’s usual place of business or residence and as having been received at the addressee’s usual place of business or residence.”*

And

“26. Acknowledgement of receipt of data message.-

- 1) An acknowledgment of receipt of a data message is not necessary to give legal effect to that message.*
- 2) An acknowledgement of receipt may be given by*
 - (a) any communication by the addressee,*

- whether automated or otherwise; or*
- (b) *any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.”*

Merits of the application

- [9] It is necessary to consider the type of website proposed by the applicant in order to understand how it relates to other publication forms generally used in effecting substituted service and whether it is accessible. Facebook is defined as:

“Facebook is a social networking website that was originally designed for college students, but is now open to anyone 13 years of age or older. Facebook users can create and customise their own profiles with photos, videos, and information about themselves. Friends can browse the profiles of other friends and write messages on their pages.

Each Facebook profile has a “wall” where friends can post comments. Since the wall is viewable by all the user’s friends, wall postings are basically a public conversation. Therefore, it is usually best not to write personal messages on your friends’ walls. Instead, you can send a person a private message, which will show up in his or her private Inbox, similar to an e-mail message.

Facebook allows each user to set privacy settings, which by default are pretty strict. For example, if you have not added a certain person as a friend, that person will not be able to

view your profile. However, you can adjust the privacy settings to allow users within your network (such as your college or the area you live) to view part or all of your profile. You can also create a “limited profile,” which allows you to hide certain parts of your profile from a list of users that you select. If you don’t want certain friends to be able to view your full profile, you can add them to your “limited profile” list.”¹³

Whilst the website is initially intended to be a social network service, the present application showed that it has developed to serve more than one purpose. For example it is being used as a tool for tracing individuals and in some instances to bring information to the knowledge of those individuals concerned. In this modern era various connection devices are used to access the website, which renders the site easily accessible to most persons.¹⁴

13 See <http://www.techterms.com/definition/facebook> accessed on 02/08/2012.

14 See R Shambare and A Mvula, ‘South African Students’ perceptions of Facebook: Some implications for instructors’ *African Journal of Business Management* (2011) Vol 5, 10557-10564. At 10560 the authors list the type of devices as follows:

“Ability to connect to the Internet is a prerequisite for Facebook usage. There are numerous connection devices which individuals can use to access Facebook. Ultimately, these determine not only the speed but also the nature of the content accessible on the site. Subscribers therefore select connection types most suited to their needs, lifestyle and budget. While desktop computers generally provide faster broadband connection, these tend to be more expensive in that they require modems and Internet connection through an Internet service provider (ISP). On the other hand, subscribers are also able to access Facebook with WAP-enabled cellular phones.”

[10] The applicant explained in its supplementary affidavit why the notice of set down could not merely be sent to the defendant's email address:

“5.

Both my attorney and I have carefully scrutinised the Defendant's Facebook pages, including his information page, a printout of which is Annexure “K” and nowhere on his Facebook page appears either a contact telephone number or an email address. The Defendant has obviously chosen not to insert any such information as part of his Facebook profile.”

[11] I am indebted to Adv Harcourt SC, who filed comprehensive heads of argument in support of the application and who had drawn my attention to the Canadian case of *Boivin and Associates v Scott*.¹⁵ Importantly, the Canadian Court held that the same reasoning for the use of email as a method of service should also apply for service by Facebook. The Canadian court authorised service of the motion proceedings on the address of the defendant on Facebook.

[12] Before authorising the sought service I raised with counsel the issue of mistaken identity or even fake identity. The court's

¹⁵ 2011 QCCQ 10324 (CaNLII) delivered on 15 August 2011. Since the original text is in French, counsel handed up to the Court, the Google translation of the case.

concern regarding the identification of the defendant was addressed by attaching photos filed on the defendant's facebook album,¹⁶ which depicts the defendant in the company of friends. The photos are clear and the individual is without a doubt easily identifiable.

[13] Regarding the privacy of the defendant and the interests to be considered, I was persuaded that the applicant's notice would not impact on the defendant's right to privacy since it was requested that a message be sent to the defendant in the following manner:

“14.

On the Defendant's page, Annexure “K”, at the top right hand corner immediately under the solid line in the printed version is a box headed “send message”.

15.

If one clicks on that box, a window is opened enabling you to type and send a direct message to the Defendant. Once you have completed typing in your message, you would click the “send” box and Facebook would communicate to the Defendant that he has received a message and, when he clicks on that link, he would access the message that has been sent to him.

16.

The message would be a personal message to the

16 See L1, L2, M1 and M2.

Defendant in this instance and no member of the public, including those people listed as his friends, would have access to it.

17.

I submit that, in a case such as this, if the Defendant elects not to access the message, he does so at his own peril.”¹⁷

(My emphasis)

In order to promote legal certainty it was necessary to order, in addition, that the notice be published in a local newspaper should the defendant, for some reason, not have access to any electronic communication devices.

[14] Lastly, this application should be understood in the context in which it was launched and the cogent reasons submitted on behalf of the applicant in support of the application. Each case will have to be decided on its own merits and on the type of document that needs to be served on the party concerned. 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.

17 See supplementary affidavit, filed on behalf of the applicant.

Steyn J

Date of Hearing:	31 July 2012
Date of Judgment:	3 August 2012
Counsel for the applicant:	Adv Harcourt SC
Instructed by:	Mooney Ford Attorneys