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DISPUTE RESOLUTION **ALERT**

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The *"app-turn"* of personal service

The need for personal service has arguably been abused by many judgment debtors who evade personal service by the sheriff in the hope that the application will not be granted as a result of a failure to effect service in accordance with the rules.

The right to access to adequate housing is guaranteed in terms of section 26 of the Constitution. Accordingly, the courts apply very stringent measures in assessing proper service of Rule 46A applications which relate to execution against primary residences. In terms of Rule 46A(3)(d), *"Every notice of application to declare residential immovable property executable shall be served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner."*

Now imagine this, you are sitting in the unopposed motion court for a Rule 46A application; armed with a service affidavit detailing every aspect of your attempts to serve the application on an evasive respondent via the sheriff (who affixed it to the door), registered post, email and every other recognised manner of service. Despite all your efforts, the court is not satisfied that there was personal service as required by Rule 46A(3)(d). The need for personal service has arguably been abused by many judgment debtors who evade personal service by the sheriff in the hope that the application will not be granted as a result of a failure to effect service in accordance with the rules. It appears that our courts' natural inclination is to postpone Rule 46A applications until such time as every service avenue has been explored.

The use of technology and its impact on daily life has undeniably risen rapidly worldwide, with software applications and social media platforms leading the race in technological advancements. It is unsurprising that messaging platforms such as WhatsApp now support as many as two billion users. Social media platforms have blurred the lines between social and business use, as both memes and contracts are shared on applications such as WhatsApp. Could the burden of personal service on evasive litigants be alleviated through the use of these platforms?

When the rules relating to service were created, the only certain way to serve documents was to physically hand the documents to the relevant recipient. However, with the rise of technology, particularly social media, and its increased use for business purposes, it might be time to consider these platforms as an alternative method of service. Our courts appear to hold the same view. For instance, in the unreported case of *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* (KZD) (unreported case no 6846/2006, 3-8-2012) Steyn J, held that *"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]"*. Moreover, our legislation is increasingly, recognising the potential of technology, even social media platforms, to advance legal practice. The Administrative Adjudication of Road Traffic Offence Amendment Act 4 of 2019 (AARTO), recently introduced into law electronic service of legal process, which among other things, entails the transmission or reception of information by means of magnetism, radio or other electromagnetic waves. Arguably, this would include service via social media platforms such as Facebook.

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The *"app-turn"* of personal service

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As a general rule, banks require, in terms of their standard loan agreements that the legal costs incurred in the process of foreclosing on the property be paid by the judgment debtor on an attorney-client scale.

The benefits of serving court process via social media go without saying. The recent COVID-19 (Coronavirus) outbreak has wreaked havoc across the world which has seen, among other things, the closure of schools and a general limitation of human contact. The judicial system has not been exempted from the effects of this pandemic. With the introduction of the court's online file management system, Caselines, the courts are able to limit the number of feet walking into the court. However, service of court process, particularly in Rule 46A applications, still requires personal service, which inevitably requires human contact. Although the courts have attempted to limit human interaction through Caselines, an order for the service of Rule 46A applications through software applications, would further abate the risk of the spread of the Coronavirus. Such an order is not earth-shattering, as the Rules already contemplate that the court may make an order for any alternative form of service.

In addition, it is indisputable that the costs of service can quickly add up to a substantial amount, particularly where an evasive respondent is involved. As a general rule, banks require, in terms of their standard loan agreements that the legal costs incurred in the process of foreclosing on the property be paid by the judgment debtor on an attorney-client scale. Therefore, the cost of the efforts to effect personal service, ironically, is borne by the judgment debtor whom the court purports to protect. Service via social media platforms, however, would significantly reduce the costs of service. What would be required to effect service is merely a Wi-Fi connection. In addition, on most social media platforms, it is possible and relatively easy to ascertain if a person has *"read"* a message sent to them. Effecting service in this way would immediately do away with the need for various attempts at service where the respondent is being elusive. Instead of a file filled with the proof of various attempts at service, one would need to present the court only with a screenshot indicating that the application was *"read"* by the respondent. Furthermore, in our increasingly environmentally conscious society, one need not go to great lengths to explain the benefits of saving paper that service via social media platforms would undoubtedly bring. Having regard of the non-exhaustive benefits set out above, it is clear that advancing our laws to incorporate service via social media platforms could alleviate the burden of personal service on judgment creditors.

As stated above, Rule 46A(3)(d) provides that the court may order service in any other manner. This creates a dual application process, in terms of which the judgment creditor must, in addition to the initial application to declare the property executable, apply for an order to effect service in another manner, if the court is not satisfied by the manner of service of the initial application, which has cost implications. In order to reduce the costs, it would be efficient in the interim, particularly in light of the COVID-19 outbreak, for the courts to issue a directive in terms of which service may be effected via software applications. As a long-term solution, it will be necessary for the rules to be amended to incorporate electronic service in line with the reasoning of Steyn J. This would create a permanent solution for any future crises with no need for the courts to issue directives to cater for each new crisis that comes. This

The *"app-turn"* of personal service

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would mean that should there be a crisis or should personal service by the sheriff fail, judgment creditors would immediately have the option to serve electronically, provided that they can show proof of service.

Much like any other aspect of technology, there are a few potential problems that could arise from service through social media platforms and software applications. What immediately comes to mind are the potential privacy violations that could occur. Currently, social media platforms are structured to preserve anonymity of users, who are entitled to choose their *"screen names"* on these platforms. Additionally, social media account holders with common names could potentially be confused for each other. The obvious risk there, is documents being served on the wrong person and simultaneously providing a third party with private information such as the personal details of the intended recipient. Moreover, while most of the world is using social media platforms, presence thereon is not mandatory, accordingly, trying to track whether or not a respondent has social media accounts alone presents difficulties.

Having regard of the foregoing, it is apparent that service via social media platforms would undoubtedly assuage the burden carried by judgment creditors when it comes to personal service. It is also encouraging to see that both our law makers and our courts have not only favourably considered the potential of technology to improve law practice but are taking strides to make this a reality. It appears that there is definitely room in South African law for the increased use of technology in encouraging access to justice. Perhaps the recent COVID-19 outbreak has revealed the need for the amendment of our laws to incorporate technological advancements so that there is continuity in our court processes even in the event of crises. That said, it is also clear that there are various hurdles to be met before software applications are a standardised method of personal service.

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INSURANCE

When is a shareholder's interest an insurable one?

Until 2013, shareholders by default could not have an insurable interest in the company's assets in which they hold shares.

The concept of an insurable interest forms part of the foundation of a contract of insurance. In South African insurance law, without an insurable interest a contract of insurance will be invalid. Usually, a person is said to have an insurable interest where he or she faces financial harm on the loss or destruction of the subject matter which they have insured.

While common sense dictates that the owner of property has an insurable interest in such property by virtue of his or her ownership, the position is less clear as to whether a person other than the owner can have an insurable interest in another person's property where destruction of such property will cause such a person to incur financial loss.

The above scenario is relevant in so far as shareholders of companies are concerned. Until 2013, shareholders by default could not have an insurable interest in the company's assets in which they hold shares, based on the English decision of *Macaura v Northern Assurance 1925 AC 619*. However, in 2013, the Western Cape High Court's decision in *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd* 2013 (5) SA 42 (WCC) expanded the concept of an insurable interest.

The plaintiff in this matter, Lorcom, was the sole shareholder in Gansbaai Fishing Wholesalers (Pty) Ltd (GFW), its subsidiary. GFW owned a fishing vessel in which Lorcom was vested with a right of use and was to be vested with ownership at a later effective date. Lorcom took out an insurance policy with Zurich Insurance to insure against any loss or damage to the vessel. When the vessel was lost at sea, Lorcom lodged a claim with Zurich Insurance, which the latter repudiated on the basis that Lorcom lacked an insurable interest as it was not the owner of the vessel which formed the subject matter of the insurance policy. Lorcom thus sued Zurich Insurance for R3 million owed to it in terms of the insurance policy.

Lorcom's position was that it had an insurable interest on the basis that it was the sole shareholder of the owner GFW, that Lorcom had the right of use of the vessel, and that in terms of the purchase agreement, Lorcom was to be vested with the ownership of the vessel by the effective date.

Upon an interpretation of the policy, the court found that Lorcom did have an insurable interest as it was a 100% shareholder of GFW, and there was therefore "a direct correlation between the company's financial welfare and the

INSURANCE

When is a shareholder's interest an insurable one?...*continued*

Such loss was capped at the market value of the asset at the time of the contract, which was an amount agreed on in the contract. The court's approach to an insurable interest in this case is preferable as it is based on common sense rather than legal technicalities.

shareholder's financial welfare." This factor, coupled with Lorcom's right of use and the purchase agreement which would have vested ownership with Lorcom, gave Lorcom an insurable interest entitling it to claim the loss in terms of the policy it took out with Zurich Insurance. Such loss was capped at the market value of the asset at the time of the contract, which was an amount agreed on in the contract. The court's approach to an insurable interest in this case is preferable as it is based on common sense rather than legal technicalities.

Unfortunately, the court was constrained by the facts before it and so it did not comment on the position where a shareholder as the insured does not hold 100% of the shares in a company. As such, there still exists uncertainty in South African insurance law as regards to the above position.

However, based on the reasoning in *Lorcom Thirteen*, there is no reason why a majority shareholder, though not holding 100% of the shares in a company, should not be able to insure the property of such a company. This is because the same logic applies to a majority shareholder as it would to a sole shareholder, being that the economic livelihood of a company may depend on a specific asset, and where that asset is then destroyed, this will have an effect on the shareholders of that company. Hence, such shareholders should be able to take out an insurance policy to cover the risk of loss or destruction of the company's property.

Roy Barendse and Fatena Ali

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Mediation: A new rule

A mediation process, if conducted professionally, may lead to the swift and inexpensive resolution of many disputes which would otherwise meander through the courts, with all attendant frustration and expense, for many years.

It is not often that one can report good news on improvements in legal procedure. Today we do so. With effect from 9 March 2020, new Rule 41A has been incorporated in the High Court Rules. This new rule requires parties to a dispute (both actions and applications) to initiate potential mediation from the outset.

The party bringing the action or application is obliged to request the other side to consider and advise whether it agrees to refer its dispute to mediation. Indeed, the parties have to go further. In response to the required notice the parties have to state the reasons why they believe a dispute cannot be mediated. Even if a dispute goes past the initial stages at court it can be referred to mediation at any stage by agreement between the parties with the encouragement, if need be, of the case management judge.

This procedure, which remains voluntary in the sense that parties aren't required to mediate their disputes, is nevertheless a huge step forward. At the very least it will encourage parties to consider mediation, with all its advantages, right at the start of the dispute.

Litigating parties frequently complain, with absolute justification, of the costs, delays and expense of ordinary court processes. It was for this reason, and particularly to address delays, that arbitration has become a more popular form of dispute resolution. But arbitration is still expensive and relatively slow.

Mediation, on the other hand is a voluntary without prejudice process where parties, usually with the assistance of a trained independent mediator, attempt to facilitate resolution of a dispute through negotiation. The process is cheap and quick – it rarely lasts more than a day or two in total – is informal and does not bind parties if agreement is not reached.

In the experience of this firm, and we have conducted a number of mediations that have been successful, mediation is particularly apposite where parties have enduring commercial or other relationships, but have an issue which they need to resolve.

Of course, parties who are trying to duck and dive obligations will never agree to mediation since they do not want their dispute to be resolved speedily. But for a lot of litigants this is not the case. A mediation process, if conducted professionally, may lead to the swift and inexpensive resolution of many disputes which would otherwise meander through the courts, with all attendant frustration and expense, for many years.

This is a legal reform which has definite potential benefits to parties in dispute, and we encourage people to take up the opportunity to attempt to resolve disputes by mediation where at all possible.

Richard Marcus

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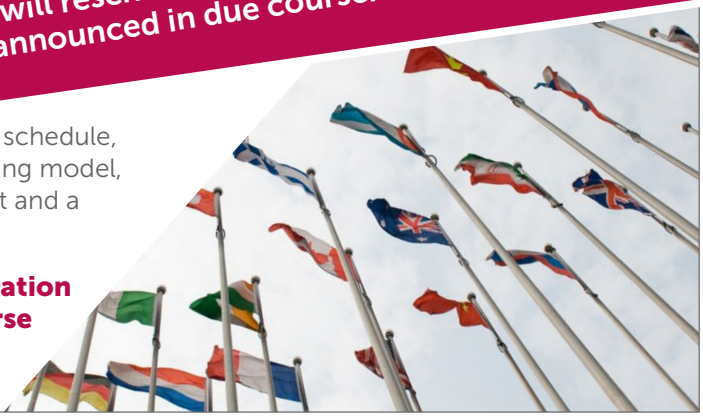

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