

## **A PRACTICAL NOTE ON SERVICE OF NOTICES UNDER THE NEW MAGISTRATE'S COURT RULES**

### **1. Introduction**

- 1.1. Under the old Magistrates Court Rules, the definition of “delivery” meant (except in Rule 9) to file with the clerk of the court and serve a copy of the opposite party. In the old Rule 9 (service of process, notices and other documents), the word “delivers” bore its ordinary meaning i.e. “to hand over”. (See: Old Rule 2(1)(b) and Jones & Buckle 7<sup>th</sup> Ed Vol 2 p 60).
- 1.2. Old Rule 9(11)(a) provided that service of any notice, request, statement or other document which is not process of the court may be affected by delivery by hand at the address for service given in the summons or appearance to defend .... The Companies Act has supplementary rules for service of documents, other than court process, upon companies (old companies act- S170).
- 1.3. Court notices, such as a discovery notice (Rule 23(1)) had to be “delivered” within the meaning of that word ascribed to it by the definition of “delivery” in S2 of the Rules (see, for instance, old Rule 23(1)). Notices thus had to be served and filed.
- 1.4. Thus, the old position can be summarised by stating that court notices, whilst not court process and being capable of service under old Rule 9(1)(a), nevertheless had to be filed in court as well since the Rule dealing with the specific notice in question dictated such filing in court.
- 1.5. The new Magistrates Court Rules have refined all of the aforesaid and the purpose of this memorandum is to point out that notices, such as discovery notices, no longer need to be filed in court in order to be effective. In addition, “service” under the old rules meant that a notice had to be physically served on the address given for that purpose. The Magistrates Court Rules has introduced “electronic service” of notices and the procedure pertaining to this new way of service needs to be examined as well.

### **2. Electronic Service of notices under the new rules**

- 2.1. Electronic service of notices is provided for in the definition of “deliver”, Rule 5, Rule 9 and Rule 13. There appears to be an interplay between these rules.

- 2.2. Firstly, the definition of deliver makes provision for electronic service. Thus, notices etc, that needs be “delivered” (i.e. filed in court) can be served electronically.
- 2.3. Rules 5 and 13 provides the following:
- 2.3.1. Where available, the plaintiff’s (or his attorney’s) e-mail address must be on the summons. (see: R5(3)(a)(i) & R5(3)(a)(ii)). The same goes for a notice to defend (see R13(3)(a))
- 2.3.2. In addition, the Plaintiff can indicate in the summons what method of service he would prefer (other than physical service) (R5(3)(b)). The same goes for notices to defend (see: R13(3)(b)).
- 2.3.3. However, if the action is defended, the defendant must, at plaintiff’s request, deliver a consent in writing to service by electronic mail (R5(3)(c)) If the defendant does not do so upon request, an application can be launched to compel defendant to do so (R5(3)(d)). Again, the same goes for notices to defend (see: R13(3)(c) &(d)).
- 2.3.4. Thus, the indication of a preferred method of service in a summons or notice to defend appears to be of no consequence if the matter is defended. Defendant/ Plaintiff must **serve and file** a consent to electronic service, but only upon written request from the plaintiff/ defendant. This is so because the word “deliver” is not excluded from the definition of that word in these rules.
- 2.4. Rule 9(9) provides that service of any notice, statement or other document which is not court process may be affected by electronic service at the address given in the summons or notice to defend. This sub-rule is, however, subject to the provisions of Rules 5 and 13 and thus cannot change what is dictated by these latter rules. It does not appear to take the matter any further.

### **3. Relevant Magistrate’s Court Rules**

#### **3.1. Rule 2(1)**

- 3.1.1. **"deliver"** (except when a summons is served on the opposite party only, and in rule 9) means to file with the registrar or clerk of the court and serve a copy on the opposite party either by hand-delivery, registered post, or, where agreed between the parties or so

ordered by court, by facsimile or electronic mail (in which instance Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 will apply), and "delivery", "delivered" and "delivering" have corresponding meanings;

3.1.2.           **"notice"** means notice in writing;

**3.2.           Rule 13**

3.2.1.           (3)(a)       When a defendant delivers notice of intention to defend, the Defendant shall therein give his or her full physical residential or business address, postal address and where available, facsimile address and electronic mail address, and shall also indicate and select therein the preferred address for service on the defendant thereat of all documents in such action, and service thereof at the address so given shall be valid and effectual, except where by any order or practice of the court personal service is required: Provided that the physical address given by the defendant in the notice of intention to defend shall be an address situated within 15 kilometres of the courthouse.

3.2.2.           (3)(b)       The defendant shall indicate in the notice of intention to defend whether the defendant is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, shall state such preferred manner of service.

3.2.3.           (3)(c)       The plaintiff may, at the written request of the defendant, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.

3.2.4.           (3)(d)       If the plaintiff refuses or fails to deliver the consent in writing as provided for in paragraph (c), the court may, on application by defendant, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.

**3.3. Rule 9**

- 3.3.1. (9)(a) Service of any notice, request, statement or other document which is not process of the court may be effected by delivery by hand at the address for service given in the summons or appearance to defend, as the case may be, or by sending it by registered post to the postal address so given: Provided that, subject to rules 5 and 13, service of such notice, request, statement or other document may be effected by sending it by facsimile or electronic mail to the facsimile address or electronic mail address given in the summons or notice of intention to defend, as the case may be.
- 3.3.2. (9)(b) An address for service, postal address, facsimile address or electronic address so given as contemplated in paragraph (a) may be changed by the delivery of notice of a new address and thereafter service may be effected as provided for in that paragraph at such new address.
- 3.3.3. (9)(c) (i) Service by registered post under this subrule shall, until the contrary appears, be deemed to have been effected at 10 o'clock in the forenoon on the fourth day after the postmarked date upon the receipt for registration.
- 3.3.4. (9)(c) (ii) Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 is applicable to service by facsimile or electronic mail.
- 3.3.5. (9)(d) Service under this subrule need not be effected through the sheriff.

**3.4. Rule 5**

- 3.4.1. (3)(a) (i) Every summons shall be signed by the attorney acting for the plaintiff and shall bear the attorney's physical address, within 15 kilometres of the courthouse, the attorney's postal address and, where available, the attorney's facsimile address and electronic mail address.
- 3.4.2. (3)(a) (ii) If no attorney is acting for the plaintiff, the summons shall be signed by the plaintiff, who shall in addition append a

physical address within 15 kilometres of the courthouse at which plaintiff will accept service of all subsequent documents and notices in the suit, the plaintiff's postal address and, where available, plaintiff's facsimile address and electronic mail address.

- 3.4.3. (3)(b) The plaintiff may indicate in a summons whether the plaintiff is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, shall state such preferred manner of service.
- 3.4.4. (3)(c) If an action is defended the defendant may, at the written request of the plaintiff, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.
- 3.4.5. (3)(d) If the defendant refuses or fails to deliver the consent in writing as provided for in paragraph (c), the court may, on application by the plaintiff, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.

### **Chapter III, Part 2 of the Electronic Communications and Transactions Act, 25 of 2002**

#### **Part 2**

#### **Communication of data messages**

##### **Variation by agreement between parties**

21. This Part only applies if the parties involved in generating, sending, receiving, storing or otherwise processing data messages have not reached agreement on the issues provided for therein.

##### **Formation and validity of agreements**

22. (1) An agreement is not without legal force and effect merely because it was concluded between parties by means of data messages;
- (2) An agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror.

##### **Time and place of communications, dispatch and receipt**

23. 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.

#### **Expression of intent or other statement**

- 24 As between the originator and the addressee of a data message an expression of intent or other statement is not without legal force and effect merely on the grounds that -
- (a) it is in the form of a data message: or
  - (b) it is not evidenced by an electronic signature but by other means from which such person's intent or other statement can be inferred.

#### **Attribution of data messages to originator**

25. A data message is that of the originator if it was sent by-
- (a) the originator personally;
  - (b) a person who had authority to act on behalf of the originator in respect of that data message: or
  - (c) an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming.

#### **Acknowledgement of receipt of data message**

- 26 (1) An acknowledgement of receipt of a data message is not necessary to give 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.