



Substituted Service vs Edictal Citation

1 INTRODUCTION

You enter a marriage with the purest of intentions, however once your marriage relationship has broken down irretrievably to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship, a divorce might be your only option. As a divorce results in a change of status, it is required that your spouse be served **personally** with a divorce summons which initiates divorce proceedings.

When your spouse is evading service, missing or in another country, which consequently means that personal service is not possible, it can cause quite a legal headache. The law does however not leave one destitute in such a situation, and makes provision for service to occur in alternative ways, i.e. either by way of substitute service or edictal citation, depending on the circumstances.

2 SUBSTITUTED SERVICE

Rule 4 (2) of the Rules Regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (*the Uniform*

Rules of Court”) and Rule 9 of the Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa (“*the Magistrates Court Rules*”) in essence states that if it is not possible to effect service personally, the court may, upon the application of the person wishing to cause service to be affected, give directions in regard thereto. Substituted service is a mechanism that can be used when your spouse is (1) evading service; or (2) if your spouse is missing.

It is important to note that one can only make an application for substituted service if it is believed that your spouse is still resident in South Africa. If it is reasonably suspected that your spouse is no longer resident in South Africa, substituted service will not be the appropriate route to take.

In order for an application for substituted service to be granted, it is imperative that the following must be set out clearly in your application: (1) the nature and extent of your claim; (2) the grounds on which the court has jurisdiction; (3) the manner of service the court is asked to authorise; (4) the last known whereabouts of your spouse; (5) the inquiries that have been made to ascertain your spouse's present whereabouts; and (6) any information that may assist the court in deciding whether leave should be granted and, if so, on what terms.¹

If the court is satisfied that a proper case has been made, it can order any manner of service it deems appropriate. There is no prescribed manner of alternative service, and as such it will differ from case to case, and the court will look at the facts and circumstances surrounding your divorce. From case law it is evident that once an application for substituted service has been granted, divorce proceedings can be initiated by way of publication of the divorce summons in a newspaper, or posting same on social media.

¹ CMC Woodworking Machinery (Pty) Ltd V Pieter Odendaal Kitchens 2012 (5) SA 604 (KZD) para 6.

3 EDICTAL CITATION

As aforementioned, when you want to institute divorce proceedings and your spouse is not believed to be resident in South Africa, but rather in a foreign country, an application for substituted service will not be a valid legal remedy available to you. When your spouse is resident in a foreign country, an application for edictal citation has to be brought in terms of either Rule 5(1) of the Uniform Rules of Court, or Rule 10(1)(a) of the Magistrate's Court Rules, which states that no process or document whereby proceedings are instituted shall be served outside the Republic, except for where you have obtained leave from the court.

In essence an edictal citation application is an application in which you seek to serve your divorce summons outside the borders of South Africa. A court will only grant an application for edictal citation if it is satisfied that service will be done correctly in such foreign country by a person who fulfils a similar role to that of a sheriff in South Africa, or in any other manner as prescribed by the court, for example service by way of electronic mail and publication in a newspaper.

Once an edictal citation application has been granted, and your divorce summons has been served on your spouse, he or she will have thirty days to respond to such summons as opposed to the normal ten working days to serve and file a Notice of Intention to Defend.

4 CONCLUSION

From the abovementioned it is clear that when you want to institute divorce proceedings and your spouse is either avoiding service, missing or living in a foreign country the normal route for instituting divorce proceedings can not be followed, and as such the law has made provision for service by way of substituted service or edictal citation. Substituted service can only be used in the instance where it is reasonably believed that your spouse is living in South

Africa. In contrast to this, an edictal citation application can only be launched if your spouse is not resident in South Africa.

Contact Malan Lourens Viljoen Inc should you want to institute divorce proceedings against a missing spouse, a spouse evading service or a spouse living in another country.

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