

Short notes on:

HAS YOUR SPOUSE GONE MISSING? - THE PROCESS OF DIVORCING A SPOUSE WHOSE WHEREABOUTS ARE UNKNOWN

Introduction

Married couples drift apart for various reasons. In certain instances, spouses may not necessarily keep track of each other's whereabouts should a separation occur prior to divorce. A problem arises when one of these spouses wants to remarry. The spouse wishing to be remarried would have to divorce the other legally, but how can this be done when the other spouse cannot be located?

The Process

Where a spouse's whereabouts are unknown, one may institute a divorce by applying to the court for substituted service before the summons is issued. The different forms of substituted service include a newspaper publication, an email, fax or a social media post or message.

In terms Rule 9 (9) (a) of Magistrate Court Rules 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.

In terms of Rule 10 Magistrate Court Rules If service of process or document whereby proceedings are instituted cannot be effected in any manner prescribed in rule 9, or if process or a document whereby proceedings are instituted is to be served outside the Republic, the person desiring to obtain leave to effect service may apply for such leave to a presiding officer, who may consider the application in chambers. Furthermore, In terms of Rule 4 (2) of the High Court Uniform Rules of Court, if service of a legal document cannot be completed as usual, an application can be made to the Court for directions on how service can occur.

In ***Ex parte: Mos Wear (Pty) Ltd: In re: An application for substituted service of documents in respect on a name dispute application*** (CT005April2017) [2017] COMPTRI 44 (25 April 2017)-,

the court stated that '*Substituted service is ordered when the Defendant is believed to be in the Republic but one of the standard forms of service set out in the rules cannot be affected. The court then gives directions authorizing some form of "substituted service".'*¹

Requirements For Substituted Service

There are a few things one ought to do before applying for substituted service. Firstly, the divorcing spouse would need to have the Defendant's last known address. Secondly, the divorcing spouse will have to confirm that address and interview the people living there about the Defendant's whereabouts. Thirdly, the divorcing spouse will have to ask known relatives, friends, former employers and any other person who may know the Defendant about the Defendant's whereabouts. Fourthly, the divorcing spouse will have to make attempts to find the Defendant on social platforms such as Google, Facebook, and Twitter. Finally, once all these avenues have been exploited, the divorcing spouse will have to write a written summary of their efforts in an affidavit to show that they tried by all means to locate the Defendant.

Thereafter, the Plaintiff must appoint a tracing agent in an attempt to locate the Defendant. Once all these avenues have been exhausted, the spouse will be entitled to make an application for substituted service and show that all avenues to locate the Defendant have been exhausted.

What Happens If The "Missing" Spouse Resides Outside Of South Africa?

In the instance where the "missing" spouse resides outside of South Africa, the divorcing spouse must approach the court to apply for an edictal citation that allows the divorcing spouse to serve a summons on the Defendant, in whichever country they are currently residing in. In such a case, the court must be of the opinion that there is no other way to serve summons and that the court or sheriff will properly affect the service. The Defendant will then have one month to file a notice of intention to defend failure, of which the divorce may be set down for a hearing date.

Conclusion

¹ Jolane van der Walt 2020 Accessed at <https://legalhero.co.za/2020/09/08/can-i-divorce-my-missing-spouse/>

Evidently, it is not impossible to divorce your estranged spouse should his/her whereabouts be unknown. Our courts provide an avenue that one could explore to achieve this by way of an application. It is nonetheless important to obtain legal advice should this issue arise in order to ensure that all requirements have been complied with.

Contact an attorney at SchoemanLaw for your legal needs!

