

## **Memorandum**

To: **Ruane Davids**  
From: **Sivuyile Coko**  
Date: **13 January 2012**  
Topic: **Court Orders**

We have dissected all the questions that were asked in the email sent by Mr. Thomas and tried to answer them in the following manner.

- 1. We would like to know whether an order would be valid if it fails to bear a Case No. and an Official Stamp of the High Court?** When dealing with urgent applications it is important to take into account that the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet. See rule 6(12) of the Uniform Rules of the Court. In the case of *Naidoo v. Naidoo*, 1948 (3) S.A. 1178 (W), WILLIAMSON, A.J. (as he was then) said at p. 1180:  
  
“*Prima facie* it seems to me that the test as to whether a judgment is final or not cannot be as to whether or not the order has been uplifted from the Registrar’s office or issued by the Registrar.”
- 2. How far is a presiding judge legally allowed to go in regards to serving of the court orders?** Once a court has made an

order disposing of the matters in issue, the court becomes *functus officio* and may not make any further orders not sought in the papers that set out and define the *lis* before court.

**3. If a Court Order instructs a citizen to break a law, would the individual be excused from prosecution simply because they were obeying a Court Order?**

A court will not make an order that cannot be enforced. See herein *Mansell v Mansell* 1953 (3) SA 716 (N) at 720-1; *Administrator, Cape & Another v Ntshwaqela & Others* 1990 (1) SA 705 (A) at 720 D-H

**4. The Hon. Judge made several statements that showed him to have been a witness rather than a judge, is this normal?**

No. In practice, judges are protected against having to give evidence relating to proceedings that have been held before them. Judges cannot be expected to justify their decisions in the witness box and the law does not countenance such a procedure: it is contrary to public policy to allow a judge to be examined and cross-examined with reference not to facts but to the performance of his or her judicial duties. See *LAWSA Vol 9, 2<sup>nd</sup> Edition, Evidence*.

**5. Would the Justice Department confirm whether judges are allowed to issue orders through cellphones to respondents or their representative?**

No. But If the applicant requires the operation of any other rules to be dispensed with, such as rules relating to the service of any order made, he should in his application make out a case for dispensing with them. See

*Erasmus: Superior Court Practice at 56A.* It is further stated in *Erasmus* *ibid* that “The court may order any manner of service as is likely to bring the proceedings to the notice of the party to be served. This may be in the form of publication in one or more newspapers, or by registered letter to the defendant at his or her last known address, or care of his or her relatives or legal advisers, or by affixing the process *ad valvas curiae*, or by a combination of these and other methods. In *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* the manner of service authorised was by facsimile transmission (fax) at given numbers confirmed by despatch of copies of the documents by registered mail to a given address. A court may also authorise service by way of electronic mail (e-mail) or other electronic means.

6. **Isn't it normal practice for any such urgent interdicts to be arranged by the Duty Registrar?** Yes, when an application is alleged to be urgent, the applicant's legal representative shall approach the Registrar to arrange a hearing as soon as possible in consultation with the duty judge. See *Practice Note 34 of the Consolidated Practice Notes of the Western Cape High Court*. But in case of extreme urgency, the matter may even proceed without service or notice to the registrar. See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 1 SA 773 (A).

**7. And since, no evidence seems to have been produced in Court to confirm any such attempts to reach the Duty Registrar, wouldn't be right to conclude that no such attempts (to subsequently reach the Registrar) were made?**

In terms of the website called [www.youdictionary.com](http://www.youdictionary.com) the word *incomunicado* is defined *inter alia* as:

“without a means of communication or not willing to communicate with others”

But reverting to the question at hand, one will realise that this is a question of fact. Therefore one will need to examine the facts as stated in the reasons for the order. From the reading of the judgment, Davis J did elude to the fact that the attorney obtained his number from the Duty registrar. This indicates that the attorneys did contact the duty registrar.