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You’ve been served … via NFT

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The Uniform Rules of Court (**Uniform Rules**) were amended in 2012, which resulted in the inclusion of Rule 4A (dealing with the delivery of documents and notices, including electronic service, in High Court proceedings). Following this amendment to the Uniform Rules, the KwaZulu-Natal High Court, *inter alia*, held that it is not unreasonable to expect the law to recognise and accommodate the advances in technology in relation to the service of court documents.

Fast-forward to June 2022, when the Supreme Court of the State of New York ordered that Holland & Knight LLP (**Holland & Knight**) may serve a temporary restraining order by means of a non-fungible token (**NFT**). Even though the South African legal field has undergone numerous changes to keep up with ever-changing technological advances, the question remains whether current South African laws would accommodate service by way of an NFT…

The Ethereum platform and NFTs in a nutshell

The Ethereum platform (**Ethereum**) is a decentralized, open-source blockchain platform which allows peer-to-peer digital transactions. Each transactor using the platform creates their own private Ethereum key (**Private Key**) to access their digital wallet, which stores all the transactor's crypto assets. The transactor also has a public Ethereum key (**Public Key**), which is known to other transactors on the platform and which is used as a means to verify the transactor when concluding transactions.

Public Keys can be accessed through blockchain explorers such as Etherscan, which enables members of the public to search for real-time and historical information about a specific blockchain.

Due to Public Keys being publicly accessible, it has become possible for businesses and crypto transactors to "airdrop"[1] crypto assets to a transactor's digital wallets, without the consent of that receiving transactor as the algorithm permits one-way encryption such that the Private Key of the receiving transactor is not required to decrypt the blockchain data. This also allows companies to distribute crypto assets (including NFTs) to transactors for free as part of a marketing campaign by that company.

NFTs are unique digital units of data, representing real-world objects (that are based on blockchain technology) that track the history (such as previous ownership and transfers) of data. As a result, NFTs exist on a blockchain which contains public ledgers that record all the transactions related to that specific blockchain and consequently, NFTs can be airdropped to wallets using Public Keys without having to access to the recipient's Private Keys.

LCX AG v John Doe Nos. 1-25 (LCX case)

The LCX case dealt with the unauthorised access to and theft of c. $8 million of virtual assets on Ethereum, stored in the LCX Exchange digital wallet (**Stolen Crypto Assets**). The LCX Exchange digital wallet was secured by a Private Key, however, on 8 January 2022, the defendants unlawfully gained access the LCX Exchange digital wallet and transferred the Stolen Crypto Assets to an Ethereum address under the defendants' control.

The defendants proceeded to transfer the Stolen Crypto Assets to Tornado Cash, a crypto mixing service that breaks the on-chain links between the source and destination address on the blockchain (essentially "washing" the blockchain history), in an attempt to disguise the blockchain transaction history retained on the Ethereum blockchain. Subsequently, the defendants then proceeded to store the majority of the Stolen Crypto Assets in cryptocurrency known as USD Coin, a cryptocurrency that is stored in the Centre Consortium LCC digital wallet (**CCL wallet**). Interestingly, the governing protocol of the CCL wallet permitted CCL to blacklist a particular Ethereum address and to preclude a user from transferring and receiving USD Coin.

Holland & Knight, on behalf of LCX, approached the court (following internal investigations to ascertain the Public Keys of the defendants because the identities of the defendants were unknown) to serve notice of the court proceedings and a temporary restraining order on the defendants by means of airdropping an NFT using the Public Keys of the defendants to each of their CCL wallets.

The court had to assess whether service by NFT would constitute sufficient service under New York State laws and concluded that Holland & Knight may, by means of a special purpose Ethereum-based token (**Service NFT**), airdrop the notice of the court proceedings and the temporary restraining order to the CCL wallets using the defendants' Public Keys, on condition that the Service NFT included

(i) a hyperlink to a website created by Holland & Knight that also contains the court order and

(ii) a mechanism to track when a person clicked on the hyperlink, in order for the requirement of sufficient service to be satisfied.

CMC Woodworking Machinery Proprietary Limited v Pieter Odendaal Kitchens (CMC Woodworking)

In 2012, a South African court also had to consider technological advances to assess whether a plaintiff could serve a notice of set down and pre-trial directions on a defendant by means of social media. Despite the South African legislature and the Uniform Rules recognising the evolution of communication technology, the court acknowledged that the judiciary adheres to established procedures to promote legal certainty and justice.

Notwithstanding the aforementioned (and pursuant to Rule 4A), the applicant applied to the court for substituted service by means of service on the defendant via a Facebook message. Substituted service, according to Erasmus Superior Court Practice, is ordered when the defendant is believed to be in South Africa but none of the normal forms of service set out in the Uniform Rules can be effected. Substituted service can be distinguished from edictal citation, which a court is authorised to grant when the defendant is or is believed to be outside of South Africa or the exact whereabouts of the defendant are unknown.

The court, in reaching its conclusion, confirmed that substituted service should only succeed if all the requirements for substituted service are met. Additionally, the court should also consider the type of social media platform that is requested by the applicant, and the data privacy of the defendant. Ultimately, the application was granted, however, the court noted that each case should be determined on its own merits.

It is, however, worth noting that whilst the identity of the defendant, in this case, was known, his whereabouts were unknown, making service of processes in the ordinary manner nigh impossible. Additionally, the notice of set down and pre-trial directions were not served to initiate the proceedings, as was the case in the LCX case, but were rather subsequent notices that were required to be served on the defendant.

Service via a Service NFT

The South African legal system is flexible enough to recognise technological advances, however, it remains unclear whether service via a Service NFT (specifically to initiate legal proceedings against an unknown defendant) would be possible in South Africa. Nevertheless, the judgment in CMC Woodworking may have already laid the foundation for an application for substituted service (or even edictal citation) by way of a Service NFT, if all the requirements for these forms of service are met. Once a case is brought before the South African judiciary, the court may consider the LCX case as foreign law to reach its conclusion.

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[1] Refers to a mechanism through which a company or an individual can distribute free digital assets to a company or an individual can distribute free digital assets to a public wallet address of a transactor.

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