

# An Analysis of the Implementation of the CaseLines System in South African Courts in the Light of the Provisions of Section 27 of the *Electronic Communications and Transactions Act 25 of 2002*: A Beautiful Dream to Come True in Civil Procedure

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## Abstract

The *Electronic Communications and Transaction Act 25 of 2002* is an effective piece of legislation that strives to put South African law on the map of the evolving global world. However, some provisions have not yet been recognised in civil proceedings, particularly section 27 of the ECT Act. Although some rules attempt to embrace e-technology, such as Rule 4A of the Uniform Rules of Court, this is not sufficiently compliant with e-technology. The CaseLines system implemented by the judiciary seeks to enforce this section to a certain extent but a *lacuna* has been identified and must be modified. This article analysis the CaseLines system with reference to section 27 of the ECT Act and provides solutions and recommendations.

## Keywords

Section 27 ECT Act; *Electronic Communications and Transactions Act*; civil procedure; CaseLines system; Rule 4A; centralisation of civil procedure; e-technology law; civil proceedings; pleadings; summonses.

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## 1 Introduction

Technology is developing rapidly, yet certain processes followed in civil procedure are still not in line with technology laws, particularly section 27 of the *Electronic Communications and Transactions Act* 25 of 2002 (ECT Act).<sup>1</sup> For example, some of the Rules such as Rule 4(1)(a) of the Uniform Rules of Court in the High Court, as well as Rule 8 of the Magistrates' Courts Rules still require the Sheriffs to personally serve the summons or pleadings on the defendant,<sup>2</sup> yet the ECT Act provisions<sup>3</sup> and Law Society Guidelines<sup>4</sup> are available for legal practitioners to use electronic communication and effective methods of storing data in practice.<sup>5</sup> These guidelines place an obligation on legal practitioners to take measures to enhance the protection of personal information in order to comply with the *Protection of Personal Information Act* 4 of 2013 (POPI Act), during the process of using technology in their practices.<sup>6</sup>

An attempt is made in Rule 4A of the Uniform Rules of Court to provide for electronic service of pleadings, but the original copies of the pleadings must still be filed.<sup>7</sup>

Another example relates to Rule 19 of the Uniform Rules of Court, which provides that a notice of intention to defend must be served on the plaintiff personally.<sup>8</sup> The courts also attempted to modify civil

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<sup>1</sup> Papadopoulos and Snail *Cyberlaw @ SA III* 24; Van der Merwe *et al Information and Communications Technology Law* 24-349; *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954).

<sup>2</sup> Rule 4 and 17 of the Uniform Rules of Court.

<sup>3</sup> Section 27 of the *Electronic Communications and Transactions Act* 25 of 2002 (hereafter the ECT Act).

<sup>4</sup> The Law Society drafted guidelines in 2015 to assist legal practitioners in practice to use correct methods of storing and processing data to shield clients' confidential information that is used in the form of data. These guidelines seek to comply with the provisions of the *Protection of Personal Information Act* 4 of 2013 (hereafter the POPI Act).

<sup>5</sup> LSSA 2015 <https://www.lssa.org.za/wp-content/uploads/2019/12/LSSA-Guidelines-on-the-Use-of-Internet-Based-Technologies-in-Legal-Practice-March-2015.pdf> 1-12 (hereafter LSSA Guidelines).

<sup>6</sup> LSSA Guidelines 7.

<sup>7</sup> Rule 4A of the Uniform Rules of Court.

<sup>8</sup> Rule 19 of the Uniform Rules of Court; the proposed new e-rules and amendments to the Uniform and Magistrates' Court Rules for electronic civil justice system that were published on 11 March 2021 by the Department of Justice and Constitutional Development, which are still under discussion, further enforce the use of personal

proceedings to be in line with e-technology in cases such as *CMC Woodworking Machinery v Odendaal Kitchens*<sup>9</sup> and *Spring Forest v Wilbery Ltd Pty Limited*<sup>10</sup> respectively. However, the author expresses the view that this recognition by the courts is not sufficient; there is still a need to modify civil proceedings. For example all courts should operate online and do away with hard copies in order to fully embrace technology in practice.

The United Kingdom is far more progressive in employing e-technology in civil proceedings.<sup>11</sup> This is shown by the establishment of the Online County Court project<sup>12</sup> and the Electronic Working Pilot Scheme that is provided in Practice Direction 510.<sup>13</sup> It is argued that Civil Procedure must also be competitive and consistent with global laws and the trends in other international jurisdictions, as is the case in the United Kingdom. It is unequivocal that globally e-technology is evolving daily<sup>14</sup> and there is an urgent need to amend our law and processes to align with the same. This is why it is important to employ section 27 of the ECT Act in civil proceedings.

This article starts by looking at the recognition of the ECT Act provisions by the courts and thereafter interprets section 27 of the ECT Act in the context of South African Civil Procedure. This is followed by a discussion that links section 27 of the ECT Act with the CaseLines system,<sup>15</sup> as well as the United Kingdom's e-technology laws in civil procedure. In addition, the author looks at how section 27 can

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service when required by the rules (DoJ & CD 2021 [https://www.justice.gov.za/m\\_statements/2021/20210311-draftnewe-Rules.pdf](https://www.justice.gov.za/m_statements/2021/20210311-draftnewe-Rules.pdf)).

<sup>9</sup> *CMC Woodworking Machinery v Odendaal Kitchens* 2012 5 SA 604 (KZN) (hereafter the *CMC Woodworking* case). In this case the KwaZulu Natal High Court allowed service to be carried out through Facebook.

<sup>10</sup> *Spring Forest Trading v Wilbery Pty Ltd* 2015 2 SA 118 (SCA) (hereafter the *Spring Forest* case).

<sup>11</sup> Andrews *Andrews on Civil Processes* 3-1137; Ambrose *et al Blackstone's Civil Practice* 249-1069.

<sup>12</sup> Andrews *Andrews on Civil Processes* 81; Ambrose *et al Blackstone's Civil Practice* 249.

<sup>13</sup> Practice Direction 510: Electronic Working Pilot Scheme; Ambrose *et al Blackstone's Civil Practice* 250.

<sup>14</sup> Papadopoulos and Snail *Cyberlaw @ SA III* 124; Van der Merwe *et al Information and Communications Technology Law* 24-349.

<sup>15</sup> The CaseLines system is a new system that the judiciary implemented in January 2020. It is a new project that requires parties to the proceedings to use online systems to effect civil processes in certain matters such as "opposed and unopposed motions". The Judge President's Practice Directive 1 of 2020 sets out the manner in which the Registrar of the High Court, as well as parties to the proceedings, must use the CaseLines system (Office of the Judge President 2020 <https://www.ppv.co.za/judge-presidents-practice-directive-1-of-2020/#:~:text=Judge%20President%20Mlambo's%20first%20Practice,effect%20from%2027th%20January%202020>) (hereafter Practice Directive 1 of 2020).

effectively be implemented in civil procedure by making a distinction between pre-trial, trial proceedings, and post-trial proceedings.

## **2 The recognition of the provisions of *Electronic Communications and Transactions Act 25 of 2002* by the South African courts**

The legislature passed the ECT Act to assist different institutions such as the courts to accommodate e-technology.<sup>16</sup>

The interpretation of data<sup>17</sup> in terms of the ECT Act includes summons and pleadings, in practice because they are electronically "presented information".<sup>18</sup> The South African courts have officially recognised and interpreted e-technology laws in the context of civil proceedings as seen in cases such as *CMC Woodworking Machinery v Odendaal Kitchens*<sup>19</sup> and *Spring Forest Trading v Wilbery (Pty) Ltd*. In *CMC Woodworking v Odendaal Kitchens* the court decided that a summons for divorce proceedings may be served on Facebook.<sup>20</sup> The court was very cautious in doing so, because it also ordered the publication of the summons in a newspaper.<sup>21</sup>

In *Spring Forest Trading v Wilbery (Pty) Ltd* the court acknowledged that e-mails fall within the meaning of "in writing" as required in terms of the non-variation clause.<sup>22</sup> These emails, according to the court, must be within the ambit of data messages in order to be used to cancel contracts or agreements. Court documents such as summonses, for example, are important in implementing section 27 of the ECT Act. Section 27 of the ECT Act provides for processes that ought to be followed concerning electronic filing by a public body.<sup>23</sup>

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<sup>16</sup> The preamble of the ECT Act.

<sup>17</sup> Section 1 of the ECT Act defines "data" as meaning "electronic representations of information in any form".

<sup>18</sup> Section 1 of the ECT Act defines data messages as follows: "... means data generated, sent, received or stored by electronic means and includes – a. voice, where the voice is used in an automated transaction; and b. a stored record."

<sup>19</sup> *CMC Woodworking* case.

<sup>20</sup> *CMC Woodworking* case paras 12, 13.

<sup>21</sup> *CMC Woodworking* case para 13.

<sup>22</sup> *Spring Forest* case para 17.

<sup>23</sup> Section 27 of the ECT Act; Papadopoulos and Snail *Cyberlaw @ SA III* 124; Van der Merwe *et al Information and Communications Technology Law* 117, 121-122, 369. In the United Kingdom electronic filing is already in place through the Practice Direction 5B: Electronic Communications and Email Filing; *J v K* 2019 EWC Civ 5.

### 3 Interpretation of the provisions of section 27 of the Electronic Communications and Transactions Act 25 of 2002 in the context of civil procedure

It is significant to construe section 27 of the *Electronic Communications and Transactions Act 25 of 2002* because the CaseLines system is paving a way towards paperless proceedings. Section 27 of the ECT Act states:

Any public body that, pursuant to any law-

- a) accepts the filing of documents, or requires that documents be created or retained;
- b) issues any permit, licence or approval; or
- c) provides for a manner of payment, may, notwithstanding anything to the contrary in such law—
  - i) accept the filing of such documents, or the creation or retention of such documents in the form of data messages;
  - ii) issue such permit, licence or approval in the form of a data message; or
  - iii) make or receive payment in electronic form or by electronic means.<sup>24</sup>

Section 27 of the ECT Act must be interpreted in the light of the meaning of the words "public body". Section 1 (b) of the ECT Act describes a "public body" as:

- (b) any other functionary or institution when-
  - i) exercising a power or performing a duty in terms of the Constitution or provincial Constitution; or
  - ii) exercising a power or performing a function in terms of any legislation.<sup>25</sup>

It is important to construe the meaning of a public body in the light of the provisions of section 27 of the ECT Act. Further, section 27 of the ECT Act must be read with the provisions of the *Constitution of the Republic of South Africa, 1996*. The Constitution establishes various courts<sup>26</sup> in South Africa and it confers some courts such as the High Court with inherent jurisdiction.<sup>27</sup> For example, section 173 grants the Constitutional Court, the Supreme Court of Appeal and the High Court "inherent jurisdiction" to decide on how these courts should operate.<sup>28</sup> The provisions of sections

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<sup>24</sup> Section 27 of the ECT Act; Van der Merwe *et al Information and Communications Technology Law* 117, 121-122, 369.

<sup>25</sup> Section 1 of the ECT Act.

<sup>26</sup> Sections 166-170 of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution).

<sup>27</sup> Section 169(1) of the Constitution.

<sup>28</sup> Section 173 of the Constitution.

166 to 173 in particular are pertinent in constructing section 27 of the ECT Act, because courts are public bodies as defined in section 1 of the ECT Act. This implies that South African courts exercise a duty or power that is entrenched in the provisions of the Constitution to decide on cases brought before them.<sup>29</sup> Furthermore, the respective courts perform or exercise functions that are provided in various statutes such as the *Superior Courts Act*<sup>30</sup> and the *Magistrates' Courts Act*.<sup>31</sup>

Suffice it to say that section 27(1) of the ECT Act does indeed apply in civil proceedings and the rules and CaseLines system must be modified to be in line with its provisions.

In applying the principles of interpretation of statutes in section 27 of the ECT Act the courts, including Magistrates' Courts, the High Court and other civil courts, fall within the ambit of public bodies.<sup>32</sup> This will show full compliance with section 27 of the ECT Act. Hence the same is included under the interpretation of the said provision.

The emails and other digitally produced documents that are used in practice by legal practitioners become evidence and they are discovered in terms of Rule 35 of the Uniform Rules of Court. This implies that emails are filed in the court files and they are used as evidence during civil trials. For example, in *Spring Forest Trading v Wilbery*<sup>33</sup> the Supreme Court of Appeal accepted a cancellation by email of an agreement wherein there was a non-variation clause.<sup>34</sup> The parties to the proceedings had exchanged various emails about the cancellation.<sup>35</sup>

It was argued that the emails sent regarding the cancellation did not amount to a valid cancellation because they were not in writing in a literal sense.<sup>36</sup> In addition, in terms of the agreement the parties were required to sign the cancellation.<sup>37</sup> The Supreme Court of Appeal considered the provisions of

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<sup>29</sup> Sections 166-173 of the Constitution.

<sup>30</sup> The *Superior Courts Act* 10 of 2013 regulates the manner in which the superior courts should operate.

<sup>31</sup> *Magistrates' Court Act* 32 of 1944.

<sup>32</sup> Section 27 of the ECT Act; Van der Merwe *et al Information and Communications Technology Law* 117, 121-122, 369.

<sup>33</sup> *Spring Forest Trading v Wilbery Pty Ltd* 2015 2 SA 118 (SCA).

<sup>34</sup> *Spring Forest* case para 31.

<sup>35</sup> *Spring Forest* case paras 1-5.

<sup>36</sup> *Spring Forest* case paras 3-5.

<sup>37</sup> *Spring Forest* case paras 5.

sections 1,<sup>38</sup> 2,<sup>39</sup> 13<sup>40</sup> and 37<sup>41</sup> of the ECT Act in order to determine the validity of the cancellation.

It appears that the Supreme Court of Appeal did not consider the provisions of section 12<sup>42</sup> of the ECT Act in so far as the meaning of the words "in writing" is concerned. It is submitted that the fact that there was a non-variation clause in the agreement required the exploration of the meaning of "writing" in accordance with section 12 of the ECT Act. The non-variation clause stipulated that any changes to the agreement must be "in writing".<sup>43</sup> This implies that the cancellation conducted by emails should have also been construed in terms of the meaning of the term "writing".

The court held that:

A legal requirement for an agreement to be in writing, subject to the exceptions mentioned above, is satisfied if it is in the form of a data message. There is no dispute in this case that emails met this requirement. The real dispute is about whether or not the names of the parties at the foot of their emails constituted signatures as contemplated in ss 13(1) and (3).<sup>44</sup>

It is evident that the court focussed on section 13 instead of interpreting both sections 12 and 13 simultaneously.

It is observed that the court interpreted the emails in the context of data messages in terms of section 1 without making any reference to the provisions of section 12 of the ECT Act. Section 12 states that:

A requirement in law that a document or information must be in writing is met if the document or information is-

- a) in the form of a data message; and
- b) accessible in a manner usable for subsequent reference.<sup>45</sup>

It is the view of the author that the case of *Spring Forest Trading v Wilbery* is important in interpreting section 27 of the ECT Act. This is said because the pleadings are filed in the court files and when interpreted in terms of the ECT Act, they become data messages.

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<sup>38</sup> Section 1 of the ECT Act defines data to include emails.

<sup>39</sup> Section 2 of the ECT Act provides for the purpose of the ECT Act.

<sup>40</sup> Section 13 of the ECT Act regulates the use of electronic signatures.

<sup>41</sup> Section 37 of the ECT Act regulates the "accreditation, of authentication products and service".

<sup>42</sup> Section 12 of the ECT Act narrows down the meaning of "writing" after the case of *Narlis v SA Bank of Athens* 1976 2 SA 573 (A); *Van Blerk Preparation for Civil Trials* 65.

<sup>43</sup> *Spring Forest* case paras 4-5.

<sup>44</sup> *Spring Forest* case para 17.

<sup>45</sup> Section 12 of the ECT Act.

Rule 4A of the Uniform Rules of Court allows parties to serve pleadings electronically.<sup>46</sup> It appears that these pleadings are viewed as data messages when filed electronically. Further, in the High Court, court files are managed by the Registrar of the High Court and in the Regional Magistrates' Court by the Registrar, as well as the Clerk of the court in the Magistrate Courts.

Documents such as summonses must be signed before they are issued by the Registrar or Clerk.<sup>47</sup> The Clerk or the Registrar also places a case number on the document, as well as an official court stamp.<sup>48</sup> These summonses are served on the defendant personally or otherwise in terms of rule 4(1) of the Uniform Rules of Court before they subsequently form part of the court files.<sup>49</sup> There is no doubt that section 27 of the ECT Act does apply to civil proceedings.

#### **4 The link between section 27 and the CaseLines system**

The judiciary introduced a new CaseLines system that enables parties to file pleadings electronically.<sup>50</sup> An attempt is also made to amend the current rules of the respective courts to be in line with electronic systems, but these proposed amendments are still under discussion.<sup>51</sup> Thus, the courts still use the rules that require original copies of the pleadings and notices to be filed in a lever arch file, and this will be so until the amendments are finalised. Further, the CaseLines system requires the Registrar and the parties to operate online. This analysis is supported by item 3 of the Judge President's Practice Directive 1 of 2020, which obliges the Registrar of the High Court to manage the new Caselines system by creating cases and by inviting parties to participate online.<sup>52</sup>

The failure to sign the summons may warrant the raising of a special plea by the defendant as a defence, as seen in the case of *Motloung v The Sheriff Pretoria East*. In the High Court the defendant raised a special plea because the summons had not been signed by the Registrar as required by the Uniform Rules of Court.<sup>53</sup> It was argued that the summons was defective

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<sup>46</sup> Rule 4A of the Uniform Rules of Court.

<sup>47</sup> Rule 17 of the Uniform Rules of Court; Rule 5 of the Magistrates' Court Rules.

<sup>48</sup> *Motloung v The Sheriff Pretoria East* 2019 3 SA 228 (GP) para 28 (hereafter the *Motloung case*).

<sup>49</sup> Rule 17(3) of the Uniform Rules of Court; Rule 5(2) of the Magistrates' Court Rules.

<sup>50</sup> *Chongqin Gingxing Industries SA (Pty) Limited v Ye* 2021 ZAGPJHC 2 (29 January 2021).

<sup>51</sup> Proposed new e-rules and amendments to the Uniform and Magistrates' Courts Rules for an electronic justice system published on 11 March 2021. (These are still under discussion. Comments must be sent on or before 11 May 2021.) DoJ & CD 2021 [https://www.justice.gov.za/m\\_statements/2021/20210311-draftnewe-Rules.pdf](https://www.justice.gov.za/m_statements/2021/20210311-draftnewe-Rules.pdf).

<sup>52</sup> Item 3 of Practice Directive 1 of 2020.

<sup>53</sup> *Motloung case* paras 10-12.



because the Registrar omitted to sign it. Thus, there was non-compliance with Rule 17(3)(c) of the Uniform Rules of Court. The court interpreted Rule 17(3) of the Uniform Rules of Court, which compels the Registrar to sign the summons, and confirmed that the signature is imperative in terms of the rules.<sup>54</sup>

The High Court concluded that:

If a summons is a nullity for lack of signature by the Registrar, service of same would not constitute the institution of an action and would not result in the suspension of prescription.<sup>55</sup>

The High Court endorsed the special plea.<sup>56</sup> On appeal the Supreme Court of Appeal held that defective summons "is a nullity".<sup>57</sup> Thus, the omission of the signature by the Registrar was condoned, regardless of the mandatory provision of Rule 17(3)(c) of the Uniform Rules of Court.<sup>58</sup>

It is observed that this case dealt with a dilatory special plea<sup>59</sup> because the summons had not been signed. Thus, the issue before the court did not relate to the merits of the case *per se*, but to one of the court processes, which required a signature of the Registrar before summonses are issued. It is significant to interpret Rule 17 of the Uniform Rules of Court in the light of section 27 of the ECT Act, as well as the CaseLines system. This Rule states:

- (3) Every summons *shall be signed by the attorney acting for the plaintiff* and shall bear an attorney's address, within eight kilometres of the office of the registrar, or, if no attorney is acting, it *shall be signed by the plaintiff*, who shall in addition append an address within eight kilometres of the office of *the registrar at which he will accept service of all subsequent documents* in the suit; and *shall thereafter be signed and issued by the registrar* and made returnable by the sheriff to the court through the registrar.<sup>60</sup>

The construction of the above rule shows that courts are public bodies and the Registrars accept and file court documents on behalf of the courts as public bodies.<sup>61</sup>

The new CaseLines system demonstrates the link between section 27(1) of the ECT Act and civil proceedings, because the Registrars are required to create a link and invite legal practitioners so that court documents can

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<sup>54</sup> Rule 17(3) of the Uniform Rules of Court.

<sup>55</sup> *Motloun* case para 33.

<sup>56</sup> *Motloun* case para 34.

<sup>57</sup> *Motloun* case para 30.

<sup>58</sup> *Motloun* case para 29.

<sup>59</sup> *Sana v Eskom Holdings Limited* (Gauteng HC) (unreported) case number 2010/16004 (7 October 2010) paras 14-21.

<sup>60</sup> Rule 17(3) of the Uniform Rules of Court.

<sup>61</sup> Section 27(1) of the ECT Act.

be accepted, processed and managed electronically.<sup>62</sup> This includes the process of granting default judgments electronically.<sup>63</sup>

It is submitted that there is a gap in the CaseLines system, however. It is the view of the author that the online court proceedings should be offered to all the courts. In addition, the CaseLines system is limited to certain matters such as "opposed" or "unopposed motions".<sup>64</sup> This warrants or calls for a modification of the CaseLines system to fully use and apply the provisions of section 27(1) of the ECT Act in order to be abreast with e-technology.

Further, the CaseLines system is silent about the type of signature to be used. For example, the Registrar is compelled to sign and stamp default judgments<sup>65</sup> and upload the same, but the type of signature to be used is not expressly provided for. An inference may be drawn that the CaseLines system still requires the use of a manual signature.

The fact that the default judgment is uploaded after it is "signed" and "stamped" confirms that the Registrar is required to manually sign the judgement. It is observed that there is a gap in Practice Directive 1 of 2020 in so far as the use of an electronic signature is concerned. Namely, item 3.8.4.5 of the Practice Directive must be modified to allow the Registrar to use an electronic signature and an electronic stamp before uploading the default judgment.

In addition, item 4.3 of the Practice Directive states that:

Each order granted shall be typed, vetted, stamped and signed by the Registrar who shall ensure that the court order is uploaded onto the respective case on the CaseLines system.<sup>66</sup>

The construction of the above Practice Directive shows that the signature is required from the Registrar but there is no reference to the type of signature that must be appended. It is suggested that the Practice Directive should be explicit and incorporate a provision that refers to the type of signature to be used, which includes an electronic signature as provided in section 13 of the ECT Act. It is the view of the author that there is need to amend the Practice Directive to incorporate the use of an electronic signature and an electronic stamp.

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<sup>62</sup> Item 3 of Practice Directive 1 of 2020.

<sup>63</sup> Item 3.8.4 of Practice Directive 1 of 2020.

<sup>64</sup> Item 3.8.2 of Practice Directive 1 of 2020.

<sup>65</sup> Item 3.8.4.5 of Practice Directive 1 of 2020.

<sup>66</sup> Item 4.3 of Practice Directive 1 of 2020.

Rule 5 of the Magistrates' Court Rules places an obligation on the Clerk of the court to sign and issue the summons.<sup>67</sup> This rule states that:

- (2) The summons *shall be signed by the clerk of the court* and shall bear the date of issue by him.<sup>68</sup>

The construction of Rule 5 confirms the link between section 27 of the ECT Act and civil procedure, because the Magistrates' Courts are public bodies and the Clerks of the courts accept and manage the court files or documents on behalf of the public bodies. By signing the summonses, the Clerks accept the summonses on behalf of the Magistrates' Courts, and this satisfies the provision of section 27(1) of the ECT Act. The use of the word "shall" denotes that the rule is mandatory.

The judiciary has attempted to bring the justice system in line with e-technology by implementing the CaseLines system.<sup>69</sup> This implies that courts must create a system to enable the electronic issuing of summonses and the filing of court documents that will be used by all courts, which include Magistrates' Courts.<sup>70</sup> This calls for the modification of the CaseLines system in order to fully embrace section 27 of the ECT Act.

This court system, according to section 27, must comply with all the requirements of receiving, filing<sup>71</sup> and storing data in terms of the provisions of the POPI Act and other relevant provisions of the ECT Act.<sup>72</sup> The CaseLines system attempts to address some of the aspects of section 27(1) of the ECT Act to a certain extent, because it enables the Registrar to create cases online.<sup>73</sup> There has been a strong demand by judges and authors such as Whitear-Nel in various cases for South African courts to fully embrace e-technology.<sup>74</sup>

In *CMC Woodworking Machinery Pty Ltd v Odendaal Kitchens*, for the first time in the history of civil proceedings the court allowed a party to serve court papers through Facebook.<sup>75</sup> The court held that:

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<sup>67</sup> Rule 5 of the Magistrates' Court Rules.

<sup>68</sup> Rule 5(2) of the Magistrates' Court Rules.

<sup>69</sup> Practice Direction 1 of 2020.

<sup>70</sup> Section 51 of the ECT Act; Practice Direction 5B: Electronic Communications and Email Filing; Everson 2013 *JICLT* 206-217.

<sup>71</sup> Section 27 of the ECT Act.

<sup>72</sup> Sections 4, 27, 16, 28 and 51 of the ECT Act; Everson 2013 *JICLT* 206-217.

<sup>73</sup> Item 3.1 of Practice Directive 1 of 2020.

<sup>74</sup> Whitear-Nel 2019 *SALJ* 245-260.

<sup>75</sup> *CMC Woodworking* case paras 1-7.

In order to promote legal certainty it was necessary to order, in addition, that the notice be published in a local newspaper should the defendant, for some reason, not have access to any electronic communication devices.<sup>76</sup>

The court in this case acknowledged the use of internet and social media that can be used to expedite civil proceedings such as the service of court papers.<sup>77</sup>

In *Le Roux v Viana* (hereinafter referred to as *Le Roux*)<sup>78</sup> the court recognised electronic communications as legal documents to the extent of "data creation, recording and storage".<sup>79</sup> The court held that:

We should take judicial notice of technological advancements regarding electronic data creation, recording and storage because this was unheard of in 1936 when the Insolvency Act was passed.<sup>80</sup>

The case of *Le Roux* is important in applying the meaning of "data" and "writing" in civil proceedings as defined in the provisions of the ECT Act, because they fall within the ambit of legal documents.

In *Minister of Police v Premier of Western Cape*<sup>81</sup> the Constitutional Court confirmed that a witness might testify without making an appearance when issued with a subpoena and subpoena *duces tecum*.<sup>82</sup> This case is different from *K v Transnet* because it looked at the subpoenas issued to the police to appear before the commission of inquiry. The Constitutional Court held that:

A subpoena may not always demand physical presence, but may be to obtain specified documents or material to be produced by the subpoenaed witness (*duces tecum*).<sup>83</sup>

The case of *K v Transnet Ltd t/a Portnet*<sup>84</sup> on the other hand took the recognition of e-technology in the courts to a higher level by allowing a witness to testify through a video link.<sup>85</sup>

The court illustrated that the time has come to officially recognise e-technology in our courts.<sup>86</sup> The court held that:

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<sup>76</sup> *CMC Woodworking* case para 13.

<sup>77</sup> *CMC Woodworking* case paras 11-13.

<sup>78</sup> *Le Roux v Viana* 2008 2 SA 173 (SCA) (hereafter the *Le Roux* case).

<sup>79</sup> *Le Roux* case para 10.

<sup>80</sup> *Le Roux* case para 10.

<sup>81</sup> *Minister of Police v Premier of the Western Cape* 2014 1 SA 1 (CC) (hereafter the *Minister of Police* case).

<sup>82</sup> *Minister of Police* case paras 53-54.

<sup>83</sup> *Minister of Police* case para 54.

<sup>84</sup> *K v Transnet Ltd t/a Portnet* 2018 4 All SA 251 (KZD) (hereafter the *Transnet* case); *Whitear-Nel* 2019 SALJ 245-260.

<sup>85</sup> *Transnet* case paras 4-16.

<sup>86</sup> *Transnet* case paras 16-24.

In general, in civil proceedings oral testimony is given by the plaintiff in a court of law. Giving evidence through video link and other social media mechanisms is a novelty in South Africa, save to a very limited extent in the criminal courts. Technology is at this stage of our lives so advanced to a point that direct evidence can be taken from a witness in another country and cross-examination can take place whilst the witness is visible to all.<sup>87</sup>

The court interpreted section 173 of the Constitution and held that "technology with the necessary safeguard enhances such right enshrined in the Constitution".<sup>88</sup> Accordingly, the witness, who was residing in Yugoslavia at the time of the trial and could not make an appearance because of a medical condition, was allowed to testify through a video teleconference.<sup>89</sup> This means that the court relaxed the enforcement of Rule 38(2) of the Uniform Rules of Court that requires witnesses to give oral testimony in person.<sup>90</sup>

The judges and Whitear-Nel concur that the court in *K v Transnet Ltd t/a Portnet* made the correct decision when it held that:

The legal barriers created by the lack of rules, cannot override the right to access to justice. Video link conferencing extends and expands access to justice. Technology with the necessary safeguards enhances such a right enshrined in the Constitution.<sup>91</sup>

Other authors such as Cassim,<sup>92</sup> Papadopoulos and Snail<sup>93</sup> and Van der Merwe *et al*<sup>94</sup> promote and support the use of e-technology in civil proceedings.<sup>95</sup>

These authors assert that our courts should enforce the provisions of the ECT Act.<sup>96</sup> With all that said, it is significant to observe that the CaseLines system that the judiciary recently implemented came just at the correct time.<sup>97</sup>

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<sup>87</sup> *Transnet* case para 16.

<sup>88</sup> *Transnet* case para 25.

<sup>89</sup> *Transnet* case paras 9-25.

<sup>90</sup> *Transnet* case paras 4-25.

<sup>91</sup> *Transnet* case para 25.

<sup>92</sup> Cassim 2017 *JJS* 19-40.

<sup>93</sup> Papadopoulos and Snail *Cyberlaw @ SA III* 316-332.

<sup>94</sup> Van der Merwe *et al Information and Communications Technology Law* 117, 121-122, 369.

<sup>95</sup> Cassim 2017 *JJS* 19-40; Papadopoulos and Snail *Cyberlaw @ SA III* 316-332; Van der Merwe *et al Information and Communications Technology Law* 117, 121-122, 369.

<sup>96</sup> Papadopoulos and Snail *Cyberlaw @ SA III* 316-332; Van der Merwe *et al Information and Communications Technology Law* 117, 121-122, 369.

<sup>97</sup> Caselines 2021 <https://caselines.com/>.

## 5 The analogy of the CaseLines system

In January 2020 the judiciary introduced the new CaseLines system that allows the courts to operate without paper.<sup>98</sup> The CaseLines system creates a case or cases<sup>99</sup> which the Registrar of the Gauteng High Court must monitor.<sup>100</sup>

Legal practitioners are invited to file court papers online through the CaseLines system.<sup>101</sup> They are allowed to follow court processes electronically.<sup>102</sup> It is observed that Practice Directive 2020 limits the implementation of the CaseLines system to certain matters, namely, "special motions"<sup>103</sup> and "commercial court matters".<sup>104</sup>

In addition, item 3.8.7.3 of Practice Directive 1 of 2020 refers to proof of service only in so far as appeals are concerned.<sup>105</sup> Thus, it appears that there is no express reference to the role of the Sheriffs in the provisions of the new Practice Directive.<sup>106</sup> Proof of service is not referred to in the Practice Directive and it is mentioned in respect of appeals only in item 3.8.7, which relates to applications for leave to appeal.<sup>107</sup>

This is a major concern because Rule 4 of the Uniform Rules of Court provides that service must be directed to the Sheriffs<sup>108</sup> and the same enables parties to serve electronically subsequent to the initial stage.<sup>109</sup> The same applies to Rule 22 of the Uniform Rules of Court, that regulates the process of filing pleadings in High Court. The CaseLines system refers to Rules 31(5) and 43 of the Uniform Rules of Court only.<sup>110</sup> It is submitted that section 27 of the ECT Act must be read with the provisions of items 3 of Practice Directive 1 of 2020.<sup>111</sup>

A court appearance in terms of the CaseLines system may be conducted through digital teleconferences.<sup>112</sup> The same goes for the preparation of the

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<sup>98</sup> Practice Directive 1 of 2020; *Chongqin Gingxing Industries SA (Pty) Limited v Ye* 2021 ZAGPJHC 2 (29 January 2021).

<sup>99</sup> Item 3.1 of Practice Directive 1 of 2020.

<sup>100</sup> Item 3 of Practice Directive 1 of 2020.

<sup>101</sup> Item 3.1 of Practice Directive 1 of 2020.

<sup>102</sup> Item 3 of Practice Directive 1 of 2020.

<sup>103</sup> Item 3.7.1 and 3.8.1 of Practice Directive 1 of 2020.

<sup>104</sup> Item 3.8.1 of Practice Directive 1 of 2020.

<sup>105</sup> Item 3.8.7.3 of Practice Directive 1 of 2020.

<sup>106</sup> Practice Directive 1 of 2020.

<sup>107</sup> Item 3.8.7.3 of Practice Directive 1 of 2020.

<sup>108</sup> Rule 4 of the Uniform Rules of Court.

<sup>109</sup> Rule 4A of the Uniform Rules of Court.

<sup>110</sup> Practice Directive 1 of 2020.

<sup>111</sup> Caselines 2021 <https://caselines.com/>; Maseko 2019 <https://www.itnewsafrika.com/2019/05/south-africa-to-implement-digital-justice-system/>.

<sup>112</sup> Caselines 2021 <https://caselines.com/>.

discovery bundles<sup>113</sup> but it is observed that the communication that is currently shared about digital CaseLines system is very limited and is silent on how it intends to deal with the issue of compliance with the current rules of the respective courts and the relevant legislation.<sup>114</sup>

This is not sufficient, in the author's view, because the system is designed to be used in all courts. Superior and lower courts should also benefit from the new legality of conducting online court proceedings. Furthermore, it is observed that no turn-around time is provided in the CaseLines system on how soon legal practitioners should receive case numbers after applying to the Registrar.

Registrars already have large numbers of cases that are not yet been heard. Judge President Mlambo admitted to this fact.<sup>115</sup> In addition, the information that is currently published on the CaseLines system suggests that it is an attempt to do away with the current processes that require manual filing, serving, discovery and pre-trial conferences.<sup>116</sup> However, this does not address the realities of civil proceedings. It is submitted that there should be some reference to the initial service process in the CaseLines system.

Further, there is no indication of post-trial civil proceedings in the CaseLines system that the court officials must adhere to. Of course the CaseLines system is a new project, but it submitted that it should cover all civil procedure processes, including post-trial proceedings. For example, there should be an amendment to the CaseLines system to incorporate the process of conducting taxation and taxation reviews after the conclusion of trial proceedings by way of video teleconferencing. The same applies to the process of executing the judgments; there should also be a provision that incorporates the digital attaching of movable property in compliance with the order granted by the court.

In the United Kingdom default judgements are already issued and executed online through the Online County Courts<sup>117</sup> in cases such as claims arising from specified amounts of money, the value of which is under 10, 000 pounds may be issued by "unrepresented parties".<sup>118</sup>

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<sup>113</sup> Caselines 2021 <https://caselines.com/>.

<sup>114</sup> Caselines 2021 <https://caselines.com/>; Maseko 2019 <https://www.itnewsafrika.com/2019/05/south-africa-to-implement-digital-justice-system/>.

<sup>115</sup> Ramotsho 2019 <http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/>; Sedutla 2020 *De Rebus* 3.

<sup>116</sup> Ramotsho 2019 <http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/>; Caselines 2021 <https://caselines.com/>; Maseko 2019 <https://www.itnewsafrika.com/2019/05/south-africa-to-implement-digital-justice-system/>.

<sup>117</sup> Practice Direction 51S: The County Court Online Pilot; Andrews *Andrews on Civil Processes* 81.

<sup>118</sup> Practice Direction 51R; Andrews *Andrews on Civil Processes* 81.

It also appears that the CaseLines system addresses the problems experienced by Judges as opposed to the challenges that the Registrars of the respective courts are faced with on a daily basis in complying with the rules.<sup>119</sup> These are court officials that ensure the smooth operation of the courts.

In addition, there is no averment in the content of the CaseLines system to the effect that there is an intention to amend the current rules of the respective courts in so far as civil proceedings are concerned.<sup>120</sup>

Item 3.4 of the Practice Directive asserts:

Electronic uploading of pleadings and other relevant documents in terms of this clause shall amount to filing as contemplated in the Rules of Court. Consequently, from the commencement of Term 1 2020, the filing of pleadings and other relevant documents shall be by way of the uploading of the said pleadings and other relevant documents on the CaseLines system. No hardcopy pleadings and other relevant documents shall be allowed on all cases designated for handling through the CaseLines system and created on the system.<sup>121</sup>

It is observed that there is a *lacuna* in relation to the protection of clients' personal information that is included in the pleadings or courts documents that are filed through the CaseLines system in terms of Practice Directive 1 of 2020. Although the Practice Directive does not directly refer to the details of the pleadings, the courts and the Uniform Rules of Court require that facts must be pleaded, and they include personal information to illustrate the cause of action.<sup>122</sup>

It is argued that this *lacuna* may run afoul of the client privilege principle because there is no indication in Practice Directive 1 of 2020 of how pleadings that include the personal information of clients will be protected from unlawful interception. Further, there is no indication as to the extent of the protection that will be provided to protect clients' confidential records.<sup>123</sup> In fact, there is no reference in the Practice Directive regarding the security measures that will be taken to protect clients' confidential information. This may require the CaseLines system to include stringent measures to prevent unlawful interception.<sup>124</sup>

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<sup>119</sup> Ramotsho 2019 <http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/>.

<sup>120</sup> Ramotsho 2019 <http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/>.

<sup>121</sup> Practice Directive 1 of 2020.

<sup>122</sup> Rules 18(4), 20(2), 22(2), 25(3) and 35 of the Uniform Rules of Court.

<sup>123</sup> Ramotsho 2019 <http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/>.

<sup>124</sup> Snail 2009 *JILT* 1-13; Cassim 2009 *PELJ* 1727-3781; Van der Merwe *et al Information and Communications Technology Law* 366-367; Njotini *E-crimes and E-authentication* 1-337.



Moreover, there is no reference in the CaseLines system to security measures that are taken to ensure the privacy and confidentiality that the POPI Act seeks to achieve.<sup>125</sup>

This is a risk that legal practitioners cannot afford to take, because if they do so they may breach the provisions of the POPI Act, ECT Act, as well as the legal duty that legal practitioners must conform to, namely client privilege.<sup>126</sup> There is no indication of how soon the rules will be amended and brought in line with the CaseLines system.<sup>127</sup> This appears to be a major concern, because there are rules in place and court officials must conform with them, as must legal practitioners.<sup>128</sup>

There is a need to modify those Uniform Rules of Court that have a bearing on the personal information of clients. For example, Rules 17,<sup>129</sup> 18,<sup>130</sup> 19,<sup>131</sup> 20,<sup>132</sup> 21,<sup>133</sup> 22 (dealing with the plea that the defendant must file) and 35<sup>134</sup> refer to clients' information, which includes personal information that deserves to be protected when using the CaseLines system. Personal information or court documents are viewed as data messages when interpreted in terms of the ECT Act.<sup>135</sup>

It is submitted that the rules mentioned should be amended to be in line with the CaseLines system, and a stringent security system involving encryption should be put in place to enforce the provisions of the POPI Act. There are provisions of the POPI Act<sup>136</sup> that must be complied with when dealing with

<sup>125</sup> Caselines 2021 [https://caselines.com/;\\_Maseko](https://caselines.com/;_Maseko) 2019 <https://www.itnews africa.com/2019/05/south-africa-to-implement-digital-justice-system/>; Ramotsho 2019 <http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/>.

<sup>126</sup> Van der Merwe *et al Information and Communications Technology Law* 366-367.

<sup>127</sup> Caselines 2021 [https://caselines.com/;\\_Maseko](https://caselines.com/;_Maseko) 2019 <https://www.itnews africa.com/2019/05/south-africa-to-implement-digital-justice-system/>; Ramotsho 2019 <http://www.derebus.org.za/gauteng-high-courts-on-a-journey-to-go-paperless/>; Sedutla 2020 *De Rebus* 3.

<sup>128</sup> Van Blerk *Preparation for Civil Trials* 1-289; Cilliers, Loots and Nel *Herbstein and Winsen* 1-2000; Kelkbrick and Cassim *Civil Procedure* 1-146; Faris and Hurter *Student Handbook for Civil Procedure* 344-345; Pete *et al Civil Procedure* 52-268; Harms *Civil Procedure in Magistrates' Courts* Part C-10; Erasmus and Van Loggerenberg *Jones and Buckle* 21-80.

<sup>129</sup> Deals with summons.

<sup>130</sup> Regulates pleadings.

<sup>131</sup> Deals with the notice of intention to defend.

<sup>132</sup> Provides for declaration, and this contains a cause of action, which includes personal information of the client that relates to the claim.

<sup>133</sup> Deals with further particulars that are necessary for the proceedings, and these may include personal information of the client that deserves protection.

<sup>134</sup> Deals with the discovery of documents that are pertinent to civil proceedings.

<sup>135</sup> Sections 1, 11, 12, 24 and 15 of the ECT Act.

<sup>136</sup> Section 11 of the POPI Act.

client's personal information<sup>137</sup> and these must be considered during the discovery stage in the CaseLines system. Rule 35 will therefore have to be enhanced and modified.<sup>138</sup>

For example, section 11 of the POPI Act provides that personal information may be processed when consent is given by the person concerned.<sup>139</sup> The Practice Directive 1 of 2020 is silent about the protection of personal information during discovery. The same applies to compliance with the provisions of section 11 of the POPI Act.<sup>140</sup> It is the author's view that the CaseLines system should be modified and implemented in a manner that addresses all the concerns that relate to civil proceedings, including the amendments to the current rules. In addition, the modification of the CaseLines system should also address compliance with the POPI Act.

It is submitted that the CaseLines system should have password encryption, so that a password may be used only by those who are party to the proceedings, for example, the clerk or the Registrar of the court and the legal representatives.<sup>141</sup> It is observed that the United Kingdom is far ahead of South Africa in using e-technology in civil proceedings. This is illustrated below.

## **6 The United Kingdom's e-technology laws in civil procedure**

The United Kingdom is far advanced in embracing technology in civil proceedings, because it has an Electronic Working Pilot Scheme that is regulated by Practice Directive 510, as well as Online County Courts.<sup>142</sup> Unlike the United Kingdom, item 3.8.4.2 of Practice Directive 1 of 2020 in South Africa does not indicate whether or not the website is available 24 hours a day or during normal court hours.<sup>143</sup>

Unlike the South African CaseLines system, the United Kingdom online and electronic civil process has an exception with regard to the submission of hard copies in certain matters.<sup>144</sup> Thus, Practice Directive 501 still requires

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<sup>137</sup> Sections 9, 10, 11 and 12 of the POPI Act; De Stadler and Esselaar *Guide to the Protection of Personal Information Act* 1-103.

<sup>138</sup> Van Dorsten 2012 *De Rebus* 42-36.

<sup>139</sup> Section 11 of the POPI Act.

<sup>140</sup> Section 11 of the POPI Act permits the processing of data when consent is given; Van der Merwe *et al Information and Communications Technology Law* 425-428; Papadopoulos and Snail *Cyberlaw @ SA III* 49-124.

<sup>141</sup> Van der Merwe *et al Information and Communications Technology Law* 311-314.

<sup>142</sup> Practice Direction 510: Electronic Working Pilot Scheme; Practice Direction 51S: The County Court Online Pilot; Ambrose *et al Blackstone's Civil Practice* 249-251; Andrews *Andrews on Civil Processes* 3-1137.

<sup>143</sup> Practice Directive 1 of 2020.

<sup>144</sup> Ambrose *et al Blackstone's Civil Practice* 250-251.

parties to file hard copies after filing electronic copies, whilst the CaseLines system does not require the subsequent filing of hard copies.

The CaseLines system, on the other hand, does not require the submission of hard copies *per se*. The Practice Directive is silent about the hard copies that are submitted in other civil matters. They are not mentioned in Practice Directive 1 of 2020. In addition, in the United Kingdom, there are criteria that must be satisfied when using emails or technology in civil proceedings.<sup>145</sup> For example, there must be "a case number; parties must be reflected; the date of the hearing must also be incorporated, email must include details of the sender such as the name, telephone number, and contact details."<sup>146</sup>

The application of the criteria was illustrated in the Court of Appeal in the case of *Morris v Bank of America National Trust*.<sup>147</sup> The court acknowledged the fact that the use of technology saves time and money.<sup>148</sup> In South African the criteria are contained in the CaseLines system, particularly in item 3.8.7.2 of Practice Directive 1 of 2020.<sup>149</sup> Item 3.8.7.2 states that "the notification should include case number, Parties' details, the name/s of the Judge/s and the date of Judgement".<sup>150</sup> The South African criteria contained in Practice Directive 1 of 2020 are not unlike the United Kingdom criteria.<sup>151</sup>

The advancement of the use of technology in the United Kingdom is further illustrated by the establishment of the Electronic Working Pilot Scheme, which is provided for in Practice Directive 510, that has been in operation since 16 November 2016.<sup>152</sup> The said pilot scheme is also limited to certain courts, such as the Chancery Division,<sup>153</sup> the Commercial Court,<sup>154</sup> the Technology and Construction Court,<sup>155</sup> the London Circuit Commercial Court<sup>156</sup> and the Admiralty Court.<sup>157</sup> It is evident that the United Kingdom has taken steps to embrace technology in civil proceedings.

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<sup>145</sup> Ambrose *et al Blackstone's Civil Practice* 773.

<sup>146</sup> Ambrose *et al Blackstone's Civil Practice* 773.

<sup>147</sup> *Morris v Bank of America National Trust* 2000 1 All ER 954 (CA) (hereafter the *Morris* case).

<sup>148</sup> See the *Morris* case.

<sup>149</sup> Item 3.8.7.2 of Practice Directive 1 of 2020.

<sup>150</sup> Item 3.8.7.2 of Practice Directive 1 of 2020.

<sup>151</sup> Practice Directive 1 of 2020.

<sup>152</sup> Ambrose *et al Blackstone's Civil Practice* 773-774.

<sup>153</sup> Ambrose *et al Blackstone's Civil Practice* 773-774.

<sup>154</sup> Ambrose *et al Blackstone's Civil Practice* 773-774.

<sup>155</sup> Ambrose *et al Blackstone's Civil Practice* 773-774.

<sup>156</sup> Ambrose *et al Blackstone's Civil Practice* 773-774.

<sup>157</sup> Ambrose *et al Blackstone's Civil Practice* 773-774.

Just as in the United Kingdom, the South Africa's CaseLines system is one of the few steps taken on the journey towards the full implementation and use of technology in law.

It is submitted that the enforcement of section 27 of the ECT Act in civil courts will completely embrace technology laws in South Africa. The question is how can this be successfully achieved? This question is answered below.

## **7 Effective manner of implementing section 27 of the ECT Act**

As a starting point, it appears that section 27 could be effectively implemented by using the three stages of civil proceedings both in superior and lower courts. It is submitted that these stages must be divided into pre-trial proceedings, trial proceedings and post-trial proceedings.<sup>158</sup>

### **7.1 Pre-trial proceedings**

It is submitted that each court should have an administrative centre that would be controlled by a single body and managed by the Registrar in the superior courts and the Clerk in the lower courts. These court officials are already familiar with civil proceedings and are thus the best people to ensure the effective and smooth operation of the proposed centres.

It is submitted that the Judge President and the Registrars of the respective courts should manage the centres. The author expresses the view that each centre should be composed of different divisions, one of which deals with electronic or digital application proceedings to ensure electronic management of the process.<sup>159</sup> A division should deal with the process of issuing summons and make provision for of e-technology throughout the process.<sup>160</sup> All signature requirements should cater for the use of advanced electronic signatures in compliance with sections 1, 13 and 37 of the ECT Act.<sup>161</sup>

An Information and Communications Technology division should provide the necessary support to meet all needs and address all challenges.<sup>162</sup> It is submitted that the government should fund the divisions.

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<sup>158</sup> Pete *et al Civil Procedure* 262-336.

<sup>159</sup> Backblaze 2016 <https://www.backblaze.com/company/copyright.html>.

<sup>160</sup> Iris Document to Knowledge Date Unknown <http://www.irislink.com/EN-US>.

<sup>161</sup> Christianson 2012 *De Rebus*; Christianson and Mostert 2000 *De Rebus* 26-28; Eiselen 2014 *PELJ* 2806-2809; Herselman and Hay 2003 *Informing Science* 931-943; Langenhoven 2013 *Without Prejudice* 80-82; Mupangavanhu 2016 *SALJ* 853-873; Swales 2015 *SALJ* 257-270.

<sup>162</sup> Herselman and Hay 2003 *Informing Science* 931-943.

The employees of the centres would be court officials that are already working in the courts, such as the Registrars, Clerks and Administrators, as well as the Sheriffs, who would have to undergo training on how to conduct these tasks smoothly. More importantly, the Information and Communications Technology division should monitor the storage, collection, use and distribution of the data relating to court proceedings.<sup>163</sup>

Alternatively, it is recommended that one system should be created that caters for all functions.<sup>164</sup> For example, filing information that is disclosed during the discovery process is not mentioned in the CaseLines system.<sup>165</sup> This would demonstrate compliance with the provisions of the POPI Act. The author expresses the view that the system should also be designed to send e-mail notifications that remind parties of due dates relating to pleadings.<sup>166</sup> This does not mean that legal practitioners should not keep their diaries where they record the dates so that if there are technology glitches and notifications are not sent timeously, they will have a record of the due dates.

It is submitted that the notifications are meant to enhance civil proceedings in a manner that assists the courts and legal practitioners. Legal practitioners are still ethically liable for ensuring that their clients' pleadings are filed timeously. After serving a summons on the defendant, an automatic e-mail should be sent to the defendant reminding him/her that the notice of intention to defend must be filed within 10 days.<sup>167</sup> In addition, the author submits that an alert message should also be used to inform the defendant of the fact that summons has been instituted electronically. The CaseLines system refers only to the invitation that ought to be sent to the legal practitioner to commence proceedings in an electronic format.<sup>168</sup>

Further, item 3.8.7.3 provides that the notification of appeal must be electronically sent to the CaseLines system website in appeal matters.<sup>169</sup> The Sheriffs play a significant role in civil proceedings and the CaseLines system and the Practice Directive takes this role away to a certain extent.<sup>170</sup>

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<sup>163</sup> Section 1 of the ECT Act.

<sup>164</sup> Practice Directive 1 of 2020.

<sup>165</sup> Miller and Tucker 2014 *J Law Econ Organ*; Hibbert *Electronic Evidence* 3-65; LSSA Guidelines 1-12.

<sup>166</sup> Nayak 2006 <https://patents.google.com/patent/US20070130369A1/en>.

<sup>167</sup> Uniform Rules of Court; Magistrates' Court Rules.

<sup>168</sup> Item 3.1 of Practice Directive 1 of 2020.

<sup>169</sup> Item 3.8.7.3 of Practice Directive 1 of 2020.

<sup>170</sup> Item 3.8.7.3 of Practice Directive 1 of 2020 states: "the applicant shall then be obliged to upload the application for leave and proof of service".

The duty to serve the summons or court papers is tacitly implied in item 3 of Practice Directive 1 of 2020. For example, the fact that the applicant is required to upload the proof of service suggests that the Sheriff has already served the application to the defendant. This calls for amendments in all of the rules that compel Sheriffs to perform the functions of the court to be in line with the CaseLines system.

The archive department should also be responsible for creating electronic files for civil court matters.<sup>171</sup> Files should be created in a manner that will enable the court to access and read them during the proceedings.<sup>172</sup> These files must also be named in an orderly manner, starting with the documents that commence proceedings.<sup>173</sup> For example, the file per matter must contain the summons, the notice of intention to defend, the pleadings, the notice to discover, the heads of arguments and other relevant pleadings.

The author further argues that files must be stored in the same order as per the requirements of the Rules of the court, namely the summons followed by the relevant pleadings. Further, it is suggested that it must be easy to browse through these documents by using a touch screen or other e-technology device.<sup>174</sup> Thus, the courts should start budgeting towards buying touch screen computers, which will be used in courts in future during civil proceedings. It is submitted that the courts should make use of electronic indexes from which content can be accessed in an instant.

## **7.2 Trial proceedings**

The decisions of the court in *K v Transnet Ltd t/a Portnet*<sup>175</sup> and other cases that are discussed in this article show the flexible approach that is followed by the South African Courts.<sup>176</sup> The court in *K v Transnet* held that:

The hearing with the aid of a video link conference will be a public hearing in a court of law, where all the parties will be appearing before a judge seized with the matter. I cannot see why such evidence cannot be admissible in any court of law.<sup>177</sup>

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<sup>171</sup> Practice Direction 510: Electronic Working Pilot Scheme; Ambrose *et al* *Blackstone's Civil Practice* 249-251.

<sup>172</sup> eLawExchange Date Unknown [http://www.elawexchange.com/index.php?option=com\\_content&view=article&id=302&Itemid=334](http://www.elawexchange.com/index.php?option=com_content&view=article&id=302&Itemid=334).

<sup>173</sup> eLawExchange Date Unknown [http://www.elawexchange.com/index.php?option=com\\_content&view=article&id=302&Itemid=334](http://www.elawexchange.com/index.php?option=com_content&view=article&id=302&Itemid=334)

<sup>174</sup> Suchanek 2019 <https://www.suchanek.name/texts/archiving/>.

<sup>175</sup> See the *Transnet* case.

<sup>176</sup> See the *Transnet*, *Minister of Police*, *Spring Forest* and *CMC Woodworking* cases.

<sup>177</sup> *Transnet* case para 24.

The above finding of the court in *K v Transnet Ltd t/a Portnet* is significant in instances where witnesses are overseas or ill and cannot attend the proceedings.<sup>178</sup>

Further, the author submits that e-technology can also be used to enable parties who would have given evidence through interrogatories and examination or a commissioner to testify live and be subject to cross-examination and re-examination via digital and e-technology means.<sup>179</sup> Just as is the case in the *Transnet* case in South Africa, the United Kingdom allowed a witness to testify through a video link in *Polanski Condé Nast Publications Ltd*.<sup>180</sup> This is why it is submitted that the courts must digitally adapt indexes and pagination so that the judges and parties to the proceedings can be able to page through the touch screen.

### **7.3 Post-trial proceedings**

The author suggests that when the court delivers a judgment in favour of the plaintiff or the defendant, the system must be designed in a manner that will enable Sheriffs to execute the judgments and writs by using e-technology or through digital means of communication.<sup>181</sup> The Sheriffs should also be able to execute judgements without necessarily being present in their offices. This may be achieved by using technological devices such as laptops, telephones or tablets. The author recommends that the system should be designed in a manner that will enable the Registrar and the successful party to conduct taxation without physically appearing at the office of the Registrar.<sup>182</sup> This may be achieved by using tele-conferences as seen in the *K v Transnet* case, for example.

The author submits that a new system should be designed to automatically notify parties and remind a party to send the bill of costs to the Registrar. There should be a tele-conference or digital video recording or Skype or telephone conference to finalise taxation or taxation reviews.<sup>183</sup>

When the Registrar receives the bill of costs from the successful party, he/she should arrange a date for a tele-conference or a Skype or digital telephonic discussion.

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<sup>178</sup> See the *Transnet* case.

<sup>179</sup> Henshall 2017 <https://www.process.st/best-video-conferencing>.

<sup>180</sup> *Polanski Condé Nast Publications Ltd* 2005 1 WLR 637.

<sup>181</sup> Central District of California Date Unknown <http://www.cacd.uscourts.gov/court-procedures/writ-execution>.

<sup>182</sup> The *Minister of Police* case. This decision shows the flexible approach followed by the courts in applying the rules of the respective courts.

<sup>183</sup> See the *Minister of Police* case.

## 8 Conclusion

The analysis of the CaseLines system in the light of the provisions of section 27 of the ECT Act shows that South Africa is striving towards embracing technology in civil procedure. It is submitted that the implementation of the CaseLines system alone is not enough. Here are gaps that need to be filled. It is observed that the CaseLines system, as well as the Uniform Rules of Court, must be modified to be in line with the ECT Act. For example, section 27 of the ECT Act applies to other areas of law as well, including the law of civil procedure. It is evident that the application of section 27 of the ECT Act in civil proceedings is feasible and doable. This is shown by the provisions of the CaseLines system in South Africa, the United Kingdom's Practice Direction 510-Electronic Work Pilot Scheme and the Online County Court.

It is also observed that the CaseLines system does not include a provision that specifically deals with the measures for ensuring the security of personal information that is electronically stored or distributed to prevent unlawful interception. In addition, it is noted that the CaseLines system is a new project, and the rules that deal with court documents or data messages such as Rule 17 or 18, 20 and 22 of the Uniform Rules of Court have not yet been amended in order to be in line with the same.

Moreover, there appears to be a need to adjust the rules that deal with the service of court documents by the Sheriff. For example, Rule 4(1) of the Uniform Rules of Court should be transformed to incorporate the use electronic service of the pleadings by the Sheriff. Further, Rule 4(1) of the Uniform Rules of Court and Rule 8 of the Magistrates' Courts Rules should also be amended to allow Sheriffs to submit electronic returns of service that are required after serving the summons to the defendant. This calls for a modification of the rules to fully incorporate technology into civil proceedings. An attempt is made to allow parties to use electronic service of pleadings subsequent to the initial service that is effected by the Sheriffs in Rule 4A of the Uniform Rules of Court, but the author is of the view that this is not enough.

South African courts have shown that they support the use of technology in civil proceedings in cases such as *CMC Woodworking Machinery v Odendaal Kitchens* and *Spring Forest v Wilbery Ltd Pty Limited* respectively. This shows that slow progress has been made by the courts to fully implement electronic technology in civil proceedings. Furthermore, there is an urgent need to transform the CaseLines system so that it can be in line with the rules, the provisions of the ECT Act, and those of the POPI Act. Lastly, the recommendations must be read with Practice Directive 1 of 2020 to fully realise the benefits of e-technology. This would be a dream come true in civil proceedings.



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## List of Abbreviations

ECT Act	Electronic Communications and Transactions Act 25 of 2002
DoJ & CD	Department of Justice and Constitutional Development
JICLT	Journal of International Commercial Law and Technology
JILT	Journal of Information, Law and Technology
JJS	Journal for Juridical Science
J Law Econ Organ	Journal of Law, Economics and Organization
LSSA	Law Society of South Africa
PELJ	Potchefstroom Electronic Law Journal
POPI Act	Protection of Personal Information Act 4 of 2013
SALJ	South African Law Journal