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**2023**
University of the Witwatersrand, Johannesburg
https://hdl.handle.net/10539/43536
Ferreira, Marius Salomon. (2024). The development of e-technology at the pleading And pre-trial stage of civil procedure [Master's dissertation, University of the Witwatersrand, Johannesburg]. WireDSpace.

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# THE DEVELOPMENT OF E-TECHNOLOGY AT THE PLEADING AND PRE-TRIAL STAGE OF CIVIL PROCEDURE

*by*

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Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: 28 September 2023

ABSTRACT

South Africa has been lodged into embracing the e-platforms since the advent of the lockdown restrictions of the Covid-19 pandemic. CaseLines, and later-on Court Online, have been introduced to the South African judicial adversarial system in the High Court Divisions in Gauteng. Since its inception, the Caselines and Court Online electronic platforms (e-platforms) have undergone numerous amendments to comply with traditional civil procedure. At the same time, the e-platforms are being used to change the civil procedure at the Gauteng Divisions. The purpose of this report is to critically analyse the CaseLines and Court Online e-platforms and the online civil procedure, through the applicable directives in place, as well as the current Rules of Court, in order to determine its effectiveness in South African civil procedure as well as its fairness in the current South African dispensation. The procedure at the High Court Gauteng Divisions is further compared to the procedure at the Labour Court and Commission for Conciliation, Mediation and Arbitration (CCMA), who have both utilised the use of certain online procedures long before the introduction CaseLines and Court Online. The use of evidence on an online e-platform is critically discussed to determine whether it is in line with the current laws involving the admission of evidence in the South African judiciary. The online judicial system in South Africa is critically compared to the current online procedures in the United States of America and in the United Kingdom to determine whether any lessons can be taken from the foreign judiciaries in terms of online civil procedure. Lastly, the report will provide concluding remarks and recommendations to consider for the South African e-platform and online civil procedure.

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# I INTRODUCTION

The Covid-19 pandemic has pushed the High Court, especially in the Gauteng Division, into adopting an electronic platform ('e-platform') in order to ensure access to justice and the continued operation of the judicial process.[1] It has led the High Courts in Johannesburg and Pretoria to introduce and integrate an online CaseLines system and the subsequent Court Online system for the filing of pleadings, affidavits and other notices including case management and online trial and hearings. What is of particular interest is that the CaseLines system had already been introduced before the Covid-19 pandemic, and the declaration of the National State of Disaster, and shows Gauteng's early intention to begin the process of integrating the judicial adversarial process onto an e-platform.[2]

Clearly, the Court Online and CaseLines system is here to stay and is continually being revised as new procedural issues are identified in order to streamline the civil procedure process on the e-platforms. What must be critically highlighted is the fact that the new e-platform system is limited to the High Courts of Johannesburg and Pretoria and has not yet been adopted in other provincial divisions of the High Court. In fact, while the High Court of Johannesburg and Pretoria struggle through the process of implementing an online system for the pleading stage, preparation for trial stage, and the eventual trial of a matter, the rest of the divisions and local seats of the High Court continue to use the familiar paper-based procedures which has been in play for as long as the current Uniform Rules have existed.[3]

The aim of this report is to critically analyse how the new CaseLines and Court Online electronic technology ('e-technology') has developed by examining its efficient use on online procedures with specific focus on the civil procedures of litigation, pleading stage, and preparation for trial stage (although some mention may be made to the other stages of civil litigation, such as the trial stage and the execution/enforcement stage). The author's critical analysis will also concentrate on explaining how the directives issued by the Judge President of the High Court of Pretoria has influenced the methodology of the pleading stage and preparation for trial stage and its procedural conduct. This paper will also consider possible

[1] Judge President's directive, *Special arrangements to address COVID-19 implication for all litigation in the Pretoria and Johannesburg High Courts,* dated 25 March 2020.
[2] Judge President's Practice Directive 1 of 2020, *Implementation of the CaseLines system in the Gauteng Division of the High Court, Pretoria and Johannesburg,* dated 10 January 2020.
[3] Reference here is to both the Rules regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa GNR 740 *GG* 33487 of 23 August 2010 and the Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa GNR.48 *GG* 999 of 12 January 1965.

procedural alternatives to the current online system in place. This critical analysis will take into consideration the current Rules in place in both the High Court and the Magistrate's Court and whether the relevant rules of the pleading and preparation for trial stages require an update or amendment, or alternatively need to be completely repealed in order to pave the way for a more appropriate rule-based system which is in line with the adversarial judicial system.

Foreign adversarial systems which have adopted an online court system, such as the United States of America and the United Kingdom will also be comparatively considered to identify the procedural similarities and differences between the foreign online civil procedures and our own. Lastly, the author will critically consider whether the new judicial e-technology will enhance or result in an efficient cost-effective access to justice – in other words, would the implementation and adoption of an upscaled e-platform aid or inhibit the general public's access to justice in the High Court and/or any other lower court.

## II THE ONLINE COURT DIRECTIVES IN PLACE AT THE HIGH COURT, GAUTENG DIVISION AND GAUTENG LOCAL DIVISION

### *(a) CaseLines prior to the Covid-19 Pandemic*

The Judge President issued a Practice Directive ('the 10 January 2020 Directive') which introduced a CaseLines system.[4] This directive was a milestone as it finally brought about the commencement of the digitisation of the Gauteng court system, which in the opinion of the author has been long overdue. The 10 January 2020 Directive was rudimentary in nature. It briefly set out that legal practitioners are obligated to register with the CaseLines system in order for High Court matters to move forward on this e-platform.[5] In particular, it sets out a number of procedures on how legal practitioners had to proceed in uploading and managing relevant pleadings, and court documents, onto the CaseLines system. It also set out the types of matters that would be litigated on the CaseLines system.[6] Clause 3.1 of the 10 January 2020 Directive stated that the High Court Registrar would be procedurally responsible for creating an electronic court file and would only subsequently invite the relevant parties onto CaseLines.[7] Clause 3.1 placed the procedural responsibility on the relevant party with *locus standi*, or a

[4] Op cit note 2.
[5] Ibid.
[6] Ibid para 3.
[7] Ibid para 3.1.

respective legal representative, with the task of ensuring that all relevant documents, such as pleadings, affidavits, etc., have been uploaded to CaseLines and that the relevant parties have been invited onto CaseLines.[8] What is of importance is the procedural scope of the implementation of the CaseLines system in respect of certain matters. At its inception, the 10 January 2020 Directive envisaged the use of the CaseLines system on matters such as:

> '…Opposed and Unopposed Motions, Motion Interlocutory applications, Special and 3rd Court Motions, Commercial Court matters, Special and ordinary Civil Trials, Divorce actions, Case Management Conferences, Trial Interlocutory applications, Default Judgments in terms of Rule 31(5), Civil and Criminal Full Court Appeals (before 3 Judges), Civil and Criminal Full Bench Appeals emanating from the Lower Courts (before 2 Judges), Rule 43 applications, Summary Judgment Applications and Applications for Leave to Appeal'[9]

This was quite an extensive spread of civil matters that the Gauteng Divisions were to accommodate for an online system which had just been introduced. The 10 January 2020 Directive further set out how a final Court Order was to be provided. The court orders must be signed and endorsed by the Registrar and thereafter the said order must be uploaded onto CaseLines by the relevant Judge's Secretary.[10] The 10 January 2020 Directive did not amend the current Uniform Rules of the High Court.[11] Rather, it supplemented the court procedure of the High Court as set out in the Uniform Rules of Court and the Superior Courts Act 10 of 2013 (the Superior Courts Act). Procedurally, the Uniform Rules of Court have not been amended and thus all the current procedures regarding a civil matter are still in force.[12]

Nombulelo Queen Mabeka ('Mabeka') raises the argument that the new CaseLines system ties section 27 of the Electronic Communications and Transaction Act 25 of 2002,[13] with civil procedure, in that the various High Court Registrars in terms of the 10 January 2020 Directive are required to create the case files on CaseLines and then invite the parties with

[8] Ibid paras 3.2 to 3.6.
[9] Ibid para 3.7.1.
[10] Ibid para 4.
[11] Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa GNR.48 *GG* 999 of 12 January 1965.
[12] Ibid.
[13] 'ECTA'.

*locus standi* to upload documents in order to ensure that the pleadings are being handled online.[14] The context behind this is that section 27 of ECTA states the following:

> '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;
>
> (iii) make or receive payment in electronic form or by electronic means.'

On the author's opinion, CaseLines, in its online application for civil proceedings in the High Court, should be interpreted to be part of a public body, in terms of section 27 of ECTA, and to fully embrace the provisions which allows for the promotion and acceptance of electronic filing and management of cases online.[15] For example, Clause 3.8.4.5 of the 10 January 2020 Directive clearly does not comply with the requirements of section 27 of ECTA in that the Registrar, in respect of a default judgment, is still required to physically sign and stamp a court order manually before uploading the said order onto CaseLines, instead of an electronic version endorsing the order on an online platform.[16]

Furthermore, clause 4.2 of the 10 January 2020 Directive still requires an additional procedural step of having the High Court Registrar manually stamp an order on the same day as the matter is heard which is subsequently uploaded onto the relevant CaseLines.[17] Clause 4.3 states that the court order needs to be signed, but does not state that an electronic signature is required.[18] There is no mention of the use of an electronic signature, which is another example of how the CaseLines system at the time did not take into account the ECTA,

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[14] Nombulelo Queen Mabeka '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' (2021) 24 *PER / PELJ* at 9.

[15] Ibid at 10. Section 13 of ECTA deals with electronic signatures and the requirements that need to be adhered to in order for it to be considered as a legitimate signature, as well as the requirements of an advanced electronic signatures.

[16] Ibid; Op Cit note 2 para 3.8.4.5.

[17] Op cit note 2 para 4.2.

[18] Op cit note 14 at 10.

specifically section 13 of ECTA which allowed for electronic signatures.[19] Of further interest, which was highlighted by Mabeka, is that in *Motloung v The Sheriff Pretoria East*,[20] the High Court condoned the failure of the Registrar to sign the Summons, despite the requirement set out in Rule 17(3)(c) of the Uniform Rules of Court which requires the Registrar to sign and issue a Summons.[21] What is of importance is that for the efficient functioning of the CaseLines system is that there is a need to sign the relevant court document and/or summons and such signature does not require the actual physical signing of the said document, but rather a provision for the adoption of an electronic means to sign documents, which will bring the procedures in line with both Rule 17(3)(c) of the Uniform Rules of Court and section 13 of ECTA.[22] This is so because Rule 17(3)(c) of the Uniform Rules of Court expressly requires the Registrar to sign the Summons and to issue same. Therefore, the use of the electronic signature will be of great assistance.

The 10 January 2020 Directive only briefly referred to the preparation of trial stage in that it did not set out in any detail how pre-trial conferences would be accommodated on an e-platform, or how parties' discovery bundles would be filed.[23] Furthermore, service must still be effected by the sheriff as per Rule 4 of the Uniform Rules of Court.[24] Thus, although the necessary court document (i.e. Summons or Notice of Motion) is issued on the CaseLines Platform, physical service by the sheriff is still procedurally required.[25]

### *(b) CaseLines during the Covid-19 Pandemic and post- Covid-19 – the introduction of the Court Online Portal*

On 15 March 2020, the President of the Republic of South Africa announced that the country would be placed under lockdown due to the COVID-19 pandemic.[26] The Judge President brought out a Directive ('the 25 March 2020 Directive') which set out the procedure for the

[19] Ibid.
[20] 2019 3 SA 228 (GP)
[21] Ibid paras 8 & 9; Op cit note 11.
[22] Ibid. Rule 17(3)(c) provides that "…the summons shall be signed and issued by the registrar and made returnable by the Sheriff to the court through the registrar". Section 13 of ECTA expands on electronic signatures. Advanced electronic signatures may be used where the type of signature, by law, is not defined. By simply having a signature in electronic form does not make it redundant. See section 13(1) and (2) of ECTA.
[23] Ibid at 14-5.
[24] Ibid at 14.
[25] Ibid.
[26] Classification of a National Disaster GN 312 *GG* 43096 on 15 March 2020; Declaration of a National State of Disaster GN 313 *GG* 43096; See further Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 GNR 318 *GG* 43107 on 18 March 2007, which sets out the '…steps necessary to prevent an escalation of the disaster or to alleviate, contain and minimise the effects of the disaster'.

functioning of the courts in both civil and procedural matters during the initial commencement period of the lockdown.[27] The 25 March 2020 Directive effectively stated that the "Urgent Court" would be the only Court to function from 25 March 2020 to 20 April 2020.[28] No new matters were to be issued during this period.[29] The 25 March 2020 Directive also automatically removed and re-enrolled matters to trial dates subsequent of what was known as the hard lock down.[30] This unfortunately suspended the development of the CaseLines e-platform system in terms of the National Regulations at the time for the prevention of the spread of the Covid-19 virus.[31]

When the National lockdown regulations were eased and some form of normality was restored, further Practice Directives were issued by the Judge President of the Gauteng Division in which multiple changes, additions and amendments were made to the online functionality of the CaseLines system.[32] These amendments were made throughout the years of 2020 to 2022 as many procedural problems and system issues were identified, and as the Court administration attempted to streamline the online process.[33] These changes did not materially address the shortcomings of the effective use of e-technology, as highlighted by Mabeka, wherein it was argued that electronic issuing and filing of court documents needed to be utilised and promoted.[34]

Nevertheless, as the Court administration identified the online procedural defects of the previous directives, it led to the enforcement of the Directive on 08 July 2022 (the '08 July 2022 Directive') for matters which involve the CaseLines system.[35] The CaseLines system

[27] Op cit note 1.
[28] Ibid para 2.
[29] Ibid.
[30] Ibid paras 6 to 11.
[31] Ibid paras 1 & 14.
[32] See Judge President's Directive - Supplementary Directive in re Court Operations in the Pretoria and Johannesburg High Courts During the Extended COVID-19 National Lockdown for the Remainder of Term 2 dated 17 April 2020; Judge President's Directive - Revised Supplementary Directive in re Court Operations in the Pretoria and Johannesburg High Courts During the Extended Covid-19 National lockdown and for Remainder of Term 2, dated 24 April 2020; Judge President's Consolidated Directive In Re - Court Operations in the Pretoria and Johannesburg High Courts During the Extended COVID-19 National Lockdown and for the Remainder of Term 2, dated 11 May 2020; Judge President's Consolidated Directive In Re - Court Operations in the Pretoria and Johannesburg High Courts During the Extend COVID-19 National State of Disaster, dated 02 December 2020; Judge President's Practice Revised Directive 1 of 2021, dated 11 June 2021; Judge President's Consolidated Directive: In re: Court Operations in the Pretoria and Johannesburg High Courts During the Extended COVID-19 National State of Disaster dated 11 June 2021; Gauteng Division of the High Court Acting Judge President's Directive 1 of 2022: Piloting of the Court Online system in the High Courts of the Gauteng Division. These reflect only the major amendments and changes in regard to the procedure of matters to be heard online.
[33] Ibid.
[34] Op cit note 14 at 11.
[35] Judge President's Revised Consolidated Directive 2 of 2022 In re: Court Operations in the Pretoria and Johannesburg High Courts of the Gauteng Division, with effect from 18 July 2022, dated 08 July 2022.

operates in conjunction with the Court Online system previously introduced in the Gauteng Division and the CaseLines system analysed further below.[36] But for the purposes of this paper, during 27 June 2022, a directive was sent out explaining the piloting of a new Court Online system.[37] This Directive set out how legal practitioners were to register on the new Court Online portal, as well as how the filing of civil matters on the Court Online portal would take place and the procedural process for enrolling matters.[38] This is a procedural innovation as the Court Online system promotes the use of an e-platform for matters and obliges the courts to adopt a paperless system.[39] It also enforces section 27 of ECTA in promoting the use by a public body of an electronic system for issuing, filing and managing court documents on an e-platform.[40]

Subsequent to the introduction of the pilot Court Online system, an additional 08 July 2022 Directive was introduced.[41] In the Preamble of this Directive it states that the 'provisions of the Uniform Rules of Court shall continue to apply and will be strictly enforced'.[42] The Preamble permits a differentiation between new matters and existing matters which have yet to be placed on the e-platform.[43] For existing matters which have yet to be placed on an e-platform, the 08 July 2022 Directive provides for the relevant steps that need to be taken by the litigant to upload the case on the CaseLines system.[44] However, existing cases cannot be initiated on the Court Online system.[45] Furthermore, the 08 July 2022 Directive must be read in conjunction with the Court Online Portal User Manual, which further elaborates and explains the functionality of the Court Online system.[46]

The process for creating a file on Court Online has been simplified. A litigant, after registering on the platform, may simply direct themselves to the tab 'start a case', identify whether it is an urgent matter, or a matter involving a minor, or a high-profile matter or a normal civil matter and thereafter upload the relevant documentation.[47] According to the 08 July 2022 Directive, the litigant is only required to upload the Notice of Motion or Summons

[36] Ibid.
[37] Gauteng Division of the High Court Acting Judge President's Directive 1 of 2022: Piloting of the Court Online system in the High Courts of the Gauteng Division paras a–b.
[38] Ibid paras 1–4.
[39] Ibid; See also op cit note 14 at 5.
[40] Op cit note 14 at 5–6 & 9.
[41] Op cit note 37.
[42] Ibid para ii.
[43] Ibid.
[44] Ibid paras 18–20 & 45–224.
[45] Ibid.
[46] Court Online Portal User Manual, dated 10 August 2021.
[47] Ibid at 43.

in order to issue a matter.[48] This issuing process will be done electronically with the relevant case number being provided and with the relevant electronic stamp of the Registrar attached once it is approved.[49] This is in line with the argument made by Mabeka on how a functional electronic process had to be created in order for the Registrar of the High Court to efficiently and cost effectively issue court documents, without the need of having to do so manually.[50] With the Court Online system, the signature required by the Registrar is electronic and falls within the scope of section 13 of ECTA.[51]

For matters that have been issued by the Registrar before the advent of the Court Online system, the litigant must still rely on the CaseLines system.[52] This means that a litigant is required to create the relevant file and invite the relevant court Registrar to move the matter forward after complying with all necessary requirements as set out in the 08 July 2022 Directive.[53] The relevant Registrar, depending on the process of the matter and/or the outcome of same, will make any of the relevant endorsements on the case file on CaseLines.[54] It is interesting to note that draft court orders are still to be printed out, signed, stamped and then re-uploaded onto the relevant case on CaseLines.[55] Thus in this respect, the court procedure fails to adopt and/or create a system which would fall more in line with section 27 of ECTA.[56]

The 08 July 2022 Directive further provides for the fact that when litigant parties wish to file pleadings and documents on the relevant e-platform (whether on the CaseLines platform or the Court Online platform) it must be done in terms of Rule 3 of the Uniform Rules of Court.[57] The Directive specifically provides that parties can only file documents on the e-platforms from 09:00 to 15:00 and only on weekdays.[58] This is only for the filing of court documents. The service of documents must still be compliant with Rule 4 of the Uniform Rules

[48] Op cit note 35 para 27. It is the opinion of the author that this may lead to an abuse of the system. When a Summons or a Notice of Motion is meant to be issued, it has to be issued with the attached Particulars of Claim (if necessary) or with the Founding Affidavit (Rule 6(1) of the Uniform Rules of Court). With the new Court Online system, some litigants might be issuing documents which do not have the relevant and/or completed Particulars of Claim and Founding Affidavit, especially considering affidavits are deposed to and are sworn statements, which cannot be dated after the issuing of the Notice of Motion. This does not rule out the possibility that fraudulent conduct may take place.
[49] Op cit note 46 at 43.
[50] Op cit note 14 at 8.
[51] Ibid at 10.
[52] Op cit note 37 paras 45–55.
[53] Ibid paras 56–73 & 77–214.
[54] Ibid para 45.4.
[55] Ibid para 146–147 & 167.
[56] See page 4.
[57] Op cit note 35 paras 267–271.
[58] Ibid para 267. Rule 3 of the Uniform Rules of Court sets out the office hours of the Registrar's office in which instituting and filing of court documents may take place.

of Court.[59] Compliance with the provisions in the 08 July 2022 Directive and the relevant Rule 3 of the Uniform Rules of Court is required as non-compliance or partial compliance with the said Rule 3 and the Directive may require the relevant party having to request condonation for their non-compliance.[60] It should be noted that the Sheriff of the Court may be granted access to the e-platform in limited capacity, such as to verify a court order.[61] This is inclusive of both CaseLines and Court Online.[62]

*(c) The current lacuna in e-technology and the e-platforms in respect of existing laws*

The litigant, whether a Plaintiff, or Applicant, will still be required to comply with Rule 4 of the Uniform Rules of Court which requires service to be effected by way of the Sheriff.[63] Thus the litigant, after receiving the electronically issued Summons or Notice of Motion, must still proceed to pay the disbursements of the Sheriff by delivering the original and a copy of the pleading to the Sheriff to serve on the opposing party.[64] For the Rule 4 procedure to be effective and convenient, the procedure regarding service may have to be amended in order to bring it within the ambit of the e-platform. In a society where e-technology is readily available, whether in a private capacity, or through the assistance of the relevant Courts or Tribunals, the requirement to serve documentation and pleadings by way of the sheriff, as is currently required, is out-dated and redundant. Furthermore, electronic service can easily be established as legitimate and trustworthy.

It is important to consider that when pleadings are filed on either CaseLines or Court Online (whichever one is applicable) it should be interpreted as a data message.[65] Rule 4A(1)(c) of the Uniform Rules of Court allows for a litigant to deliver subsequent documentation on each other by way of electronic mail. Rule 4A(3) of the Uniform Rules of Court further states that Chapter III, Part 2 of ECTA applies in these instances where documents are served by way of email. Chapter III, Part 2 of ECTA concerns the communication of data messages. Due to the fact that the Uniform Rules of Courts acknowledges that service by way of email is a form

[59] Ibid para 268. Rule 4 of the Uniform Rules of Court sets out the different forms of service that a sheriff of the Court may perform. In other words, the sheriff of the Court must be relied on in order to effect service of pleadings and documents, especially in order to institute proceedings.
[60] Ibid para 271.
[61] Ibid paras 40 & 270.
[62] Ibid paras 40, 146 & 270.
[63] Op cit note 11.
[64] Ibid.
[65] Op cit note 14 at 7–8.

of data message, as contemplated in terms of ECTA,[66] it does pave the way to allow for the service of pleadings which institute proceedings against opponent litigants, without the possible use of a physically based Sheriff.[67] In other words, a litigant (whether unrepresented or represented) should be able to serve the initiating documentation, whether it be a Combined Summons or Notice of Motion with a Founding Affidavit, by way of electronic mail and not have to incur the costs of physical service by a Sheriff, as ECTA may recognise it as data messages which can be accepted as a reliable form of service.[68] The relevant legislation and the Uniform Rules of Court can be amended to give effect to this electronic model of service.[69] This is both procedurally cost-effective and efficient. In recent years, there have been multiple amendments to the Superior Courts Act, the Magistrates' Court Act 32 of 1944 (Magistrates' Court Act), the Uniform Rules of Court and the Magistrates' Courts Rules. But more needs to be done to ensure that the changes to the Rules of Court fall in line with the Directives in place for a system based on Court Online and CaseLines. It has already been noted since 2020 that the Rules do not fall in line with the Directives.[70]

In *Le Roux v Viana NO & others,*[71] the Supreme Court of Appeal held that electronic documents are 'susceptible to seizure' in terms of a search warrant and that the judiciary effectively must consider and take advantage of the 'technological advancements' in terms of 'data creation, recording and storage'.[72] What is of importance here is that 'data' and 'writing' defined in the ECTA should be applied in civil procedure as it would apply to legal documents as well.[73] The case of *CMC Woodworking Machinery v Odendaal Kitchens*,[74] is an instance in which the High Court 'embraced', albeit cautiously as Mabeka submitted,[75] the use of e-technology by allowing the service of a summons by way of Facebook.[76] The use of e-technology in terms of service can be utilised successfully and to the satisfaction of the courts in today's modern era without having to rely on physical service by Sheriffs.

It should be noted that although Rule 4A of the Uniform Rules of Court accepts email as an acceptable manner of service, the Rule is contradicted by other provisions of the Uniform

[66] Section 1 of ECTA defines data message as '…data generated, sent, received or stored by electronic means…'
[67] Op cit note 14 at 8.
[68] Ibid.
[69] Nombulelo Queen Mabeka & Rushiella Songca 'An overview of Statutes relating to Civil Procedure in South Africa in light of the changes in technology' 2020 *Obiter* at 686.
[70] Lucrecia Sadhaseevan 'Ready…set…line your cases…" March 2020 *Without Prejudice* 37.
[71] 2008 (2) SA 173 (SCA).
[72] Ibid para 10.
[73] Op cit note 14 at 12.
[74] 2012 (5) SA 604 (KZN).
[75] Op cit note 14 at 4.
[76] Supra note 74 paras 12–3.

Rules of Court. For example, Rule 19 (3) of the Uniform Rules of Court in terms of service of a Notice of Intention to Defend, provides that the defendant may identify the manner in which they are willing to accept service of further documents from the Plaintiff(s).[77] The defendant can also request that the Plaintiff consent in writing to the service by way of email and if it is refused, the defendant can make an application to court to have service by email ordered.[78] In other words, as much as Rule 4A promotes the service of documents and notices by way of email, it is not being utilised in terms of Rule 19 (3) of the Uniform Rules of Court.

The amendments to the Superior Courts Act and Magistrates' Court Act indicate changes being made by the courts. For example, in *M.K v Transnet t/a Portnet,*[79] the High Court allowed a witness to testify in terms of a video link.[80] The court did so because the court believed it possible to do so in terms of the advancement of technology.[81] For its time it was an advancement for e-technology with the use of e-platform in the courts. Section 37C of the Superior Courts Act allows for a party, on application, to give evidence by way of audio-visual link, whether the witness is in South Africa or not, and this may be defined as having been subpoenaed.[82] The same is seen in the Magistrates' Court Act.[83] These amendments have influenced the judiciary to adopt the relevant e-platforms. Thus, if these amendments can be effected, in terms of the Uniform Rules of Court and eventually the Magistrate Court Rules, to fall in line with the Directives managing CaseLines and Court Online, it may lead to a paperless based e-platform in the courts, while at the same time upholding the integrity of the procedure.

Although it is not the main form of service, substituted service and/or edictal citations can play a role in ensuring proper service of pleadings on opponents where the normal use of Sheriffs' service would be redundant.[84] It also may outline the possible amendments required in order to bring the ECTA in line with the Rules of Court in the Superior Courts and Magistrate's Courts. One can effect service by email if one can justify such service in terms of the application that would need to be made.[85] This was noted in *M.K v Transnet t/a Portnet* case, albeit through Facebook.[86] It is submitted that if service by way of email is accepted as a normal form of service, which can be in line with sections 12, 13, 15, 25, 26 and 27 of ECTA,

[77] Op cit note 11 Rule 19(3)(b).
[78] Ibid Rule 19 (3)(c) & (d).
[79] [2018] 4 All SA 251 (KZD).
[80] Ibid para 16.
[81] Ibid.
[82] Op cit note 11 Rule 37C (1), (2) & (5).
[83] See Section 57C.
[84] Op cit note 11. See Rules 4(2) & 5.
[85] Ibid.
[86] Supra note 79 para 16.

it would assist litigants in serving pleadings and documents on opposing parties where non-service by sheriffs, and the costs occasioned thereof, can be removed.[87] As is noted by Mabeka, in *Morris v Bank of America National Trust*,[88] the court held that using e-technology can save both 'time and money'.[89] It is thus unnecessary to rely on outdated manners of service to institute proceedings and rather develop the Rules of both High Court and Magistrates' Courts to embrace the technological electronic availabilities in place.

Another alternative which may be appealing to Sheriffs in South Africa is the incorporation of service by way of email.[90] This can be further expanded upon by the incorporation of the Sheriffs in the Directives overseeing the functioning of both the CaseLines and Court Online portals.[91] On that basis, Sheriffs would still be involved in the proper service of pleadings, which service can be effected by electronic means, i.e. serving by way of email or even by way of CaseLines.[92] This would lead, as Mabeka notes, to the Sheriff's offices having to restructure itself in order to be equipped to handle such electronic forms of service.[93] In any event, the implementation of section 27 of ECTA in respect of the functioning of the court system regarding the service and filing of documentation would be a big step in the right direction for the move to an electronically-based court process. Although it is applicable in some instances regarding the filing of court documents on either CaseLines or Court Online, it is still not incumbent on the entire process, especially the commencement of a lawsuit, as set out above.

### *(d) A brief consideration of the procedure regarding Labour Dispute Resolution process*

Lessons can also be taken from the procedure currently in use in both the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court of South Africa (the Labour Court). First, in terms of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA Rules),[94] complainants

[87] Op cit note 69 at 695. Sections 12, 13, 15 25, 26 and 27 of ECTA may be summarised as representing the provisions dealing with the legitimacy of online signatures and providing legal authority and authenticity for data messages (such as email correspondence), which would in turn justify online issuing and service of pleadings and court documents, as well as for electronically signing Court orders.
[88] 2000 1 All ER 954 (CA).
[89] Op cit note 14 at 19.
[90] Ibid.
[91] Ibid.
[92] Op cit note 69 at 695–96.
[93] Ibid at 695.
[94] *GN* R3318 in *GG* 48445 of 21 April 2023

referring unfair labour practice,- and/or unfair dismissal disputes to the CCMA, may serve notice of such referral by way of email.[95] Furthermore, the party who serves any relevant documentation by way of email, must provide the CCMA with proof of the sent email to indicate successful transmission of the said email.[96] The CCMA Rules continues to state that until the contrary is proven, it will be accepted that the proof of service of the email will be presumed to have been served on the opposing party.[97] It further adds that the relevant provisions of ECTA will apply regarding the service by way of email.[98] Section 27 of ECTA will also be of importance in this regard as the CCMA Rules highlights how electronic filing of documents can be accepted by the CCMA, being a public body, and furthermore how the CCMA issues case numbers out to the relevant parties.[99]

Similar procedures apply in the Labour Court in respect of service in terms of the Rules for the Conduct of Proceedings in the Labour Court (Labour Court Rules).[100] In terms of the Labour Court Rules, the Labour Court allows for service of documentation to be effected in any manner prescribed in the said Rules.[101] This means that documents required to institute a matter in the Labour Court need not be physically served by the sheriff.[102] The Labour Court Rules further sets out the manner of proof in Court.[103] Although the Labour Court Rules do not set out that the manner of service can be by way of email, such manner of service has become common practice and has further been expanded upon by the Directive from the Judge President in respect of service by Electronic Mail Number LC 02 /2022. This Directive requires that the party serving by way of email file a 'service affidavit' containing the email address used for service. The party receiving the document must confirm receipt by way of telephonic correspondence or by way of email.[104] By complying with the requirements set out in the Directive, service will be considered to have been properly effected, thus rendering obsolete the need for physical service by the sheriff. The procedural issue with the aforementioned process is that filing still needs to be made physically at the Labour Court as the Labour Court is not part of any e-platform. However, the Labour Court Registrar may email notices of set-downs, and other forms of correspondence and notices, to the parties if an email address is

[95] Ibid Rule 5(1)(c).
[96] Ibid Rule 6(1)(e).
[97] Ibid Rule 6(2).
[98] Ibid.
[99] Op cit note 14 at 9–11.
[100] GN 1665 in *GG* 17495 of 14 October 1996.
[101] Ibid Rule 4.
[102] Ibid.
[103] Ibid Rule 4(2).
[104] Directive from the Judge President in respect of service by Electronic Mail Number LC 02/2022.

provided.[105] Thus apart from the Labour Court not being part of the e-platform like its counterpart (the High Court), it has adopted and successfully implemented a manner of service in instituting legal disputes which bypasses the physical use of the sheriff.

*(e) The effect of e-technology and evidence presented online*

Not only will the e-techonology effect the manner in which service, filing and instituting proceedings take place, but will influence the admissibility of evidence that is presented on both Court Online and CaseLines. If one considers the law of evidence, the academic opinion in respect of data messages is that it would be real evidence unless it is on some form of material in which 'knowledge or thoughts are reproduced'.[106] For example, and as compared by Murdoch Watney, in *S v Fuhri*,[107] the court determined a photograph that displayed the vehicle of a driver that had committed a traffic violation as being real evidence, whereas in *S v De Villiers*,[108] where a computer printout, which had a 'human source' in that it was printed by someone, was interpreted as a document.[109] Taking the concept of documents further, a private document can only be produced if it is the original document and if its integrity is still guaranteed.[110] These requirements may not comply with the fact that the e-platform requires a copy to be placed online on either CaseLines or Court Online. This must be read together with section 14 of the ECTA which sets out the requirements on how to satisfy the production of the original document in terms of a data message.

With the use of the e-platform in the admissibility of relevant evidence which the Courts must consider, it will be necessary to ensure the integrity of the documents due to the risk of fraudulent alteration.[111] The evidence admissibility requirements must be read in conjunction with section 15(1) of ECTA which allows a person to not have to comply with the requirements set out in section 14 of ECTA, if such evidence is the only and/or best evidence that can be produced.[112] The authenticity of the documents must also be proved. Because of the risk of manipulation, data messages need to be authenticated in order to be considered admissible.[113]

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[105] Ibid Clause 2.
[106] Murdoch Watney 'Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position' (2009) 1 *Journal of Information, Law & Technology* at 4.
[107] 1994 (2) SACR 829 (A).
[108] 1993 (1) SACR 574 (Nm).
[109] Op cit note 106.
[110] Ibid at 4–6.
[111] Ibid at 7.
[112] Ibid. See *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W).
[113] Ibid at 8.

Section 15(4) of ECTA states that if the data message, or an extract thereof, is made by a person in their 'ordinary course of business', it will be considered admissible until rebutted.[114] By contrast, if the data message is not made in the ordinary course of business by the said person, then it will not be admissible and the person responsible for the said message, or by way of an expert, must be brought before the court in order to '…establish its authenticity'.[115] Thus the issue that arise is how the originality of documentation can be confirmed if copies are placed on the e-platforms for the presiding officer to consider. It is also important to ensure its authenticity as without same, it cannot be considered admissible.[116]

One such solution can be seen in the 18 July 2022 Directive with regard to the admissions of legal practitioners. Paragraph 241 of the 18 July 2022 Directive requires the principal attorney for the candidate legal practitioner to depose to an affidavit wherein he/she confirms having sight of the said candidate legal practitioner's Identification Document and any other documents relating to their qualifications and thereafter confirming that the said documentation appear authentic.[117] The deposing to an affidavit may be a possible manner of ensuring originality of documents as currently there is nothing in the current Directives regarding both Court Online and CaseLines that sets out how bundles regarding the parties' evidence are to be uploaded.[118] One reason for the Directives' lack of provisions regarding the testing of the integrity of the documents placed online may stem from the fact that, in any event, documents will be made available at court, considering that all trial hearings are in person.[119] This simply comes with the *caveat* that it is the legal representative's responsibility to ensure the integrity of the evidence given by a witness that is testifying by way of a video-link, as allowed by the presiding officer, but the directive does not refer to the authenticity or originality of evidence produced on CaseLines and/or Court Online.[120]

The 18 July 2022 Directive further provides that Judicial Case Management matters are to be heard virtually by default and thus does not require physical appearance.[121] The presiding officer who is allocated a matter for Judicial Case Management, may exercise his/her discretion

[114] Ibid.
[115] Ibid. See *ABSA Bank Limited v Le Roux and Others* 2014 (1) SA 475 (WCC) para 19.
[116] Lee Swales *An Analysis of the Regulatory Environment Governing Electronic Evidence in South Africa: Suggestions for Reform* (published LLD thesis, University of Cape Town, 2018) 122.
[117] Op cit note 35 para 241.
[118] See both Op cit note 35 and Op cit note 46.
[119] Op cit note 35 para 3.
[120] Ibid.
[121] Op cit note 35 para 11.

insofar as he/she will arrange a time for the video-link, or alternatively any procedure he/she find to be appropriate.[122]

## III FOREIGN COURTS AND THE USE OF THE ONLINE PLATFORM AND E-TECHNOLOGY IN THE JUDICIARY

The Magistrates' Court is presently omitted from the advancement of the e-platform, in comparison to the High Court in Gauteng, which has adopted the CaseLines and Court Online systems. As has been argued in this paper, the Court Online and CaseLines platforms have only been concerned with the High Courts in Gauteng. Also, its availability throughout South Africa has yet to be tried and tested. In essence, the e-platform does not involve the Magistrates' Courts in South Africa. The reason this omission is highlighted is due to what is occurring in the international sphere in respect of foreign courts and their judiciary.

### *(a) The United States of America*

The aim of a foreign judicial e-technology is focused on the principle of Online Dispute Resolution (ODR) which is particularly based on assisting unrepresented litigants online without having to attend a physical court room.[123] For example, the United States of America (USA) is not that advanced when it comes to the technological development regarding online courts, or an online procedure, and many of the USA online systems are temporary pilot systems in place in different States and counties.[124] When the concept of access to justice has been analysed, it was done so in the context of litigants still needing to physically attend court in order to obtain the sought after relief.[125]

This is seen as an outdated system and unnecessary especially if the matter in itself is minor and easy to determine on paper.[126] It was argued that by taking the court system onto an e-platform, it would promote access to justice in that litigants would be able to easily exercise their rights in terms of the online system (although it was also admitted that the evidence for

[122] Ibid, paras 71.1–71.3.
[123] Amy J Schmitz 'Expanding Access to remedies through e-court initiatives' (2019) 67 *Buffalo Law Review* 89 at 95.
[124] Ibid at 104.
[125] J. J. Prescott 'Improving access to justice in State Courts with Platform Technology' (2017) 70 *Vanderbilt Law Review* 1993 at 1995.
[126] Ibid at 1996.

the use of the e-platform in the USA was limited).[127] The benefit may also become more apparent especially where e-technology can assist those in rural areas of the USA or people with disabilities who may in general not have access to the closest court.[128] The type of case will also determine to the unrepresented litigant whether obtaining the services of an attorney will be worth the fees and costs, especially with matters where the civil dispute is of a 'low-stake'.[129] The USA procedural structure is similar to the South African Small Claims Court.[130] Thus when the 'stakes are low' the litigant has to weigh up the cost of litigating versus the cost and disbursements they may incur for it and in many cases, the litigant will then decide not to take any further action due to external factors such as taking time off of work, arranging transport, and so forth.[131] It would, as per the following example, not make sense for a person earning an hourly wage to lose half a day's work for a claim or offence which value would not justify the loss of such daily income.[132] By contrast, the South African Small Claims Court allocates hearings after working hours in order to ensure that individuals do not lose out on their daily income.[133]

The ODR has been utilised by various States in the USA. States such as New York, Utah, Ohio and Michigan have adopted various types of e-platforms to provide electronic access to the courts.[134] In Michigan, an ODR was put in place to assist with traffic fines.[135] Essentially, a litigant can log on to an online portal (in this instance, an e-platform system called Matterhorn) wherein he/she can submit his/her case including arguments and/or explanations for their failure to pay fines. The prosecutor, and police, can further review the matter before it is brought before a presiding officer.[136] The litigant's information is submitted to the relevant presiding officer and based on the submission, the presiding officer can request further information if need be.[137] According to the data collected in respect of the use of 'Matterhorn' e-platform in Michigan, it has been established that the time length of matters to be finalised has decreased, in that matters are resolved within a maximum of nine days in comparison with in-person resolution of the matter which may take up to a few months to

[127] Ibid at 2000.
[128] Op cit note 123 at 104.
[129] Op cit note 125 at 2003.
[130] Small Claims Court Act 61 of 1984.
[131] Op cit note 125 at 2004.
[132] Ibid at 2005.
[133] Op cit note 130.
[134] Amy J Schmitz 'Measuring "Access to Justice" in the rush to digitize' (2020) 88 *Fordham Law Review* 2381 at 2389-391 & 2396.
[135] Op cit note 123 at 105-6.
[136] Ibid.
[137] Ibid at 107.

resolve.[138] Above all, the 'Matterhorn' e-platform was considered 'user-friendly' which further encouraged the use of it by members of the public.[139]

In comparison to the Michigan ODR platform, in Ohio the courts also made use of the 'Matterhorn' e-platform, but limited specifically to issues regarding tax disputes as their pilot program.[140] The Ohio free e-platform allows for parties in a tax dispute to be placed on an online space wherein they may communicate with one another, upload relevant files in relation to the dispute, as well as accept and/or reject any settlement offers proposed.[141] It also allows for a 'court negotiator' who effectively acts as a mediator on the e-platform.[142] The introduction of the Ohio ODR has led to an increase in matters being dismissed due to settlement negotiations being reached, as well as reducing the number of default judgements being made, which in turn means an increased pay-out to the City Tax administrators.[143] Again, the time period in terms of which the matters were resolved was reduced compared to matters being heard in person.[144] The Ohio e-platform opened up the possible and easy access to negotiated settlement which was not observed with the in-person matters.[145] This would effectively lead, as projected, to a lower default rate amongst defendants.[146] One argument proffered is that by allowing litigants to litigate from home increases participation in the legal system and enhances access to justice, as less anxiety and emotional stress is being experienced by members of the public while dealing with their 'online' dispute.[147] Furthermore, it also allows all relevant parties to attend to the case on an online platform and thus attend to it at a time which is most convenient for the relevant parties, without having to arrange a 'face-to-face' conference or meeting.[148]

The pilot programme for the e-platform system is taken a step further. In Tennessee, the Tennessee Free Legal Answers e-platform was created in which members of the public, specifically in Tennessee, in an effort to expand on access to justice for the low-income earner, could set out their disputes and/or issues and ask questions on the e-platform wherein an attorney would then respond to these questions.[149] The privacy of the member of the public is

[138] Ibid.
[139] Ibid at 108.
[140] Ibid at 109.
[141] Ibid.
[142] Ibid.
[143] Ibid 109-10.
[144] Ibid at 112.
[145] Ibid at 113.
[146] Op cit 125 at 2025.
[147] Ibid at 2009.
[148] Ibid at 2020 & 2023.
[149] Op cit note 123 at 121.

also taken into consideration as once an attorney responds to a question, the specific attorney and litigant will continue to communicate in a private setting.[150] This project has further expanded to other States in the USA, such as in Illinois where an individual, in a confidential manner, is able to post questions regarding his/her matters online and have it answered by qualified attorneys.[151] From a USA perspective, the use of these e-platforms in both courts and for legal advice, will be an important factor in order to assist members of the public who are low-income earners and who would not in the normal course of 'business' have taken any further steps had the only manner to resolve the dispute been to attend court, which may have proven cost and fee expensive.[152]

### *(b) The United Kingdom*

His Majesty's Courts and Tribunal Services (HMCTS) have attempted to reform the court system to make effective use of current e-technologies.[153] The United Kingdom judiciary had previously made mention of the need for individuals to enforce their rights to access to justice as being a part of the rule of law and that it was the State's obligation to ensure same.[154] Reemphasis on the justice procedure brought about the creation of a bill known as the Courts and Tribunal (Online Procedure) Bill (the Bill) in order to establish the Online Procedure Rule Committee which would be tasked with creating new relevant rules and procedure for the 'civil and family courts in England and Wales, in the First-tier Tribunal and Upper Tribunal and in employment tribunals and the Employment Appeal Tribunal'.[155]

The UK e-platform, specifically dealing with small claims,[156] will be based on three procedural steps.[157] The first step determines the dispute in question and after the dispute has been identified, the relevant legal options are made available to the litigant.[158] The second step is to provide online 'facilitators' to attempt at reaching settlement in respect of the matter.[159]

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[150] Ibid at 122.
[151] Op cit note 125 at 2011.
[152] Ibid at 2013.
[153] Op cit note 123 at 134.
[154] Amanda Darshini Selvarajah & Catrina Denvir 'Safeguarding Access to Justice in the Age of the Online Court' (2022) 85 *Modern Law Review* 25 at 25. See also *HM Treasury v Ahmed & Ors* [2010] UKSC 2, [2010] 2 AC 534 at [146] & *Children's Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34, [2013] HRLR 17 at [38].
[155] Ibid at 34.
[156] Low-risk claims.
[157] Op cit note 123 at 135.
[158] Ibid.
[159] Ibid at 135-36.

The last procedural step, should settlement fail, will be to place the matter before a judge to make a final decision on the matter.[160] HMCTS is also expected to expand the online system to divorce matters as well. However, certain procedural issues are still being considered, such as the authentication of marriage certificates on an e-platform.[161] The Bill may also include an option for litigants to opt out of the online process and elect to proceed in the traditional manner in respect of instituting and filing a matter in the courts.[162]

Although this option is available to the litigant, it will only be so up until a certain procedural point, as the aim of the Bill is to attempt to make the online hearing phase as close to as a matter being heard on the papers and for a decision to be made on this basis and with no need to rely on oral evidence.[163] However, for certain matters, a judge will have the discretion to decide how to discharge the matter, whether by an in-person hearing, video-conferencing and so forth.[164] The UK Bill is comparable to the South African 08 July 2022 Directive in that unrepresented litigants will be the 'exception to the Rule' insofar as the litigant will be assisted at court with his/her matter and that facilities will be made available to the litigant in order for his/her matter to be heard.[165] The UK Bill does not go into much detail as to the depth of assistance the unrepresented litigant will receive, but one can only assume it is to the extent that is required depending at what procedural stage the litigant's matter is.[166] A note of caution is required, as with the United States, that 'efficiency should not overshadow fairness'.[167] As has been shown by the collection of data on the users of the e-platform, in general, low-income, older and less educated individuals were more likely to struggle and/or not use the e-platform, but even individuals with the necessary skills to manipulate the e-platform did not translate into legal competency.[168] Therefore, to move to a complete online judicial system may be considered an infringement of the right to access of the courts, as the case of *R (on the application of Unison) v Lord Chancellor*,[169] indicated that by having procedures in place which prevent 'certain groups from accessing the courts' may be considered as an infringement on the said group of people's rights to access to the courts.[170]

[160] Ibid at 136.
[161] Ibid.
[162] Op cit note 154 at 35.
[163] Ibid.
[164] Ibid at 36.
[165] Op cit note 35 paras 50, 168, 214.3 & 313.
[166] Ibid.
[167] Op cit note 123 at 140.
[168] Op cit note 154 at 45–52.
[169] [2017] UKSC 51, [2017] ICR 1037 para 87.
[170] Op cit note 154 at 53–4.

Nevertheless, even before the Bill, there were pilot projects initiated, such as the Practice Direction 51R – Online Civil Money Claims Pilot, which sets out the availability to litigants to take part in the Online Civil Procedure e-platform in order to speedy adjudication. Practice Direction 51R has run since 7 August 2017 and will end on 1 October 2024, as per section 2.1(1) of the said Practice Direction. Section 2.1(4) of the Practice Direction 51R states that it is completely voluntary for litigants issuing a money claim, which falls under its scope, as set out in section 2.1(3)(a)-(n), to take part in the pilot scheme. Section 2.1(4) provides that it is still within the discretion of the HMCTS to use the volunteering litigant's claim as part of the pilot programme. The Practice Direction 51R also distinguishes the use of the pilot scheme between litigants who are acting in their own capacity, versus litigants who have legal representation. The Online Civil Money Court (OCMC) platform is being used during this pilot scheme.

In addition, the UK courts apply Practice Direction 51O – The Electronic Working Pilot Scheme, which is the UK's version of the digitisation of the Court administrative procedure. This pilot scheme commenced on 16 November 2015 and comes to an end on 6 April 2024, as per paragraph 1.1(1)(a) of the Practice Direction 51O. It uses an e-platform known as 'Electronic Working', wherein litigants, according to paragraph 2.1, may issue and file court documents online, 24 hours a day, every day, all year. Electronic working may further be used to start a new claim, or continue an already existing claim, as per paragraph 2.2 of the Practice Direction 51O. The Electronic Working scheme is further available for use by both unrepresented litigants and represented litigants, as per paragraph 2.2A of the Practice Direction 51O. Paragraph 8.2 of the Practice Direction 51O provides further that any documents filed and/or issued by the relevant courts, shall be served by the litigants and not by the said court. South Africa's Court Online system to a certain extent duplicates the Practice Direction 51O in many aspects in respect of the responsibilities placed on the litigant versus the obligations of the Court. Some differences are noticeable between the two e-platforms. For example, when trial bundles are to be filed at court, in South Africa, the trial bundles are filed online and transferred from Court Online and then onto CaseLines in order to have the bundles electronically viewed.[171] However, in the UK, paragraph 13.1 of the Practice Direction 51O states that physical trial bundles need to be filed at court, unless the court has ordered that an electronic trial bundle be filed. With application proceedings, paragraphs 10.1 to 10.3 of the Practice Direction 51O requires that all documents relating to the application instituted at Court

[171] Op cit note 35 paras 28–34.

be filed online on Electronic Working, as well as that a physical bundle of the application be filed at court.

The move by the UK courts to integrate the adversarial system with an online platform stems from the basis that the UK Civil Procedure Rules have already placed, as a procedural foundation, the necessary online procedural changes which may ensure a better transition of the judicial civil courts from traditional physical procedure to an online procedure, which is more cost effective to litigants. For example, Rule 5.5 of the Civil Procedure Rules, 1998 (Civil Procedure Rules) provides authority for Practice Directives to be issued which set out the manner of filing and services of court documents. Rule 6.3(d) of the Civil Procedure Rules further provides that service of a claim may be made by way of electronic means. Rule 6.3(d) of the Civil Procedure Rules is further elaborated upon in the Practice Direction 6A – Service within the United Kingdom. Specifically, Paragraph 4.2 of Practice Direction 6A provides that a party wishing to serve a court document on another party must first ask the party of any limitations to the service of the document, i.e. file size, etc. Furthermore, Paragraph 4.1(1) of Practice Direction 6A provides that the opposing party must have shown their willingness, in writing, to accept service by way of email and have identified the relevant email address it would accept such service. Paragraph 4.2(2) of Practice Direction 6A sets out the manner in which indication to the acceptance of service per email would be sufficient. Rule 6.4(1) of the Civil Procedure Rules provides that the relevant court will be responsible for the service of the claim and that Rule 6.4(2) of the Civil Procedure Rules determines the appropriate manner of service. Rule 6.4(1) of the Civil Procedure Rules does provide for instances where the claimant may be responsible for the service of the said claim. What this shows is that the need for service by way of a Sheriff, as is required in South Africa, to institute a civil claim, is not required in UK civil procedure. The Rules of the South African Labour Court somewhat mimics the UK civil procedure insofar as service may be done by way of email to institute a claim at the Labour Court, albeit with the additional step of a service affidavit by the person serving the said pleading and/or document.[172]

When observing the use of the e-platform for courts and the use of the online court system, most of the USA, as mentioned above, chose pilot programs which are aimed specifically to deal with lesser or low legal risk types of matters which it believes are easy to dispose of and are not complex.[173] The same can be seen with the UK although it is already

[172] Op cit note 106.
[173] Op cit note 125 at 2003; Op cit 116 at 135.

considering expanding the e-platform to divorces.[174] Furthermore, even though South Africa is attempting to turn the High Court civil litigation system into a paperless system, hearings are still in-person unless it is agreed by the parties to hold it virtually and still requires the entire process to undergo compliance with the relevant Rules of Court.[175] Whereas by comparison with the USA and UK pilot programmes, the procedural aim is to have the matter dealt with in an asynchronous manner without the litigant having to attend court in person.[176]

It is apparent that the procedural differences are quite distinct between the different courts. South Africa is ambitious in its attempt to 'virtualise' the High Court civil system. Both the USA and UK demonstrate a need to have small low-risk matters placed on an online platform wherein the entire purpose, or requirement, for an actual hearing could be removed, although only in exceptional circumstance.[177] It may be necessary for South Africa to consider implementing similar pilot programmes in the Small Claims Court and/or Magistrates' Courts as it may assist to streamline the processes in matters which are low-risk and thus allow resources to be placed in matters and issues which are complicated and in which Magistrates can then comfortably apply their mind to.

## IV CONCLUSION

The e-platform for the High Court is a great initiative and a step in the right direction, considering the advancements in e-technology. However, the relevant Rules of Court are outdated and do not conform to the current e-modes of services and filing available in South Africa. The Rules need to be amended and/or even possibly scrapped and redrawn in order to have the Rules comply with current e-technology available to the litigant and/or their representatives in order to move away from traditional and old modes of physical service, filing and preparation for trial matters.

Foreign courts have demonstrated successfully that matters can be completely dealt with online on a user-friendly e-platform, without the need for a hearing and wasting resources, for both the litigant and the court administration, in order to resolve civil disputes. It is submitted that South Africa needs to consider piloting such programmes, such as in the USA and UK, especially in the Small Claims Courts and Magistrates' Courts. This can assist to

[174] Op cit note 123 at 136.
[175] Op cit note 35 paras 3, 50, 51.2, 61, 89, 130, 139, 140, 142, 236 & 268, to name a few.
[176] Op cit note 125 at 2013.
[177] Op cit note 123 at 136.

relieve the pressure and the case load on the court administrators, as well as promote access to justice for litigants who would not have taken any legal action due to outside financial constraints to attend court.

Lastly, the use of evidence in an online court system needs to be interpreted to authenticate documentation and data messages so that the ordinary rule of evidence is adhered to and the integrity of the evidence can be upheld in court. Without doing so, the use of the e-platform is moot if evidence cannot be authenticated where necessary. The suggestions made in this report analyses an efficient manner in which to circumvent such an issue, which in the normal course, may be called into question for its reliability.

The Court Online and CaseLines system is here to stay, and such systems must be embraced. However there are certain outstanding issues that remain, as set out herein above, which have shown the discourse between modern e-technology civil procedure versus the traditional civil procedure which has now placed the Court Online and CaseLines system at a crossroad and which must be addressed in order promote legal certainty in civil procedure if it is to continue and expand across the whole of South Africa.

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Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa GNR.48 *GG* 999 of 12 January 1965

**DIRECTIVES & REGULATIONS**

Classification of a National Disaster GN 312 *GG* 43096 on 15 March 2020

Declaration of a National State of Disaster GN 313 *GG* 43096

Directive 1 of 2022 Re: Piloting of the Court Online system in Gauteng, dated 27 June 2022

Directive from the Judge President in respect of service by Electronic Mail Number LC 02 /2022

Judge President's Directive, Special arrangements to address COVID-19 implication for all litigation in the Pretoria and Johannesburg High Courts, dated 25 March 2020

Judge President's Practice Directive 1 of 2020, Implementation of the CaseLines system in the Gauteng Division of the High Court, Pretoria and Johannesburg, dated 10 January 2020

Judge President's Revised Consolidated Directive 2 of 2022 In re: Court Operations in the Pretoria and Johannesburg High Courts of the Gauteng Division, with effect from 18 July 2022

Judge President's Directive - Supplementary Directive in re Court Operations in the Pretoria and Johannesburg High Courts During the Extended COVID-19 National Lockdown for the Remainder of Term 2 dated 17 April 2020

Judge President's Directive - Revised Supplementary Directive in re Court Operations in the Pretoria and Johannesburg High Courts During the Extended Covid-19 National lockdown and for Remainder of Term 2, dated 24 April 2020

Judge President's Consolidated Directive In Re - Court Operations in the Pretoria and Johannesburg High Courts During the Extended COVID-19 National Lockdown and for the Remainder of Term 2, dated 11 May 2020

Judge President's Consolidated Directive In Re - Court Operations in the Pretoria and Johannesburg High Courts During the Extend COVID-19 National State of Disaster, dated 02 December 2020

Judge President's Practice Revised Directive 1 of 2021, dated 11 June 2021

Judge President's Consolidated Directive: IN RE: Court Operations in the Pretoria and Johannesburg High Courts During the Extended COVID-19 National State of Disaster dated 11 June 2021

Gauteng Division of the High Court Acting Judge President's Directive 1 of 2022: Piloting of the Court Online system in the High Courts of the Gauteng Division

Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 GNR 318 *GG* 43107 on 18 March 2020

**FOREIGN CASE LAW**

*HM Treasury v Ahmed & Ors* [2010] UKSC 2, [2010] 2 AC 534.

*Children's Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34, [2013] HRLR 17.

*R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] ICR 1037

**LEGISLATION**

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