SECOND SUPPLEMENT
TO THE JOINT SUBMISSION OF THE SPECIALIST HIGH COURT, MAGISTRATES' COURTS AND E-LAW COMMITTEES OF THE LAW SOCIETY OF SOUTH AFRICA TO THE RULES BOARD FOR COURTS OF LAW ON AMENDMENTS TO THE UNIFORM RULES OF COURT TO PROVIDE FOR THE DISCOVERY AND INSPECTION OF ELECTRONIC DOCUMENTS

The first part of this supplement has been prepared in response to questions the Law Society of South Africa (LSSA) has been advised were raised by the Rules Board regarding practical issues and guidance relating to the implementation of the proposed amendments to Rules 35(2) and 35(6) of the Uniform Rules.

The second part of this supplement has been prepared in response to a submission and recommendations that the LSSA has been advised was made to the Rules Board by a private consultant, Mr Harrison, on 17 March 2017.

PART 1

1. How will the High Courts of South Africa deal with documents discovered in electronic form unless there is digital technology available in the Courtroom?

The practical manner in which any evidence, including any documents that exist in electronic form, is to be presented and used at Court is not regulated by Rules 35(2) or (6).

The discovery processes provided for in terms of Rules 35(2) and 35(6) both take place *inter partes* and outside of Court.

Rule 35(10), which is *not* proposed to be amended, enables a party to give notice to another party to produce at the hearing "*the original*" of a document discovered by that other party. Rule 35(10) would continue to be interpreted and applied in the manner that it has been to date with due regard, where necessary, for the established provisions of section 17 of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act)[1].

In fact, it was the promulgation of the ECT Act that raised the practical question of how Courts should receive electronic evidence at court. Fortunately, the ECT Act also provided a discretionary framework for this issue to be addressed by the respective public bodies that accept the filing of documents. Section 28 of the Act specifically empowers any public body that accepts the filing of

[1] Section 17 of the ECT Act provides, inter alia, that where any law requires a person to produce a document, that requirement is met where the person produces an electronic form of that document that has remained complete and unaltered except for any endorsement or immaterial change arising in the normal course of its communication, storage or display.

any documents in terms of any law to specify by publication of a notice in the Government Gazette at any time the manner and format in which electronic documents can be filed with that body.[2] Presently, at the request of presiding judges in many matters, especially in document-intensive matters, this is generally done by producing copies of electronic documents on media disks, thereby eliminating any need for an Internet connection to view the documents and merely requiring the use of a laptop or similar computing device. It is respectfully submitted that the task of prescribing how documents could or should be presented electronically at Court be left to the Registrars, Judges President and Deputy Judges President of those Courts who are familiar with the particular technology resources available at their respective Courts.

The proposed amendments to the discovery rules therefore address only the discovery process *inter partes*.

2. How does the discovery of documents in electronic form promote access to justice?

Currently, one of the greatest barriers to justice within the civil court system is the very high costs of litigation, including the high costs of professional representation.

Paper based discovery is one of the major culprits in driving up litigation expenses to unnecessarily high and largely unaffordable levels for most South African citizens.

All too often, one party produces a lengthy discovery schedule which is met with a standard request from the other party for access to the discovered documents. The current discovery rules then only permit the receiving party to inspect the documents and to make a copy or transcript thereof. In almost every such matter, the receiving party is then forced to tender to pay the photocopying or printing costs of obtaining such copies from the producing party, which the producing party often charges for at rates that sometimes exceed several rand per individual page. The practical example below suffices to underscore the severity of this problem.

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[2] Section 28 of the ECT provides as follows:

28 (1) In any case where a public body performs any of the functions referred to in section 27, such body may specify by notice in the Gazette:

a. the manner and format in which the data messages must be filed, created, retained or issued;

b. in cases where the data message has to be signed, the type of electronic signature required;

c. the manner and format in which such electronic signature must be attached to, incorporated in or otherwise associated with the data message;

d. the identity of or criteria that must be met by any authentication service provider used by the person filing the data message or that such authentication service provider must be a preferred authentication service provider;

e. the appropriate control processes and procedures to ensure adequate integrity, security and confidentiality of data messages or payments; and

f. any other requirements for data messages or payments.

Example:

The relatives of a deceased car-owner file an action against an automobile manufacturer alleging that defective design resulted in a fatal fire and claiming loss of financial support. The automobile manufacturer has all relevant information in electronic format, including design specifications, drawings, testing reports, photographs and emails amounting in all to 100 000 pages of discoverable content.

Following discovery, the surviving relatives request access to these documents and are forced to immediately pay R3 per page for each copy of a document, leaving them with a R300 000 document copying bill. The legal representatives then spend several hundred hours reviewing this information in paper format to find the most pertinent documents and the bill quickly reaches R1m simply in relation to the discovery stage.

If the automobile manufacturer had simply disclosed the electronic formats in which the discovered information was accessible during the discovery process, and if the litigating relatives could then have utilized the discovery rules to request production of those documents in their electronic formats, the production of the relevant information would have taken place at a fraction of the cost and the most pertinent information could have been reviewed and identified much more efficiently.

The proposed amendments to the Rules therefore offer a very significant step on the journey towards more cost-effective litigation and therefore offer substantial support for the promotion of access to justice.

In order to address the question of the 'digital divide' and unequal access to computers, the Attorneys Development Fund (ADF) was established in 2011 as a joint venture between the constituent members of the LSSA (the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers) and the Attorneys Fidelity Fund (AFF) to provide office resources to law firms (mainly sole practitioners) by purchasing these resources on behalf of the practitioners who then repay the ADF for these resources over a prescribed period.

A key element in the ADF programme is that any attorney who receives support also receives technical support to assist the firm to grow into a sustainable practice. There is no longer any need for any attorney practicing in any region of the country to not be able to obtain a basic computer that would enable him or her to receive and review electronic documents and the promulgation of amendments to Rules 35(2) and 35(6) would support the twin objectives of resourcing small practitioners with the necessary equipment and of reducing the costs of litigation for clients.

3. Given that amended rules enabling electronic discovery would not replace standard discovery rules, how would paper-based and electronic discovery work together in the same cases?

The proposed amendments to Rules 35(2) and 35(6) do not require lawyers to convert hardcopy documents to electronic formats. In other words, there is no obligation proposed to be placed on a litigant to scan paper files. Paper files can be discovered and produced in their normal fashion.

The proposed amendments only have impact where the discovering party already has the documents being discovered in electronic format. In these circumstances, the discovery party would be required to disclose that fact along with a description of the electronic formats in which those documents are accessible. Where such disclosures are made, the receiving party would then be placed in a position to elect to receive copies of the documents in those electronic formats.

Although it is estimated that more than 90% of discovered documents are documents that exist electronically, it is quite likely that many cases will also entail discovery of some documents that exist only in hardcopy format. Parties may well choose to scan these documents to electronic format for discovery purposes, but this would not be a requirement of the Rules.

4. Would the amended rules change the nature of a litigant's duty to discover relevant documents?

No, the obligation that arises in the Rules is an obligation in terms of Rule 35(1) to discover "*all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party*".

Pro-forma affidavit paragraph 7 of Form 11 to the Rules provides that a litigant must disclose all such documents and tape recordings to the "*best of [my] knowledge and belief*".[3]

Pro-forma paragraphs 4, 5 and 6 of Form 11 also contemplate disclosure by a litigant of documents relating to the matters in question in an action which once were accessible to a litigant but which are no longer.[4]

Litigants are therefore already under an existing obligation to make diligent discovery of all relevant documents, including documents that may be stored in any accessible back-up tapes or digital or physical archives.

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[3] The *pro-forma* paragraphs in the model affidavit contained in Form 11 read as follows:
I, C.D., the above-named defendant, make oath and say:
(1) I have in my possession or power the documents relating to the matters in question in this cause set forth in the first and second parts of the First Schedule hereto.
(2) I object to produce the said documents set forth in the second part of the said schedule hereto.
(3) I do so for the reason that ..... (here state upon what grounds the objection is made, and verify the fact as far as may be).
(4) I have had, but have not now in my possession or power, the documents relating to the matters in question in this action, set forth in the Second Schedule hereto.
(5) The last-mentioned documents were last in my possession or power.....
.....(state when).
(6) The .....(here state what has become of the last-mentioned documents, and in whose possession they are now).
(7) According to the best of my knowledge and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody or power of my attorney, or agent, or any other person on my behalf, any document, or copy of, or extract from any document, relating to any matters in question in this cause, other than the documents set forth in the First and Second Schedules hereto.

[4] See note 3 above.

These obligations remain unchanged by the proposed amendments to Rules 35(2) and 35(6) and the Courts themselves will develop the common law further as required on a case by case basis.

5. Do the proposed rule changes have any impact on the discovery of privileged emails or other privileged documents?

No. The rules governing privilege apply equally to electronic or hard copy documents and records.

6. What practical guidance will be given to the profession in relation to the discovery of electronic documents?

The LSSA is highly committed and very well positioned and resourced to provide practical guidance to the attorneys' profession and has planned a specific guidance and awareness campaign to ensure that the proposed amendments to the discovery rules are appreciated and understood by High Court litigation practitioners.

A **LSSA Guide to Electronic Discovery** is currently under production with the support of experienced professionals and is intended for completion and initial distribution by as early as 21 April 2017, the date of the LSSA's 2017 AGM. Included within this Guide will be:

- a glossary of industry terms;
- a discussion of relevant factors, questions and considerations to raise with clients at the outset of litigation pertaining to discovery of electronic documents;
- recommended or best practice guidelines for identifying relevant documents and filtering out duplicates;
- recommended or best practice guidelines for listing electronic documents in a discovery schedule, including emails and attachment files;
- recommended or best practice guidelines for producing and exchanging documents electronically, including in terms of the proposed amended rules if the proposed amendments should be adopted by the Rules Board.

The Guide to Electronic Discovery will be offered as a free resource for all practitioners, in a similar manner as the LSSA's 2014 **Guide on the Use of Cloud Computing in Legal Practice**[5] which is available as a free download from the LSSA's website along with a variety of other practical resources and guides at: http://lssa.org.za/legal-practitioners/resources-for-attorneys.[6]

[5] See: http://bit.ly/2ndu1QG

The Guide may also be promoted in article format within the De Rebus journal, the official journal for all attorneys in South Africa, as well as promoted and made available via the LSSA's Legalbrief weekly newsletter.

Working through the **Legal Education Division of the Law Society of South Africa (LEAD)**, an e-discovery seminar series is also planned to be undertaken in all provinces and major centers for all interested attorneys.

The LSSA has also recently published a Case Management textbook for practitioners with some introductory comments included on electronic discovery in this work. An initial e-discovery guidance presentation is scheduled to take place as part of the broader Case Management session to be held at the LSSA's AGM in Port Elizabeth on Saturday 22 April 2017.

The Rules Board can also immediately consider whether a specific amendment to Form 11 would also be of practical assistance to guiding attorneys in meeting the requirements of an amended Rule 35(2). As outlined in the LSSA's first supplementary submission, the main practical effect of the proposed amendment to Rule 35(2) would be to require parties to specify whether the discovered documents are available electronically by specifying the electronic file types, if any, in which the discovered documents exist. This can potentially be done by including a column in a discovery schedule containing a description of the file type (either by disclosing the file type in full or by making use of a generally accepted file type extension abbreviation, such as ".pdf" or ".doc".

Specifically, the Rules Board could amend Form 11 to the Rules by inserting ***a new pro-forma paragraph 2*** so that the revised Form 11 would read as follows:

I, C.D., the above-named defendant, make oath and say:

(1) I have in my possession or power the documents relating to the matters in question in this cause set forth in the first and second parts of the First Schedule hereto.

(2) Where I have in my possession or power any documents set forth in the first part of the First Schedule in electronic format, I have indicated the electronic formats in which such documents exist by listing the file type or file type extension for each such file.

(3) I object to produce the said documents set forth in the second part of the said schedule hereto.

(4) I do so for the reason that..... (here state upon what grounds the objection is made, and verify the fact as far as may be).

(5) I have had, but have not now in my possession or power, the documents relating to the matters in question in this action, set forth in the Second Schedule hereto.

(6) The last-mentioned documents were last in my possession or power..... (state when).

(7) The..... (here state what has become of the last-mentioned documents, and in whose possession they are now).

(8) According to the best of my knowledge and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody or power of my attorney, or agent, or any other person on my behalf, any document, or copy of, or extract from any document, relating to any matters in question in this cause, other than the documents set forth in the First and Second Schedules hereto.

PART 2

Caveat against the Rules Board recommending a complex, non-technology neutral protocol for the listing and exchange of discovered documents

The LSSA has also been furnished with a copy of a recommended discovery listing and exchange protocol that was submitted to the Rules Board by a private consultant, Mr Harrison, on 17 March 2017.

Over the past several months, the LSSA has been open to receiving Mr Harrison's views on proposed amendments to the Uniform Rules to cater for the discovery and production of electronic documents. However, for the avoidance of doubt, Mr Harrison's written submission to the Rules Board of 17 March 2017 is his private submission.

Having had the benefit of reviewing Mr Harrison's recommendations this week and, in particular, the recommended discovery listing and exchange protocol included therein, the LSSA wishes to caution against the immediate introduction of a complex, non-technology neutral protocol for the listing and exchange of discovered documents.

In this regard, it is important to bear in mind that it is the ECT Act that provides the enabling framework for further regulation by public bodies of the production of electronic documents within regulated proceedings, including the litigation process.

Section 2(1) of the ECT Act addresses the overarching purpose of the Act and records the Act's objectives of, *inter alia,* promoting technology neutrality in the application of legislation to electronic communications[7] and ensuring compliance with accepted international technical standards[8].

The LSSA wishes to caution generally against the publication of any additional protocols, best practice guidelines, or recommendations that:

- are not technology neutral;
- are not aligned with the emerging international standard protocol for electronic discovery currently under development by the International Standards Organisation under project ISO-IEC:27050-1;
- are more complex than they need to be in order to benefit from the time and cost-efficiencies of electronic discovery;
- are more complex in some respects than similar protocols introduced to date in other jurisdictions, including the United States and the United Kingdom, where e-discovery practices have already had an opportunity to mature over a number of years;
- undermine the ease with which discovered documents may thereafter be admitted into evidence in terms of section 15 of the ECT Act;

[7] Section 2(1)(f).

[8] Section 2(1)(m).

- may inadvertently lead to an increase in the number of interlocutory applications being filed relating to discovery; and

- introduce the potential for unnecessary costs be to be incurred on electronic discovery software systems and other litigation support expenses associated therewith.

For example, it is unnecessarily restrictive to stipulate that documents must be provided as multi-page PDF images unless otherwise agreed by the parties. A set of JPEG photographs should be capable of being discovered as JPEG files or a set of emails as MSG or EML files. A litigant should not be in a position to force his or her opponent to pass all discovered files through a software system that converts all file types to PDF.

Secondly, parties should not have to first establish that the metadata of a native file is relevant to the issues in dispute in order to request production of copies of discovered items in the native formats in which those discovered items exist. A request for native format production should simply become possible once a discovering party discloses that the files are available for production in those native formats.

Thirdly, it should not be necessary for documents to be marked with their document ID on the first page if available software technology makes that reasonably possible. Available software already does make that reasonably possible but litigants should not necessarily be guided to make use of such software in all cases.

Fourthly, documents should not necessarily have to be provided on a media disk. In many instances, documents may be exchanged more efficiently by other means, including by simply attaching documents to email correspondence.

Fifthly, parties should not be expected to agree on specific privilege requirements for each litigious action nor to individually list their privileged documents with a description of the basis on which privilege is asserted for each individual file or group of files falling under one category of privilege. Parties should continue to deal with privilege in the ordinary manner. If any new recommendations for discovering privileged documents were to be introduced by the Rules Board, those new recommendations should not be different for electronic versus paper documents.

Sixthly, parties should not be placed under a new duty to consult and agree on a set list of common names to ensure consistency across their discoveries. If any such duty was to be introduced, it should not be applied only to the discovery of electronic documents but to paper documents too.

Seventhly, parties should not be placed under a positive duty to investigate whether email chain technology may assist them in discovering only top-level versions of emails that are part of a chain. This would represent an unnecessary codification of an attorney's general duty to act in the best interests of his or her client and to represent his or her client in a professional manner. Codifying the Rules by introducing specific technology considerations opens up the Rules to further "best-practice" codification in a multitude of other areas, for example, the manner in which an attorney could or should make use a modern electronic precedent system to efficiently draw a summons or other form of pleading.

Eighthly, parties' obligations to avoid discovering duplicate documents should not change whether they are discovering electronic or paper documents. Parties should also not have to discuss their de-duplication methods at an early stage in litigation, particularly since the obligation to discover only arises after the pleadings have closed and dealing with de-duplication early in proceedings front-loads discovery costs unnecessarily in many actions that might settle before the close of proceedings.

The LSSA is committed to assisting attorneys through the publication of an electronic discovery best practice guide as soon as possible (as outlined in Part 1 above). However, the LSSA respectfully submits that the publication of such a best practice guide should take place outside of the Rules and that the amendments to the Rules themselves should be simple, certain and clear while accommodating of a broad range of circumstances and cases. This electronic discovery best practice guide should ideally be published after the amended Rules have been finalised (in order to properly take the new amended Rules into account) but ideally before those amended Rules come into practical effect on a later implementation date.

We look forward to engaging with the Rules Board further and thank you for considering this second supplement to our submissions in support of amendments to Rule 35 to cater for the discovery and production of documents in electronic form.