



DISCUSSION PAPER 175

**REVIEW OF THE LAWS PERTAINING TO EVIDENCE
IN CRIMINAL PROCEEDINGS**

**PROJECT 151: THE REVIEW OF THE CRIMINAL
PROCEDURE ACT 51 OF 1977
(A SUB-PROJECT OF THE REVIEW OF THE
CRIMINAL JUSTICE SYSTEM)**

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INTRODUCTION

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EXECUTIVE SUMMARY

1 The discussion paper examines and discusses the South African law of evidence within the purview of the broader criminal justice system and, more specifically, the intersection between the law of evidence and the criminal justice process.

2 The discussion paper presents the status of South Africa's criminal procedure and identifies gaps, with specific reference to relevant key aspects, principles and rules of evidence insofar as they relate to criminal proceedings. It is based on a study of the common law of evidence, the Criminal Procedure Act, No. 51 of 1977, and various relevant and applicable pieces of legislation in criminal proceedings.

3 A comparative study and review of international developments in relation to the law of evidence, more particularly technological developments and their impact on the gathering, presentation and evaluation of newer and emerging forms of evidence are included. The focus is on common law jurisdictions, which follow the accusatorial system, and not on civil law jurisdictions, which adopt the inquisitorial system.

4 The paper emphasizes that relevance is the primary determinant of admissibility. While it recognises that the stricter standard of proof beyond a reasonable doubt should be maintained, there is a need to streamline the admissibility process, reducing reliance on complex common law rules, and fostering a more robust but flexible approach.

5 The paper concludes that a comprehensive codification of the law of evidence in criminal proceedings is not desirable. Instead, it adopts an approach of reviewing and reforming specific, problematic areas of the law of evidence. The proposed reforms are intended to ensure that the law of evidence is consistent with the constitutional right to a fair trial, including the rights of accused persons, while ensuring the safety and security of the public.

CHAPTER 1: BACKGROUND

1.1 This paper deals with the laws which regulate the law of evidence in South Africa. It forms part of the review of the criminal justice system. It follows upon the appointment, in terms of Section 7A(1)(b)(ii) of the South African Law Reform Commission Act, 1973¹, of an Advisory Committee on Criminal Procedure Investigation² chaired by Judge MF Legodi, retired Judge President of the Mpumalanga Division of the High Court. The CPI is concerned with a comprehensive review of the criminal justice system, which inherently incorporates the conduct of criminal trials in the lower courts and the high courts, from inception to finalisation.

1.2 One of the fundamental aspects of a criminal trial is the procurement and presentation of evidence which must provide the foundation for proving or disproving allegations of criminal conduct, guide investigations and ultimately influence legal outcomes. Evidence is used to establish facts, connect individuals to crime and support or refute claims made during investigations and during trial. When properly collected, documented and analysed, evidence becomes relevant and ensures a fair and just legal process. The focus of this paper is a review of the laws pertaining to evidence.

1.3 The current investigation on the law of evidence is not the first one. In 2008, the South African Law Reform Commission³ published for discussion and comments **Issue Paper 26**,⁴ which examined various issues relating to the law of evidence in general. Issue Paper 26 was followed by **Issue Paper 27**,⁵ which was published in 2010 and discussed various concerns relating to electronic evidence in criminal and civil proceedings. Issue Paper 26 was preceded by a preliminary study in 2003, conducted by the SALRC under the auspices of a project led by Professor P J Schwikkard. A Committee Paper⁶ was published in which certain aspects of the law of evidence, such as relevance and hearsay evidence, were discussed.

¹ Act 19 of 1973

² The CPI

³ SALRC

⁴ *Review of the Law of Evidence*

⁵ *Electronic Evidence in Criminal Proceedings: Admissibility and Related Issues*

⁶ Committee Paper 1024: Project 126 *Review of the Law of Evidence* (2003)

1.4 A core body of the South African Law of Evidence is rooted in the common law. Aspects of the common law of evidence consist of a body of rules and principles, developed through judicial decisions, that govern the admissibility and presentation of evidence. Modern developments, such as rapid advances in technology and changing societal norms, have, however, led to advancements that have created a gap in the legal framework.

1.5 Modern technologies have brought with them critical issues regarding the admissibility of digital evidence, evolving standards for witness testimony and increased scrutiny of computer or machine generated data and information. These in turn create challenges in areas such as data privacy, the reliability of new technologies and ensuring fair and equitable access to justice.

1.6 The increasing prevalence of digital devices and online activity has created a need for new laws that address the handling and admissibility of digital evidence, including social media posts, emails, electronic documents and other computer generated materials; the new technology of artificial intelligence also becomes relevant. New methods of gathering and presenting evidence, such as video conferencing, have emerged. There is also a growing focus on the reliability of vulnerable witnesses and the need for special protections. The role of expert witnesses is also constantly evolving, and courts must grapple with the reliability and admissibility of emerging scientific and technical expertise.

1.7 This paper examines the law relating to the use of evidence, the admissibility of such evidence, the presentation of evidence through electronic means and the reform of the law of evidence insofar as it relates to new technologies. In order to place the examination in context, it is necessary to provide an overview of the law of evidence as a whole.

CHAPTER 2: INTRODUCTION

2.1 In modern times, the law of evidence is taken for granted; yet, the law of evidence has come a long way, owing its origin to ancient legal codes, medieval legal developments and English common law, and is now regarded as a rational system of law, thus making a giant leap from trial by ordeal to rational fact-finding. The modern law of evidence has thus become a dynamic body of law which is constantly adapting to new challenges and technologies.

2.2 Historically, the presentation of evidence has always required the presence of witnesses in court. Thus, the ancient Hammurabi Code⁷ included provisions which dealt with evidence and required witnesses to take an oath. In the Old Testament, the Mosaic Law required the testimony of at least two or three witnesses, and not just one, for a criminal conviction. This principle is explicitly stated as follows: "A single witness shall not suffice against a person for any crime or for any wrong in connection with any offence that he has committed; only on the evidence of two witnesses, or of three witnesses, shall a charge be established".⁸ The requirement of more than one witness was generally aimed at preventing wrongful convictions based on the testimony of a single individual.⁹

2.3 The Mosaic Law also dealt with the issue of false testimony. It provided that if a witness maliciously or falsely accused someone, such a witness should be punished in the same way the accused would have been punished.¹⁰ This provision served as a deterrent against false testimony and ensured that the legal process was not abused.

2.4 Ancient Roman Law gave judges the freedom to evaluate evidence. The burden of proof, however, rested with the party making an assertion. It prohibited convictions based only on suspicion. Medieval Roman law, on the other hand, was characterised by the development of a more elaborate system of categorising evidence into written law (*jus scriptum*) and unwritten law (*jus non scriptum*). Written law consisted of legislation and other written sources, and unwritten law primarily consisted of customs. A further development of Roman law was

⁷ Circa 1754 BC

⁸ Deuteronomy 19:15

⁹ Section 208 of the Criminal Procedure has introduced an exception and provides that an accused person may be convicted on the evidence of a single witness. However, a conviction based on the evidence of a single witness would be sustainable only if it is clear and satisfactory in all material respects: See *R v Mokoena* 1932 OPD 79 at 80. However, courts often apply a cautionary rule and scrutinize the evidence of a single witness with extra care, especially in cases involving children and sexual offences.

¹⁰ Deuteronomy 19: 16 – 19.

the grading of evidence into full proof, half-proof and suspicion, which unfortunately influenced the use of torture to extract further evidence.

2.5 English common law, which developed over centuries through judicial decisions, significantly shaped the law of evidence in many common law jurisdictions, including South Africa. The English common law tradition, with its emphasis on the adversarial system of trial, heavily influenced the way in which evidence is presented and evaluated. The body of English common law of evidence consists of rules which prescribe and determine what types of evidence are admissible, how evidence should be presented in court, and how evidence is used to establish facts.

2.6 The rules of evidence dictate what information can be obtained, presented, considered and used in legal proceedings to prove facts. They determine what evidence is admissible and how it should be used to persuade a judge to reach conclusions. The four key concepts of the rules of evidence are **admissibility**, **probative value**, **burden of proof** and **standard of proof**.

2.7 In the law of evidence, admissibility determines what evidence can be presented in court, probative value assesses its usefulness in proving a fact in issue, burden of proof dictates who must prove a fact, and standard of proof defines the degree to which that fact must be proven.

2.8 **Admissibility** is concerned with whether evidence can or should be allowed to be presented in court. For evidence to be admissible, it must be relevant to the facts in issue and comply with the rules of evidence. Common reasons for excluding evidence include hearsay, privilege and illegally obtained evidence. A “trial within a trial” may be held in order to determine the admissibility of certain evidence.

2.9 **Probative value** relates to the extent to which evidence could rationally affect the assessment of a fact in issue. Evidence with a high probative value is likely to be more persuasive in proving or disproving a fact. Evidence with little probative value may be excluded on the basis that it has the potential to confuse the issue or mislead the court. In assessing probative value, courts consider factors such as the reliability of the evidence and the possibility of prejudice.¹¹

¹¹ See Theophilopoulos C and Bellengere A “Relevance, Admissibility and Probative Value in a Rational System of Evidence” *PER/PELJ* 2022 (25); [2022] PER 58.

2.10 The **burden of proof** determines which party in legal proceedings bears the responsibility of proving a particular fact. In civil proceedings, the burden of proof generally rests on the plaintiff who is making a claim or an applicant who seeks relief in motion proceedings. In criminal proceedings, the burden of proof rests on the prosecution which institutes the proceedings as a representative of the state, decides whether to bring charges and has to present evidence to prove guilt. Significantly, the prosecution is the gatekeeper of the criminal justice system and is expected and required to ensure a fair trial for both the accused and society.

2.11 The **standard of proof** is concerned with the degree to which the burden of proof must be satisfied. In civil proceedings, the standard of proof is on a balance of probabilities or preponderance of evidence. In criminal proceedings, the standard of proof is beyond a reasonable doubt. The higher standard of proof in criminal proceedings is intended to ensure a fair and just outcome by requiring a more stringent level of certainty.

2.12 There are other key aspects of the rules of evidence which underpin the law of evidence, such as **relevance**, **sufficiency** and **authenticity**. These aspects are crucial principles which ensure that the evidence gathered and presented is admissible and persuasive in legal proceedings. Relevance establishes a logical connection between the evidence and the fact in issue, sufficiency ensures that there is enough evidence to support a conclusion and authenticity verifies that the evidence is what it claims to be.

2.13 Evidence is relevant if it logically tends to make a fact in issue more or less probable. The question is whether the evidence has a tendency to prove or disprove an important fact in the case. Relevance is a threshold requirement for admissibility, in that evidence that is not relevant is generally not admissible. Relevance is, however, not an inherent quality of the evidence itself but rather a relationship between the evidence and the fact in issue.

2.14 Sufficiency relates to the amount or weight of evidence needed to prove a fact in issue. It means that there must be enough evidence to support a finding or conclusion. Sufficiency is closely related to the concept of probative value, which is the extent to which a piece of evidence proves or disproves a fact and is therefore persuasive in making a finding or reaching a conclusion.

2.15 Authenticity means that the evidence is what it purports to be. It ensures that the evidence is genuine and not fabricated or altered. Authenticity is essential in ensuring the reliability of evidence.

2.16 The law of evidence categorises evidence based on its source, form and purpose in legal proceedings. The various categories include testimonial, real, documentary and demonstrative evidence. Each category plays a distinctive role in proving or disproving facts.

2.17 **Testimonial evidence** is evidence given by a witness under oath, relaying their experiences or observations in relation to a case. **Real evidence**, also sometimes referred to as physical evidence, consists of tangible objects which are directly connected to the case, such as weapons, fingerprints, or DNA. **Documentary evidence** consists of any written materials relevant to the case, such as contracts, official records or letters. **Demonstrative evidence** is any evidence which helps to illustrate something relevant to the case, such as maps, sketch plans or charts.

2.18 A fundamental aspect of the law of evidence is that it makes a distinction between direct evidence and circumstantial evidence. Direct evidence proves a fact directly, without the trier of fact having to make any inferences (e.g. the testimony of a witness who was present during the commission of a crime and testifies to what he actually saw or observed). **Circumstantial evidence** requires the fact-finder to draw an inference from various facts and connect these facts to the fact in issue.

2.19 Of significance for present purposes, two other categories of evidence must also be mentioned; that is expert evidence and hearsay evidence. **Expert evidence** is evidence presented by a qualified expert in a specific field to assist the court in understanding complex technical or specialised issues. **Hearsay evidence** is evidence tendered by someone who testifies about something which he or she did not personally witness but heard or learnt about it from someone else. At common law, subject to some exceptions, hearsay evidence is generally considered unreliable and inadmissible because the original speaker or source of the information is not present to be cross-examined, and the information may be inaccurate or may have been misinterpreted.

2.20 It is within the context of the above introduction that this paper examines and reviews the use of evidence in criminal trials and whether there is a need for a reform of the law of evidence, in particular legislative reform in light of the present legislative framework as set out in the Law of Evidence Act, 1988 and the proliferation of technological developments. The

overriding rationale is to examine the law relating to evidence in criminal proceedings within the existing legislative framework and in light of a logical and practical application of the rules of evidence, addressing the challenges posed by newer forms of evidence resulting from technological developments.¹²

¹² The following general sources were consulted to extrapolate a logical and practical formulation and application of the rules of evidence: **A Digest of the Law of Evidence**, Sir James Fitzjames Stephen (Fifth Edition, MacMillan and Company, 1887); **A Manual of the Law of Evidence**, William Leader (Sweet & Maxwell, 1889); **A Practical Approach to Evidence for Judicial Officers – Common Law Sources and Applications**, Twomey M, Barnes J, Hackett J and Ebrahim M (eds), (USAID, Judicial Institute for Africa and University of Cape Town, 2023); **Principles of Evidence** Schwikkard P.J, Van der Merwe S.E *et al*, Juta & Co. 3rd ed. 2010.

CHAPTER 3: CURRENT STATE OF SOUTH AFRICAN LAW OF EVIDENCE

3.1 South African law of evidence is at present a combination of common law principles and statutory provisions; the primary focus is on relevance, admissibility and the rules governing the presentation and evaluation of evidence in legal proceedings. By and large, the statutory provisions which deal with the law of evidence are confined to admissibility and sufficiency.

3.2 In general, the rules of evidence governing admissibility and sufficiency apply to both civil and criminal proceedings, with the exception that the standard of proof in criminal proceedings is higher. The law of evidence in relation to criminal proceedings is much more extensive than in civil proceedings. In criminal proceedings, the common law, statutory provisions and the Constitution¹³ contain many safeguards which are aimed at protecting accused persons from wrongful convictions and which seek to strike a balance between the prosecution (representing the state) and accused persons. The higher standard of proof in criminal proceedings, namely proof beyond a reasonable doubt, signals the seriousness of criminal proceedings.¹⁴

3.3 Current South African criminal law of evidence is a dynamic field, characterised by a focus on the burden of proof, the admissibility of evidence and fairness. Existing rules of evidence are shaped by rationalist values, with the aim of ensuring accuracy in decision-making but with due regard to the acceptability of verdicts in a democratic society founded on constitutional values.

3.4 The common law rules and principles of evidence still constitute the core framework of South African criminal law of evidence. The burden and standard of proof, the admissibility of evidence, its relevance and its sufficiency are still governed by common law principles.

3.5 While the burden and standard of proof are important in determining who bears the burden to prove any allegation against an accused person and the standard which must be met to prove his or her guilt, it is the admissibility of evidence which ultimately determines

¹³ Constitution of the Republic of South Africa, Act 108 of 1996 ('the Constitution')

¹⁴ See *S v Baloyi* 2000 (1) SACR 81 (CC); *Magmoed v Janse Van Rensburg* 1993 (1) SACR 67 (A) at 100j and at 101a.

which evidence can be presented to prove guilt. It is only evidence which is admissible, relevant and sufficient that can lead to a conviction.

3.6 Admissibility largely depends on the nature or type of evidence that is being presented. Testimonial evidence, which consists of oral statements made under oath in court, places emphasis on the credibility and reliability of witnesses and may require corroboration in certain cases, especially in cases involving a single witness or where the evidence presented is unreliable.

3.7 The testimony of a single witness, which is the testimony of only one person presented to support a claim or allegation, is regulated statutorily in criminal proceedings by the Criminal Procedure Act.¹⁵ Section 208 of the Criminal Procedure Act provides that an accused person may be convicted on the evidence of a single witness. However, for a conviction to be sustainable on the evidence of a single witness, the evidence must be clear and satisfactory in all material respects.¹⁶

3.8 The key consideration in assessing the evidence of a single witness, therefore, is that it must be sufficiently clear, credible and reliable. In certain instances, the court may be required to apply the cautionary rule, particularly where the witness may have a motive to be dishonest or where the circumstances surrounding the event were not conducive to accurate observation.

3.9 The cautionary rule is a rule of practice which requires the trial court to recognise the dangers inherent in the acceptance of the evidence of a single witness and seeks to strive for a safeguard of some factor which reduces the risk of a wrong conviction, such as corroboration. Corroboration is any other evidence which supports the evidence of the single witness and which detracts from the evidence of the accused and renders it less probable upon one or more of the issues in dispute.¹⁷

3.10 In *Rugnanan v S*,¹⁸ the Supreme Court of Appeal remarked that the cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism, but the requirement is that it should be substantially satisfactory in relation to the material

¹⁵ Act 51 of 1977 (“Criminal Procedure Act”)

¹⁶ See *Baisley v S* (CA & R 244/2022 [2024] ZAECGHC 37 (28 March 2024).

¹⁷ *R v W* 1949 (3) SA 772 (AD) at 778/9.

¹⁸ (259/2018) [2020] ZASCA 166 (10 December 2020).

aspects or be corroborated. Corroboration may be by other testimonial evidence, by circumstantial evidence, by documentary evidence or any other evidence, such as physical evidence.

3.11 Satisfaction of the cautionary rule cannot per se justify the conviction of an accused person. The ultimate requirement is that the guilt of an accused person must be proved beyond a reasonable doubt; this depends upon a consideration of all the evidence and the degree to which safeguards against a wrongful conviction are taken into consideration.

3.12 A good example of a safeguard against wrongful convictions is the admissibility of hearsay evidence. In South African law, hearsay evidence is generally not admissible in criminal or civil proceedings. Section 3 of the Law Evidence Amendment Act,¹⁹ however, outlines an exception and specific conditions for the admissibility of hearsay evidence. In terms of Section 3(1)(a) of the Evidence Amendment Act hearsay evidence may be admitted if (a) each party against whom the evidence is to be adduced agrees to the admission thereof at the proceedings, (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at the proceedings or (c) even in the absence of consent or the declarant's testimony the court determines that it is in the interest of justice to admit the evidence, having regard to various factors, namely (i) the nature of the proceedings, (ii) the nature of the evidence, (iii) the purpose for which the evidence is offered, (iv) the probative value of the evidence, (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, and ((vi) any potential prejudice to a party in the proceedings and (vii) any other factor which in the opinion of the court should be taken into account.

3.13 Section 3(4) of the Evidence Amendment Act clearly defines hearsay evidence within the context of criminal or civil proceedings. It defines 'hearsay evidence' as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence". What becomes clear from this definition is that the *probative value*²⁰ of evidence and the *credibility*²¹ of the person giving it is fundamental in determining its admissibility.

¹⁹ 45 of 1988. ("Evidence Amendment Act").

²⁰ Emphasis.

²¹ Emphasis.

3.14 Section 3(1)(c)(vii) is perhaps the most significant statutory development in the admissibility of hearsay evidence in particular and perhaps even in the admissibility of all evidence in general. It introduces the concept of the ‘interests of justice’ as a rational and fundamental value which should play a critical role in the assessment and evaluation of evidence. It is submitted that the concept of the ‘interests of justice’ should inform any efforts to modernise, harmonise, and clarify the South African law of evidence.

3.15 The Evidence Amendment Act was introduced in South Africa primarily to modernise and clarify the law of evidence, particularly in relation to hearsay evidence, foreign law and customary law. As already appears from the above, it introduced general requirements for the admissibility of hearsay evidence and specified exceptions to the rule against hearsay. More fundamentally, it allowed for judicial notice of customary law.

3.16 Oral evidence in South African customary law is central to its nature as it is an unwritten, evolving system, often dependent upon witness testimony to prove traditional practices in court. While historically oral, modern litigation under the Evidence Amendment Act requires customary rules to be proved if not easily ascertainable, allowing courts to take judicial notice or to hear expert testimony.

3.17 Most significantly, the Evidence Amendment Act introduced the concept of the ‘interest of justice’. Due to the nature of oral tradition, hearsay evidence regarding custom may be admitted if it meets the ‘interest of justice’ test as outlined in Section 3 of the Act. The weight of oral evidence, however, depends heavily on the credibility of the witnesses and their knowledge of the community’s customs.

3.18 The “interests of justice” is a key concept of constitutional law which is important when developing the common law. It does not have a fixed definition but is rather a flexible standard that guides the courts in making decisions that are fair, equitable and promote the overall goals of the Constitution. It allows courts to adapt their approach to different situations, ensuring flexibility and a case-by-case approach in procedural law.

3.19 The relevance of the interests of justice, in relation to the admissibility of hearsay evidence, is illustrated by the judgments of the minority and the majority in *Kapa v S*.²² Mbatha

²² (CCT 292/21) [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) 24 January 2023 (“the *Kapa* case”)

AJ, writing for the minority, took the view that the reason for the inadmissibility of hearsay evidence is that “the statutory interests of justice test for the admission of hearsay evidence has a constitutional dimension, and the admission of hearsay evidence might be so unfair as to infringe the [accused’s] fair trial rights”.²³ However, Majiedt J, writing for the majority, took a different approach and said that “[b]ut where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed.”²⁴

3.20 The courts’ interpretation of Section 3(1) of the Evidence Amendment Act is encapsulated in the judgment of the minority in the *Kapa* case where it is stated that “[c]ourts are generally hesitant to admit hearsay evidence that is decisive in convicting an accused. The Supreme Court of Appeal in *Ndhlovu* stated that “admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused” should only be done “if there is compelling justification for doing so”.²⁵

3.21 The judgment of the majority, on the contrary, is underpinned solely by the concept of the “interests of justice”, without any recourse to the right to a constitutional right or the existence of a compelling justification for evidence to be admissible. Majiedt J, opined that the minority judgment “impermissibly evaluates the probative value of the statement²⁶ in a piecemeal fashion. It should instead apply a holistic approach, assessing whether on the whole the statement was of probative value in light of all the other circumstantial evidence taken together. Approached this way, the outcome must be different”.²⁷

3.22 The significance of the majority judgement in the *Kapa* case is that the interests of justice and the probative value of evidence, more than anything, are the key determinants of admissibility. It may very well be that the admission of certain evidence, such as hearsay or video or digital evidence as discussed below, may be prejudicial to an accused person. The Constitutional Court was, however, alive to the prejudice suffered by the accused person in the *Kapa* case. As Majiedt J stated, “[t]he prejudice occasioned to the applicant as an accused

²³ At para. [4], citing *Savoi v National Director of Public Prosecutions* [2014] SACC 5; 2014 (5) BCLR 606 (CC) at para. 49, *S v Basson* [2004] ZACC 13; 2005 (1) 171 (CC); 2004 (6) BCLR 620 (CC) at para. 26 and *S v Ndhlovu* [2002] ZASCA 70; 2002 (6) SA 305 at para. 16.

²⁴ At para. [110].

²⁵ At para [58], citing *S v Ndhlovu* (*supra*) at para. 39, relying on *S v Ramavhale* [1996] ZASCA 14; 1996 (1) SACR 639 (SCA) at 649.

²⁶ Or any evidence, for that matter.

²⁷ At para. [98].

person is significant. The accused was deprived of an opportunity to cross-examine the witness, which could have shed light on the credibility and reliability of the witness, her powers of observation and so forth.”²⁸

3.23 The real question in the *Kapa* case was whether the admission of hearsay evidence violates the right to challenge evidence as entrenched in Section 35(3)(i) of the Constitution, and consequently the right to a fair trial. In answering this question, the Constitutional Court relied on *S v Ndhlovu* and said the following:²⁹

The Supreme Court of Appeal in Ndhlovu considered whether the admission of hearsay evidence in itself violates the constitutional right to challenge evidence as entrenched in section 35(3)(i) of the Constitution and, consequently, the right to a fair trial. The Court held that the criteria in section 3(1)(c) – which must be “interpreted in accordance with the values of the Constitution and the ‘norms of the objective value system’ it embodies” – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of an accused.³⁰ The Supreme Court of Appeal emphasised:

The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 36) to ‘challenge evidence’. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed.³¹

3.24 In criminal proceedings, the evidence presented by the prosecution is evidently intended to prove the state’s case, but as the Constitutional Court stated in the *Kapa* case:³²

It bears emphasis that the fact that the evidence in question evidently strengthens the prosecution’s case does not render the evidence prejudicial to an accused. In this regard, the Supreme Court of Appeal in *Ndhlovu* held:

The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must however be discountenanced. A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute ‘prejudice’.

²⁸ At para. [100].

²⁹ At para. [101].

³⁰ *Ndhlovu (supra)* at para 16.

³¹ *Id* at para 24.

³² At para. [102].

Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice."³³ (Emphasis added and footnotes omitted.)

3.25 The admissibility of evidence is therefore not solely dependent on the prejudice which an accused person may suffer as a result of its admission. This much is clear from the judgment of the Constitutional Court in the *Kapa* case, where Majiedt J said the following:³⁴

There can hardly be any doubt that the applicant is being substantially prejudiced by the admission of the statement as he is deprived of the opportunity to cross-examine the deponent. But that is not the only consideration – the Court must also consider the fact that the witness is deceased, and the overriding consideration of the interests of justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence.

3.26 The approach of the Constitutional Court in the *Kapa* case illustrates a practical approach to the admissibility of evidence, with an emphasis on the probative value of the evidence tendered and the interests of justice. As can be deduced from the provisions of Section 3(1)(c) of the Evidence Amendment Act, the interests of justice, taking into account factors such as the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence and any other relevant factor in the specific case, are of paramount importance in the admission and evaluation of evidence.

3.27 In light of the approach adopted by the Constitutional Court in the *Kapa* case, it is worthwhile to consider the historical origin of the Evidence Amendment Act. This may shed some light on shaping the South African law of evidence in light of technological developments such as the proliferation of video footage, mobile phone footage and electronic communication.

3.28 As already stated, the Evidence Amendment Act was enacted primarily to modernise and clarify the law of evidence, particularly regarding hearsay, foreign law and customary law.

³³ *Id* at para 50.

³⁴ At para. [103].

It did not go further enough, however, to consider technological developments. The only amendment in relation to technological evidence was the introduction of Section 158 into the Criminal Procedure Act³⁵ in 1996 by the Criminal Procedure Amendment Act.³⁶ Section 158 introduces a mechanism through which an accused person may give evidence by means of closed circuit television or similar electronic media.³⁷ It does not, however, address the actual admissibility, reliability and probative value of the evidence being tendered or the form or nature of the evidence itself.

3.29 For the purpose of this paper, it is important to make a distinction between testimonial evidence, physical evidence and documentary evidence. Testimonial evidence, as we have seen, is oral evidence given by a person in court under oath. Physical evidence refers to tangible objects that are presented as evidence, such as weapons, fingerprints or crime scene photos. Documentary evidence includes any written document, such as written agreements, letters, medical records, official records and records of meetings that are presented as evidence. Both documentary physical and documentary evidence are real evidence.

3.30 To the extent that electronic evidence, such as emails, digital photographs, ATM transaction logs, word processed documents, instant message histories, files saved in computer programs, spreadsheets, internet browser histories, contents of computer memory, computer backups, computer printouts, GPS tracks and digital video or audio files etc., are tangible objects that can be presented to the court to demonstrate or to prove a fact they may be regarded as physical evidence. They may, however, be regarded as documentary evidence when they are presented as documents to prove the contents thereof.

3.31 Electronic evidence, however, properly viewed, falls within a category of its own, namely technological *digital evidence*. Digital evidence is any information stored or transmitted in binary form, meaning a code or system that uses only two digits (0 and 1) to represent and process all data and instructions. The system, also known as base-2, is fundamental to how computers or electronic machines store, process and communicate information, including text, audio and video, etc. Digital evidence tends to be more voluminous, more difficult to destroy, easily modified, easily duplicated, potentially more expressive and more readily available.

³⁵ 51 of 1977 ("Criminal Procedure Act").

³⁶ 86 of 1996.

³⁷ This would include electronic newer video conferencing applications such as Microsoft Teams or Zoom.

3.32 The South African Law Reform Commission has previously considered whether the application of the Computer Evidence Act³⁸ should be extended to criminal matters but deferred any decision in that regard to further investigation³⁹. That was, however, superseded by the Electronic Communication and Transactions Act.⁴⁰

3.33 The ECTA governs electronic communications and transactions, with the aim of promoting legal certainty and trust in digital environments. It provides a legal framework for electronic transactions, data protection and cybercrime. It gives legal validity to electronic communications and contracts, thus equating them to paper-based transactions and provides that electronic signatures are legally binding under specific conditions. It makes provision for the legal recognition of data messages⁴¹ and recognises that information in the form of a data message constitutes writing.⁴² It also makes provision for the use and recognition of advanced electronic signatures.⁴³

3.34 “Data” is defined in the Act as “electronic representations of information in any form”. A ‘data message’ is defined as data generated, sent, received or stored by electronic means and includes (a) a voice, where the voice is used in an automated transaction; and (b) a stored record. In simple terms, the word “data” means recorded information, regardless of form or the media on which the data is recorded.

3.35 Section 15 of ECTA deals specifically with the admissibility and evidential weight of data messages. It provides that “[i]n any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence – (a) on the mere grounds that it is constituted by a data message; or (b) if it’s the best evidence that the person adducing it could reasonably be expected to obtain, on the ground that it is not in its original form.⁴⁴ In terms of Section 15(2) information in the form of a data message must be given due evidential weight.

³⁸ 57 of 1983.

³⁹ South African Law Reform Commission, Issue Paper 26, Project 126, **Review of the Law of Evidence** (2008).

⁴⁰ 25 of 2002 (“the ECTA”).

⁴¹ Section 11.

⁴² Section 12.

⁴³ Section 13.

⁴⁴ Section 15(1).

3.36 Section 15(3) deals with the assessment of the evidential weight of a data message. It provides that “[i]n assessing the evidential weight of a data message, regard must be had to – (a) the reliability of the manner in which the data message was generated, stored or communicated; (b) the reliability of the manner in which the integrity of the data message was maintained; (c) the manner in which its originator was identified; and (d) any other relevant factor.

3.37 Section 15(4) deals with the admissibility of a data message made in the ordinary course of business or a copy, printout or extract thereof. It provides that “[a] data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible against any person and rebuttable proof of facts contained in such record, copy, printout or extract.”

3.38 Certain principles of evidence emerge from Section 15 of ECTA. First, as a general rule, data messages cannot be excluded as being inadmissible purely on an application of the ordinary rules of evidence. Second, data messages cannot be excluded purely on the ground that it is not in its original form. Third, data messages do carry evidential weight. Fourth, the evidential weight of data messages must be assessed in light of its functionality, its integrity and the identification of the originator. Lastly, authenticated data messages generated in the course of business, or copies or printouts or extracts thereof, are admissible on their mere production and constitute rebuttable proof of the facts contained therein.

3.39 The principles captured in Section 15 of the ECTA are largely consistent with those applicable to the admissibility of documentary evidence. A document is simply a physical object which is produced or generated by a person, contains information or data and can be tendered as evidence to prove the truth of its content. Similarly, a data message, as defined in the ECTA, is a physical object which is produced or generated electronically by a person, contains information or data and can be tendered as evidence to prove the truth of its content.

3.40 The interpretive approach of regarding a data message as a document is supported by Section 221(5) of the Criminal Procedure Act. Section 221(5) provides that a document includes any device “by means of which information is recorded or stored”. A data message is in and of itself a component of a device on which it is stored and from which it is generated and transmitted; it is therefore difficult to understand why a data message should not be

regarded as a document or, at the very least, a part of a document. It has been stated as early as 1919 that the word document, “is a very wide term and includes everything that contains the written or pictorial proof of something. It does not matter of what material it is made”.⁴⁵

3.41 Professor J Hofman⁴⁶ similarly contends, correctly so, that graphics, audio and video that are in a data message form should be treated the same way as documents. He argues that the view that data messages should be regarded as real evidence “is conceptually simple and appeals to those who dislike excluding any evidence. But it does not take into account the way graphics, audio and video are, to an ever-increasing extent, recorded, stored and distributed in digital form and fall under the definition of data message. This means that graphics, audio and video now resemble documents more than the knife and bullet that are the traditional examples of real evidence. In data message form, graphics, audio and video are susceptible to error and falsification in the same way as data messages that embody documentary content. They cannot prove themselves to be anything other than data messages and their evidential value depends on witnesses who can interpret them and establish their relevance.”

3.42 Data messages are potentially mutable and transient. They can easily be tampered with, modified or deleted from the very electronic device on which they are stored, generated and transmitted. It is therefore more appropriate to consider them as documentary evidence rather than as “real evidence”. In *S v Ndiki*⁴⁷ Van Zyl J adopted the correct approach when he expressed the view that the first step in considering the admissibility of documentary evidence is to examine the nature of the evidence in issue to determine what kind of evidence one is dealing with and what the requirements of its admissibility are.

3.43 The distinction between documentary evidence and physical or real evidence may become relevant, however, in relation to the classification of electronic data for criminal law purposes. The South African Criminal Law Reform Commission has previously expressed its support for the distinction between documentary and real evidence in the context of data messages and acknowledged that this area requires law reform.⁴⁸

⁴⁵ *Seccombe and Others v Attorney-General* 1919 TPD 270 at 277.

⁴⁶ J Hofman *Electronic Evidence in Criminal Cases* 2006 SACJ 257 at 268.

⁴⁷ [2007] 2 All SA 185 (CK).

⁴⁸ SALRC *Discussion Paper 131*, pp 68-70 and 85.

CHAPTER 4: CLASSIFICATION OF ELECTRONIC DATA

4.1 For practical reasons, it may very well be that, in light of evolving technology, there is a need for reform with regard to the classification of electronic data for criminal law purposes. This is so because modern electronic data consists of various forms of data which are not easily capable of classification for the purpose of making a distinction between one form of data and another.

4.2 Electronic evidence consists of data or information which, in one way or another, relates to individuals and their personal lives. Access to or disclosure of such data or information can be more or less intrusive, depending on a number of factors such as the nature of the information, the reason for access or disclosure and the means through which the information is accessed or disclosed. As a general rule, intrusion into an individual's personal life must be proportionate to the ends for which the data or information is sought.

4.3 There are competing interests that need to be reconciled when accessing electronic data, namely *privacy* considerations (personal private data, especially sensitive data), *criminal justice* considerations (the need to investigate and prosecute crime) and *fair trial* considerations (an accused's right to a fair trial). Neither of these considerations is absolute and accessing and disclosing evidence which is in the form of electronic data must be based upon principles of necessity and proportionality, and the purpose for which the evidence is gathered and presented.

4.4 Electronic evidence dates back to the old telephony, audio and video technology and early email era, where the amount of stored data was relatively limited. However, in today's digital age, the sheer amount and diversity of services (e.g. social media, instant messaging, video sharing and numerous other apps) and the different types of data stored, proper classification and regulatory regime becomes necessary. Within the digital environment, different jurisdictions may, however, have different service providers who fall under different classes and legal regulations. In many cases, the classifications and regulations are broad and may encompass any service offered over the internet.

4.5 The new technological environment, therefore, raises the question of the adequacy of the traditional classification of data and correlation between different types of data, the manner or means of accessing the data and the level of procedural protections for obtaining it. It is in

this context that the commonly used categories of electronic evidence are considered, with a view to exploring the challenges of proposing a better framing of the problem.

4.6 The classification of electronic data tends to be highly technical. Electronic data in relation to criminal law has been classified broadly into three main categories, each with its own corresponding procedural protections. These categories are *subscriber information*, *traffic/data and transactional data* and *content data*.⁴⁹

4.7 *Subscriber information* includes details about the user of an electronic service. It pertains to information that can primarily be used to identify the user of a particular service. The information may be provided by the user when signing up for an online service or may be information collected by the service provider in the process of providing a service. It usually includes personal information such as name, physical address, email address, telephone numbers etc.

4.8 *Traffic/Access and transactional data* includes data that can be used to determine or verify the origin, duration or date of an electronic communication and the means of access to a particular service, as well as the links and connections with other users, including contacts. In certain instances, it may include information pertaining to the commencement and termination of the use of a service. It generally refers to information about the communication itself, such as the sender and recipient. It can show the pattern of communication but does not reveal the actual content.

4.9 *Content data* is the core information stored, generated, transmitted or exchanged. It can be in the form of text, graphics, images, audio, video or any other digital file.

4.10 Although the three categories of electronic data may appear clear, there can be significant overlaps between them, especially in light of their protection and access to information for the purpose of criminal proceedings. Some types of traffic or access data, for example internet protocol addresses (IP addresses), are considered to have the same protection as subscriber information. There is also an ongoing debate regarding the location of data and whether it falls under transactional or content data.

⁴⁹ See Claudia Warken *Classification of Electronic Data for Criminal Purposes Eucrim*, Issue 4/2018, pp 226 -234 (<https://eucrim.eu/articles/classification-electronic-data-criminal-law-purposes>)

4.11 The three categories correspond to the threshold of procedural and substantive protections in relation to individuals' right to *privacy, due process, interests of justice and fair trial*. Specifically, subscriber information may be requested directly by law enforcement agencies, because this would usually be the starting point for criminal investigations which may have an element of electronic data and accessing this data is traditionally regarded as being less intrusive. The threshold for access to traffic/access and transactional data would require some form of authorisation such as a search warrant or, at a minimum, prosecutorial authorisation, whereas access to content data, if not already in the public domain, would require some form of validation, either in the form of corroboration or a ruling by the court on its admissibility.

4.12 Due process and the interests of justice are pivotal in the law of evidence. They ensure fairness and protection against arbitrary state action, particularly in the gathering and presentation of evidence. They encompass the constitutional right to a fair trial, the right to silence and against self-incrimination, the right to privacy and the right to be presumed innocent until proven guilty. The general rules and principles of the law of evidence also ultimately encompass due process and the interests of justice.

4.13 Due process ensures that the state's overriding powers of investigation, prosecution and punishment are balanced against the rules and principles of admissibility of evidence, especially in relation to proof of guilt beyond a reasonable doubt. As a result, the nature of the evidence obtained, the manner in which it was obtained, its relevance and its evidential weight are relevant factors in determining whether it is admissible or inadmissible.

4.14 The flexibility of the interests of justice allows courts to depart from a strict application of the rules of evidence when necessary in order to ensure a just outcome. In this regard, factors such as the nature of the proceedings, the purpose for which the evidence is tendered, the probative value of the evidence, any prejudice the admission of the evidence might cause and other factors which the court deems relevant play a significant role.

4.15 There are four interlinked considerations which make the admissibility of electronic evidence critical in the debate on access to electronic evidence and its use in criminal proceedings. First, there is nowadays an explosion of stored data; second, there are newer specialised digital services; third, there are new types of data; and, lastly, there are new methods of analysis of data.

4.16 The increasing number of human activities that are conducted or reflected digitally has led to an explosion of stored electronic data. As a result of factors such as the volumes of storage and processing, and costs associated with it, more and more data is no longer stored in a single component such as a single computer hard drive but is increasingly being stored remotely in servers accessible over the internet. This form of storage and processing of data is called 'cloud computing' and allows users to store, access and manage data stored in their electronic files from anywhere with an internet connection.

4.17 The number of digital services and applications has increased, resulting in an increasing number of specific virtual communities and interest groups, including criminal syndicates. Organised criminals use online platforms as profit engines; encrypted messaging apps, dark web marketplaces and forums enable organised criminals to sell drugs, weapons, counterfeit goods, contraband, to launder money and to traffic in stolen data or hacked accounts.

4.18 New types of electronic data, such as extended reality (XR), augmented reality (AR), virtual reality (VR), mixed reality (MR) and artificial intelligence (AI) have emerged which either be used or misused in criminal proceedings. XR, AR and VR can be used to create simulations from crime scene reconstruction and analysis, while AI algorithms can be used to enhance the speed and accuracy of processing and analysing vast amounts of digital evidence, including images, audio and video recordings to identify patterns, anomalies and potential leads that might be missed by human analysis. However, the introduction of these technologies also raises legal and ethical considerations regarding admissibility, bias and the right to a fair trial.

4.19 There are also new technologies of analysis which are heavily influenced by advancements in artificial intelligence (AI) and machine learning (ML). These technologies are capable of being used to enable more efficient and accurate analysis of large datasets, especially in emerging areas of investigations such as digital forensics, and instant messaging and social media investigations. They can, however, also be used not only in producing AI-powered text, AI generated videos so-called deepfakes but also in detecting the originality and manipulation of text, images and videos.

4.20 These trends require a re-evaluation of the admissibility of electronic data in order to understand how access to the various categories of data may affect individuals, intrude into their private life and become relevant in criminal proceedings. They challenge the current legal framework, which is based on the common law, fragmented legislation and lacking in

modernisation. Guidelines for the treatment of electronic evidence in criminal proceedings are required in order to help in framing the necessary discussion which could lead to the adoption of a new legislative framework.

CHAPTER 5: GENERAL GUIDELINES FOR ELECTRONIC EVIDENCE

5.1 Subject to the general rules of admissibility, relevance, sufficiency and probative value, electronic evidence should be admissible in any criminal proceedings. Courts should not refuse to admit electronic evidence, or deny its legal effect, solely because it was generated, transmitted, collected or presented in electronic form.

5.2 However, evidence in the form of electronic data requires careful assessment and handling to ensure its integrity, reliability and admissibility. This means that the original data needs to be preserved, an audit trail needs to be maintained and it must be carefully and properly examined by competent individuals with the relevant expertise. It is the duty of law enforcement functionaries, the prosecuting authority and the courts to ensure a fair balance between the prosecution and the defence when dealing with electronic evidence.

5.3 Current legislation dealing with electronic evidence already provides a sound basis for its admissibility. As already stated, Section 15 of the ECTA makes provision for the admissibility of electronic data. The difficulty with the ECTA is that, while it permits admissibility of electronic data, it places emphasis on the inclusion of electronic evidence and fails to address the exclusion of certain types of electronic data; it does not therefore address the common law exclusionary rule, especially in relation to the manner in which electronic evidence should be obtained and handled for it to be admissible.

5.4 Section 15 of the ECTA specifically prohibits the exclusion of electronic data on the mere ground that it is constituted by a data message or if it is the best evidence that the person adducing it could reasonably be expected to obtain on the grounds that it is not in its original form. This appears to be inconsistent with the common law best evidence rule, in terms of which an original document is the best evidence when the content of a document is directly in issue.

5.5 Secondary evidence such as computer print-outs or copies of a video-recording may be admitted if it's the only means of proving a document or electronic data.⁵⁰ Also, it may be used to prove things other than the contents of the document, for example, communication between members of a criminal organisation and their relationships.

⁵⁰ See *Welz v Hall* 1996 (4) SA 1073 (C) at 1079C-E.

5.6 Strictly speaking, the originality of electronic data is amorphous in light of the advanced technology which is involved in generating, storing and transmitting it. What is key is authenticity, rather than originality.

5.7 ECTA does not eliminate the need for proof of authenticity. The court still needs to be satisfied that the electronic data is what it purports to be and has not been tampered with. Factors such as the method of creation, storage, processing and any potential for alteration must be considered when assessing authenticity.

5.8 The requirement that electronic data needs to be authenticated implies tendering evidence of creation or authorship or possession, depending on the nature of the data and the purpose for which it is tendered as evidence.

5.9 In *Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa*⁵¹ Human J described, in relation to documents, a variety of ways in which a document can be proved or authenticated. The document must be identified by a witness who is either the writer (or creator) thereof or an attesting witness or the person in whose lawful custody the document is or the person who found it or an expert.

5.10 The question which arises is whether the current legal framework in relation to electronic evidence is adequate or whether it should be codified in legislation in clear detail, instead of dealing with it on a case-by-case basis. The question, in essence, is: what are the rules which must inform the modernisation of the law of evidence in relation to electronic evidence? In this regard, guidelines already exist on the gathering and use of electronic evidence.

5.11 The main prescriptions relating to the admission of evidence and, in particular, evidence which constitutes electronic communication, was set out in the matter of *S v Brown*⁵² wherein Bozalek, J observed that:

As a starting point, sec 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render a trial unfair or otherwise be detrimental to the administration of justice.

⁵¹ 1971 (3) SA 937 (T) at 940E-G.

⁵² (CC 54/2014) ZAWCHC 128 (17 August 2015).

Generally speaking, where evidence is obtained without a warrant or direction, with an improperly obtained warrant or direction, or without following the conditions set out in the warrant or direction, a Court must decide whether to admit it or not. In *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (2) SACR 113 CC at paragraph 13. Kriegler J summed up the position as follows at paragraph, 196 A - B: 'What the Constitution demands is that the accused be given a fair trial. Ultimately ..., fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted'.

Section 20 of the CPA provides that the State may seize anything 'which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence ...' or 'which may afford evidence of the commission or suspected commission of an offence ...'. Section 21 provides that any such articles may only be seized under a search warrant but this is subject to sec 22 which deals with the circumstances in which an article may be seized without a search warrant. These circumstances, however, do not include situations where the article in question has been lost, left or abandoned at a crime scene and, furthermore, is unlikely to be claimed by someone.

The ECTA was introduced to provide inter alia for the admissibility of evidence generated by computers since its predecessor, the Computer Evidence Act, 57 of 1983, was generally considered to have failed to achieve its purpose in this regard and, in any event, had not regulated criminal proceedings. It provides for wide definitions of data – 'electronic representations of information in any form' - and data messages – 'data generated, sent, received or stored by electronic means and includes – (a) voice, where the voice is used in an automated transaction; and (b) a stored record;'. An electronic communication is defined as meaning a communication by means of data messages. One of the objects of the ECTA is to 'promote legal certainty and confidence in respect of electronic communications and transactions'. Although electronic data in the form of images such as photographs and videos are not specifically referred to in either definition, in my view, on a purposive interpretation of the ECTA's provisions, they constitute a form of information. [17] The ECTA follows an inclusionary rather than an exclusionary approach to the admission of electronic communications as evidentiary material. This appears from sec 11 which deals with the legal recognition of data messages. It provides that information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message. Clearly, the overall scheme of the ECTA is to facilitate the admissibility of data messaging as electronic evidence. Section 15 of the ECTA deals with the admissibility and evidential weight of data messages in legal proceedings. It reads in part as follows: 10 '1. In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence – a) on the mere grounds that it is constituted by a data message; or b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form. 2. Information in the form of a data message must be given due evidential weight. 3. In assessing the evidential weight of a data message, regard must be had to – a) the reliability of the manner in which the data message was generated, stored or

communicated; b) the reliability of the manner in which the integrity of the data message was maintained; c) the manner in which the originator was identified; and d) any other relevant factor.’ [18] I agree with the observation of Gautschi AJ in *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W) at page 172 that sec 15(1)(a) does not render a data message admissible without further ado. The provisions of sec 15 certainly do not exclude our common law of evidence. This being the case the admissibility of an electronic communication will depend, to no small extent, on whether it is treated as an object (real evidence) or as a document.

5.12 Bozalek, J observed at paragraph 29 that: “*Ultimately, the question must be whether the downloaded information was obtained in a manner that violated any right in the Bill of Rights and if so, whether it must be excluded because its admission would render the accused’s trial unfair or otherwise be detrimental to the administration of justice.*”

5.13 In March 2013, the Council of Europe and the European Union published a first edition of a basic guide for police officers, prosecutors and judges on the use of electronic evidence. This version was followed by version 2.0 which represented an update.⁵³

5.14 The CoE Electronic Evidence Guide defines electronic evidence crisply as “any information generated, stored or transmitted in digital form that later be needed to prove or disprove a fact disputed in legal proceedings”. It explains that electronic evidence is any evidence that is derived from electronic devices such as computers and their peripheral apparatus, computer networks, mobile telephones, digital cameras and other equipment (including data storage and processing devices), as well as the internet. The information it contains does not possess an independent physical form.⁵⁴

5.15 Significantly, the Guide notes that in many ways electronic evidence is not different from traditional evidence in that the party introducing it into legal proceedings must be able to demonstrate that it reflects the same set of circumstances and factual information as it did at the time of the commission of the offence. This means that the evidence must be reliable in relation to the commission of the offence. However, because the intangible nature of any data and information stored in electronic form makes it easier to manipulate and more prone to alteration than traditional forms of evidence, electronic evidence creates special challenges

⁵³ ***Electronic Evidence Guide- A Basic Guide for Police Officers, Prosecutors and Judges***, Version 2.0, Cybercrime Division, Directorate General of Human Rights and Rule of Law, Strasbourg, France, 15 December 2014. (the “CoE Electronic Evidence Guide”)

⁵⁴ At p11.

for the justice system which require that such data be handled in a special way to ensure the integrity of the evidence it offers.⁵⁵

5.16 The Guide notes further that while electronic evidence shares most properties with traditional forms of evidence, it also possesses some unique characteristics. First, it is invisible to the untrained eye and often found in places where only specialists would search or in locations reachable only by means of special tools. Second, it is highly volatile because it is stored in electronic memory which can be corrupted or lost through environmental factors such as excessive heat or humidity or through the presence of electromagnetic fields. Third, it may be altered or destroyed through normal use. And, lastly, it can be copied without degradation.⁵⁶

5.17 The ultimate goal of collecting and presenting electronic evidence is to prove or disprove disputed facts, which means that it must be obtained in compliance with best practice and applicable legislation to ensure admissibility at trial. The CoE Guide identifies five criteria that should generally be taken into account when evaluating the admissibility of electronic evidence for the purpose of trial, namely **authenticity**, **completeness**, **reliability**, **believability** and **proportionality**.⁵⁷

5.18 The evidence must be authentic in the sense that it must establish facts in a way which represents its original state. It must be complete in the sense that the analysis of or any opinion based on the evidence must tell the whole story and not be tailored to match a more favourable or desired perspective. It must be reliable in the sense that there must be nothing about the way in which it was collected and subsequently handled that may cast doubt on its authenticity or veracity. It must be believable in the sense that it is persuasive as to the facts it represents and the trier of fact in the proceedings must be able to rely on it as the truth.

5.19 The principle of proportionality is particularly important. It means that the methods used to gather the evidence must be fair and proportionate to the interests of justice; the prejudice, namely the level of intrusion or coercion, caused to the rights of any party should not outweigh the probative value of the evidence.

5.20 The Guide also deals specifically with electronic evidence in criminal proceedings. It notes, as a general rule, that electronic evidence is admissible if it conforms to a series of laws

⁵⁵ *Id.*

⁵⁶ At pp11-12.

⁵⁷ At p13.

and rules that ensure it is acceptable to the court. It notes more specifically and in relation to authenticity that electronic evidence is no different to physical evidence and that it is necessary therefore to ensure that the evidence is authentic. The difference between electronic evidence and physical evidence is usually the ease with which electronic evidence can be changed, either deliberately or inadvertently.⁵⁸

5.21 The Guide states as a matter of fact that when considering electronic evidence in criminal proceedings, it should be remembered that such evidence is subject to the same rules and laws that apply to documentary evidence. It explains the doctrine of documentary evidence as follows: “the onus is on the prosecution to show to the court that the evidence produced is no more and no less than when it was first taken into the possession of law enforcement”.⁵⁹

5.22 The Commonwealth Secretariat has also recently published guidelines on the treatment of electronic evidence in criminal proceedings.⁶⁰ The purpose of the guidelines is stated as ensuring that electronic evidence can be safely and securely relied upon in domestic criminal proceedings. The guidelines were published after the Secretariat had commissioned a Research Report on its *Model Law on Electronic Evidence* (2019) and convened an Expert Working Group (10-11 September 2019) which considered the findings of the report.

5.23 The recommendations of the Expert Working Group were presented to Commonwealth law ministers, and the law ministers agreed to a preparation of the guidelines. Draft guidelines were prepared by a second Expert Working Group (24 March 2023), after which they were finalised and presented at a Virtual Meeting of Senior Officials of Commonwealth Law Ministries (23 November 2023) and then finally adopted at a meeting of Commonwealth Law Ministers (4 -8 March 2024).

5.24 Chapter 1, of the Commonwealth Guidelines state the purpose as being to assist and guide countries in creating processes for the secure and reliable treatment of electronic evidence in criminal proceedings. Electronic evidence is defined in Chapter 2 as “any evidence derived from electronic material that may be used to prove or disprove a fact in legal proceedings”.

⁵⁸ At p149.

⁵⁹ At p150.

⁶⁰ **Guidelines on the Treatment of Electronic Evidence in Criminal Proceedings**, Commonwealth Secretariat, 2025 (“Commonwealth Guidelines”).

5.25 Chapter 3 sets out the fundamental principles of electronic evidence. It states as follows:

- a. Electronic evidence should be admissible in electronic form in any criminal proceedings. Courts should not refuse to admit electronic evidence, or deny it legal effect, solely because it was generated, collected or presented in electronic form.
- b. General rules of evidence should normally apply to electronic evidence as they do to other types of evidence. Nevertheless, heightened scrutiny may be required in applying certain admissibility rules, and rules of proof, due to the ease with which electronic evidence can be manipulated, distorted or erased.
- c. Courts should seek to ensure a fair balance between opportunities afforded to the prosecution and defence with respect to any reliance on electronic evidence in criminal proceedings.
- d. It is for the finder of fact in any criminal proceedings to determine the ultimate probative value of electronic evidence, if any, in accordance with national law and rules of evidence.

5.26 Chapter 4 deals with the collection and handling of electronic material. States are urged to have clear procedures, protocols and guidance for those involved in the preservation, seizure, collection, handling and examination of electronic material and devices that may be used in criminal proceedings.

5.27 Chapter 5 deals with privileged material. It urges states to have a clear and explicit legislative framework for handling, accessing and analysing electronic material and devices that may contain legally privileged material, or material that is subject to other relevant privileges or immunities.

5.28 Chapter 6 deals with the need for a disclosure framework to cater for electronic material in the disclosure process. In particular, the disclosure framework should recognise that electronic devices are capable of storing large volumes of electronic material, much of which may not be relevant for disclosure purposes and that there is a need to ensure a balance between the fair trial rights of the accused and the privacy and data protection rights of any complainants, witnesses and any relevant third parties.

5.29 Chapter 7 deals with the transmission of electronic evidence for legal proceedings. It states that electronic evidence should be transmitted to courts in a secure and reliable manner, maintain its integrity and following a clear chain of custody and transmission between

collection and examination by investigators or experts and its use in court. It encourages transmission of electronic evidence by electronic means so long as it does not impact or risk jeopardising the cases for the prosecution or defence.

5.30 Chapters 8, 9 and 10 deal with the general common law rules of evidence and seek to incorporate these rules as part of the use of electronic evidence in criminal proceedings. These parts are significant in that they seek to adapt the common law rules of evidence for the purpose of determining the admissibility of electronic evidence.

5.31 Chapter 8 deals with the best evidence rule and states as follows:

a. Any domestic implementation of the 'best evidence' rule or related 'original document' rule should be flexible and should not exclude electronic evidence solely because it is adduced as secondary evidence in the form of physical or other form of copy.

b. Any domestic implementation of the 'best evidence' rule with respect to electronic evidence should not, however, be capable of being satisfied simply based on evidence that the computer system(s) used to generate the electronic evidence operated properly or reliably. Evidential presumptions concerning the operation or reliability of computer systems should not preclude assessments of, and challenges to, the integrity and reliability of electronic evidence in any domestic implementations of the best evidence rule.

5.32 Chapter 9 deals with relevance and states as follows:

a. Courts should engage in the active management of cases involving electronic evidence to ensure that any evidence that is adduced or required is necessary and not excessive for the matters to be proved in the case.

b. Courts may require the assistance of recognised experts in the analysis of electronic evidence to assist in relevancy determinations.

c. Where courts utilise concepts of legal relevancy for addressing reliability concerns related to electronic evidence in admissibility determinations, they should ensure that the evidentiary requirements are defined with sufficient precision for parties to know what is required for the admissibility of the evidence.

5.33 Chapter 10 deals with reliability and authentication. It states as follows:

a. States and/or their courts should provide guidance on any authentication requirements or other processes for satisfying burdens of production or proof applicable to electronic evidence in criminal proceedings.

- b. The following factors may be considered relevant to authentication requirements,
- i. Whether the electronic material relied on in any criminal proceedings can be shown to be an accurate representation of the prevailing and existing state of that material at the time relevant to the legal proceedings.
 - ii. Whether the electronic material has changed from the moment it was identified and collected as potential evidence for the criminal proceedings and whether there is an accurate and reliable method of documenting any such changes, including the reasons for any such modifications.
 - iii. Whether the continuity of the electronic material can be demonstrated between the moment in time when it was obtained for legal purposes and when it was submitted as an exhibit in the criminal proceedings.
 - iv. Whether the techniques that were used to obtain, secure and process the electronic material can be tested and shown to have been appropriate for which they were applied.
 - v. Whether the provenance and integrity of the electronic material can be reliably demonstrated and are capable of being proved.
 - vi. The value of trust services in establishing the reliability of electronic material.
 - vii. The probative value of metadata.
- c. If conviction in criminal proceedings depends on the authenticity of electronic evidence, the factfinder would need to be satisfied to the applicable standard of proof of its authenticity

5.34 Significantly, Chapter 11 deals with rebuttable presumptions in relation to, for example, the operation of devices, the integrity of device outputs or the reliability of electronic evidence from certain official or third-party sources. It states that while presumptions can serve to improve the efficiency of trial processes and help to focus parties on the main issues in a case, there is a risk that courts could be misled where presumed facts turn out to be false or are otherwise contestable. States are therefore urged to ensure that conditions under which presumptions apply to electronic evidence are coherent, justifiable in light of modern computing technology, and do not unduly disadvantage any party in criminal proceedings. States are also urged to ensure that trial procedures and disclosure processes provide parties to criminal proceedings with an opportunity to challenge the operation of any presumptions, where disproving the presumed fact is an essential feature of their case.

5.35 Chapter 12 deals with the admissibility of electronic evidence by agreement. It states that where domestic rules allow for the admissibility of electronic evidence by agreement between the prosecutions and the defence, states should consider imposing validity requirements for such agreements, including that where the evidence is prosecution-led, the accused person(s): (i) were legally represented at the time of the agreement, (ii) provided informed consent and (iii) were aware of the nature and extent of the electronic evidence and the purpose for which it is to be adduced in the proceedings.

5.36 Chapter 13 deals with the admissibility of electronic evidence from other jurisdictions. It states that electronic evidence that is from another jurisdiction should not be found to be inadmissible solely due to the foreign origin of the evidence, provided other relevant admissibility criteria in the receiving country can be satisfied.

5.37 Reference to the above guides and guidelines is made with a view of providing a framework for developing, implementing and evaluating relevant changes to the law of evidence, more particularly in light of developments which necessarily bring with them an increased use of and reliance on electronic evidence. They are intended to provide and ensure a systematic and structured approach to reforming and modernising the law of evidence.

5.38 To conclude this part, it is necessary to consider the relevant provisions in the Criminal Procedure Act⁶¹ which deal with evidence in criminal proceedings. Chapter 24 of the CPA primarily deals with evidence in criminal proceedings; it consists of Sections 208 to 253.

5.39 Section 208 deals with the evidence of a single witness. It allows for a conviction based on the evidence of a single witness. The admissibility of a single witness is, however, subject to the cautionary rule; it must be clear and satisfactory in all material respects.⁶² In *Ruganan v S*,⁶³ the Supreme Court of Appeal explained that the cautionary rule does not require that the evidence of a single witness must be free of all conceivable criticism. The requirement is merely that it should be substantially satisfactory in relation to material aspects or be corroborated.

5.40 Section 209 outlines the circumstances under which a confession is admissible as evidence. It permits the conviction of an accused person on the single evidence of such an

⁶¹ 51 of 1977 “the CPA”.

⁶² *R v Mokeona* 1932 OPD 79 at 80.

⁶³ (259/2018) [2020] ZASCA 166 (10 December 2020).

accused person. The confession must, however, be confirmed in material respect, or if it is not confirmed, it must be proved by evidence other than the confession.

5.41 Section 210 deals with the inadmissibility of irrelevant evidence. It prohibits the admissibility of evidence of any fact, matter or thing which is irrelevant or immaterial and which does not tend to prove or disprove any point or fact at issue in criminal proceedings. The section is in essence a negative expression of the principle of relevancy.

5.42 Section 211 deals with evidence of previous convictions; such evidence is not admissible for the purpose of proving guilt. Previous convictions are, however, relevant for the purpose of sentence and evidence of such convictions may be tendered during the sentencing stage.

5.43 Section 212 of the CPA outlines *prima facie* proof of certain facts by affidavit or certificate. It permits proof of acts or transactions or their occurrence in any department or sub-department of the State or provincial administration or in any branch or office of such department or sub-department or in any court of law or in any particular bank to be proved by the production of a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the employ of the State, etc., that if the act, transaction or occurrence has taken place in such department, etc., or the functionary had performed such act or had taken part in such transaction, it would in the ordinary course of events have come to his knowledge and a record, available to him, would have been kept; and that it has not come to his knowledge that such act, transaction or occurrence took place; or that such functionary performed such act or took part in such transaction, and that there is no record thereof. It also deals with *prima facie* proof of the furnishing of information to officers or functionaries in the service of the State etc. and the registration of matters under any law or recording of facts or transactions under such registration.

5.44 Section 212(4) of the CPA in particular, deals with the establishment of facts by any examination or process requiring any skill in biology, chemistry, physics, astronomy, geography or geology; in mathematics, applied mathematics, or mathematical statistics or in the analysis of statistics; in computer science or in any discipline in engineering, etc. It permits *prima facie* proof of such facts by way of an affidavit or a certificate in cases in which skill is required in chemistry, anatomy or pathology.

5.45 Section 212(8) deals with the collection, receipt, custody, packing, marking, delivery or dispatch of any fingerprint or body-print, article of clothing, specimen, bodily sample, crime

scene sample, tissue or any object. The section provides that an affidavit constitutes *prima facie* proof of any fact which is relevant to an issue.

5.46 Section 212B deals with proof of undisputed facts. Section 213 deals with proof of a written statement by consent. It provides that in criminal proceedings a written statement by any person, other than an accused at such proceedings shall be admissible as evidence to the same extent as oral evidence to the same effect by such person. The statement must be signed by the person and contain declaration to the effect that it is true and that it was made knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or which he did not believe to be true.

5.47 Section 217 deals with the admissibility of a confession by an accused person. Section 220 deals with admissions in general. Section 228 deals with evidence of disputed writing. Sections 233 to 236 deal with proof of certain documents, judicial proceedings and records.

5.48 In terms of Section 220 of the CPA, an accused or his legal advisor or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.

5.49 Sections 233 to 235 of the CPA deal with proof of public documents, official documents and judicial proceedings. In terms of Section 233, books or documents of such a public nature as to be admissible upon mere production from proper custody or a copy or extract thereof are admissible as evidence in criminal proceedings if they are proved to be examined copy or extract, or if they purport to be signed as a true copy or extract by the officer to whose custody the original is entrusted. In terms of Section 234 it is sufficient to prove an original official document which is in the custody or under the custody of a State official by virtue of his office, if a copy thereof or an extract therefrom, certified as a true copy or extract by the head of the department concerned or by a State official authorized thereto by the head, is produced at criminal proceedings. Section 235 deals with proof of judicial proceedings by means of a certified copy of the proceedings.

5.50 Sections 237 to 245 deals with evidence in relation to certain specified charges, Sections 246 to 250 deal with presumptions.

5.51 In terms of Section 252, the law as to the admissibility of evidence which was in force in respect of criminal proceedings on 30 May 1961 applies in any case not expressly provided

for by the CPA or any other law. The effect of the section is to preserve all rules and principles of the law of evidence which are dealt with in the CPA.

5.52 Section 252A deals with the use of traps and undercover operations and the admissibility of evidence so obtained. Section 252A is particularly relevant in the collection, handling, use and admissibility of electronic evidence.

5.53 The various provisions of the CPA are mentioned in light of the increased use of recording, storage, processing and transmission of records and information in digital form, mainly in computers, removable hard drives and lately in newer technologies such as hybrid storage, cloud storage, blockchain⁶⁴, etc.⁶⁵ They also raise the question of whether there is a need to consolidate these provisions in a modernised law of evidence that covers all conceivable aspects of the admissibility, relevance, reliability, authentication and sufficiency of evidence in criminal proceedings.

⁶⁴ Hybrid storage combines on-premises and cloud technology. Cloud computing is storage off-premises on multiple computer hardware which are housed in various locations and linked together to form a vast network which is referred to as a 'cloud'. Blockchain is a decentralized technology which provides a decentralized way to store and manage data, particularly for transactions and records.

⁶⁵ There are other storage technologies, such as quantum storage, which are still in development and aim to leverage quantum mechanics for high-density and potentially faster storage.

CHAPTER 6: A MODEL STATUTORY LAW OF EVIDENCE

6.1 The South African law of evidence has its origin in the English common law evidence. The English law of evidence remains uncodified. South Africa, while still retaining the common law of evidence, has introduced various pieces of legislation which deal with limited aspects of the law of evidence.

6.2 The question arises: what statutory model law of evidence can be developed which incorporates current law of evidence as expressed in the common law rules and various legislative provisions in order to modernise the law of evidence and to provide for increasingly complex storage, processing and use of data and information which come with constantly evolving technological advances.

6.3 The common law of evidence in both England and South Africa may very well still be the predominantly uncodified legal framework for the law of evidence. Yet, the codification of the law of evidence in jurisdictions under British rule is not so unique. In India, as early as 1872, the Imperial Legislative Council⁶⁶ enacted the Indian Evidence Act (IEA)⁶⁷ during the British Raj. The Act was drafted and passed at a time when the British sought to unify the diverse legal systems in India and establish a more systematic and efficient judicial process.⁶⁸ It aimed to create a uniform set of rules governing evidence, applicable to all individuals and courts within British India.

6.4 The IEA is a crucial legislative document which informs and lays the foundation for the codification of legal principles and practices in relation to the law of evidence. It marks a significant step towards a more standardised legal framework of the law of evidence.

6.5 The IEA is a seminal piece of legislation that outlines the principles of evidence. It consists of 167 sections and combines legal rigor and clarity. It establishes the essential rules for the admissibility of evidence and elucidates concepts such as relevance, admissibility and

⁶⁶ The Imperial Legislative Council was the legislature for British India from 1861 to 1947.

⁶⁷ The IEA.

⁶⁸ The Act is mainly based on the work of Sir James Fitzjames Stephen, an English lawyer, judge and law reformer.

witness competency. It is underscored by precision and accessibility, which facilitates a clear understanding of evidential norms within a vast legal framework.

6.6 In its definition section, the IEA clarifies what constitutes evidence, including oral and documentary evidence. It outlines the circumstances under which facts become relevant to a case and thus helps in determining what evidence is admissible. It specifies which types of evidence is admissible in court, such as witness testimony, documents and confessions. It provides rules for examining witnesses, including their competency and types of questions that can be put to witnesses and defines who has the responsibility to prove a particular fact in a case.

6.7 Significantly, the IEA addresses the doctrine of estoppel in relation to the law of evidence. Traditionally, estoppel is understood to be a rule of evidence that estops or prevents a representor from denying the truth of the representation that he previously made, where the latter relied on the representation to his detriment. The rule prevents the representor from reneging on his representation.

6.8 It deals with hearsay evidence and adopts the principle that while hearsay evidence is generally inadmissible, it can be admitted under certain exceptional circumstances. It also deals with presumptions and allows courts to make certain presumptions about facts, which may either be rebuttable or irrebuttable. There are also specific provisions related to confessions, admissions and the examination of witnesses.

6.9 The IEA is structured in 11 Chapters. Chapter 1 deals with relevancy of facts and contains two chapters, namely Chapter 1 and Chapter 2. Chapter 1 is a preliminary chapter; it introduces the Act and contains an *interpretation* clause, as opposed to a *definition* clause. Chapter 2 deals specifically with the relevancy of facts.

6.10 Chapter 2 of this paper consists of Chapter 3 to Chapter 6. Chapter 3 deals with *facts which must be proved*; Chapter 4 deals with *oral evidence*; Chapter 5 deals with *documentary evidence* and Chapter 6 deals with circumstances where *documentary evidence* is *given preference over oral evidence*.

6.11 Chapter 3 of this paper, which is the last part, consists of Chapter 7 to Chapter 11. Chapter 7 deals with the *burden of proof*; Chapter 8 deals with *estoppel*; Chapter 9 deals with

witnesses; Chapter 10 deals the *examination of witnesses* and Chapter 11 deals with the *improper admission and rejection of evidence*.

6.12 To summarise, the IEA may be divided into two categories, namely (i) the taking or admission of evidence and (ii) the assessment or evaluation of evidence. The general principle is that parties to proceedings in a court of law may adduce only admissible evidence. Admissible evidence is either a 'fact in issue' or a 'fact relevant to an issue', provided that the fact in issue or fact relevant to an issue is not precluded by any other provision of the IEA. Section 3 of the Act, which is the interpretation clause, defines "fact", "relevant", "facts in issue", "document", "evidence" as well as "proved", "disproved", "not proved".

6.13 "Fact" is defined as meaning and includes (1) "anything, state of things, or relation of things, capable of being perceived by the senses; and (2) "any mental condition of which any person is conscious". The expression "Facts in issue" is defined as meaning and including "any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows".

6.14 "Document" is defined broadly as meaning "any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used, or which means may be used, for the purpose of recording that matter. While this definition may raise the question of whether electronic data or information falls within the category of documents, depending on one's interpretation of what a document is and bearing in mind that the IEA was enacted during an era when communication, data processing and storage technology was by far not what it is today, it is significant to note that a newer version of the Act was enacted by the Indian legislature and now specifically incorporates electronic documents. This development is dealt with below.

6.15 "Evidence" is defined to mean and includes (1) "all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; and (2) "documents; such documents are called documentary evidence". The definition of 'evidence' was in fact amended in 2000 and extended to include electronic records produced for the inspection of the Court.⁶⁹

⁶⁹ Section 92, Act 21 of 2000.

6.16 In terms of the definition of “proved”, “[a] fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the particular circumstances of the particular case, act upon the supposition that it exists”.

6.17 In terms of the definition of “disproved”, [a] fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist”.

6.18 In terms of the definition of “not proved”, [a] fact is said not to be proved when it is neither proved nor disproved”.

6.19 In terms of Sections 69 and 70 of the IEA, facts can be proved in two ways, either by oral evidence or by documentary evidence. Oral evidence consists of direct verbal statements of fact about incidents or occurrences, statements about physical objects and may include a witness’s conclusions about such facts or physical objects. Documentary evidence is evidence contained in documents and includes electronic records.

6.20 Section 4 of the IEA deals with interpretation of ‘presumption’ and ‘conclusive proof’. The interpretation and operation of presumptions within the context of the Act is based on a distinction between “may presume” and “shall presume” as contained in the Act.

6.21 The purport of the phrase “may presume” is expressed in Section 4 as follows:

Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

6.22 The purport of the phrase “shall presumed” is framed as follows:

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

6.23 Essentially, the IEA makes provision for presumptions as to documents. The relevant provisions are contained in Sections 79 to 90. Section 79 deals with the presumption as to genuineness of certified copies; Section 80 deals with the presumption as to documents produced as a record of evidence; Section 81 deals with the presumption as to gazettes and

Acts of Parliament;⁷⁰ Section 83 deals with the presumption as to maps or plans made by authority of government; Section 84 deals with the presumption as to collections of laws and reports of decisions; Section 85 deals with the presumptions as to powers of attorney;⁷¹ Section 89 deals with the presumption as to due execution of documents not produced. The phrase used in Sections 79, 80, 81, 82, 83, 84 85 and 89 is “the Court *shall* presume”, which means that the Court is obliged to regard the documents referred in these sections as a proven fact, unless and until it is proved otherwise.

6.24 Section 86 deals with the presumption as to certified copies of foreign judicial records;⁷² Section 87 deals with the presumption as to books, maps and charts in general; Section 88 deals with the presumption as to telegraphic messages and was subsequently amended by the insertion of Section 88A to include electronic messages;⁷³ Section 90 deals with the presumption as to documents thirty years or more old and was subsequently amended by the insertion of 90A to include the presumption as to electronic records five years or more old. The phrase used in Sections 86, 87, 88 and 90 is “the Court *may* presume”, which means that the court is not obliged but has a discretion to regard these documents as a proven fact, unless and until it is proved otherwise.

6.25 Section 114 of the IEA makes provision for an interesting presumption as to the existence of certain facts which, although it may fall under the common law rules of evidence, has hitherto not come under serious scrutiny in any debate on the modernisation and possible codification of the South African law of evidence. Section 114 provides that “the Court *may* presume the existence of any fact which it thinks likely to have happened, regard being had to the common cause of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

⁷⁰ Section 81 was subsequently amended by Act 21 of 2000 through an insertion of section 81A, which extended the presumption to Gazettes in electronic form.

⁷¹ Section 85 was amended by Act 21 of 2000 through an insertion of section 85A, which addressed the presumption as to electronic agreements. The section was subsequently amended by Act 10 of 2009 by the insertion of section 85B and 85C, which extended the presumption as to electronic agreements and record to include electronic signatures and electronic signature certificates.

⁷² This presumption, although not specifically stated in section 86, may as well also extend to foreign government records in appropriate instances.

⁷³ Inserted by section 92 of Act 21 of 2000.

6.26 There are numerous examples of instances which may fall under Section 114. An example which readily comes to mind is Section 37(1) of the General Law Amendment Act⁷⁴, which creates a statutory offence of ‘possession of stolen goods’⁷⁵. Properly viewed, Section 37(1) of the GLAA creates a rebuttable presumption of guilt; it presumes or regards as a fact possession of stolen property in the absence of reasonable cause or a proper explanation.

6.27 In *S v Manamela and Another (Director-General of Justice Intervening)*⁷⁶ the Constitutional Court found that Section 37(1) reversed the normal criminal onus of proof and infringed both the constitutional right to silence and the presumption of innocence. There was nothing, however, inherently unreasonable or unduly intrusive in requiring an accused person to show that he had a reasonable belief that a transaction was honest; the Constitutional Court therefore unanimously held that the limitation on the right to silence was justified. The Court was divided, however, over whether the limitation on the presumption of innocence could also be justified. The majority held that the provision was too sweeping and introduced a requirement which obliged an accused person to *produce evidence of belief which could reasonably be true*. The caveat which can be discerned from the *Manamela* case, therefore, is that any codification of the law of evidence based on Section 114 of the IEA must be carefully considered and crafted so as to avoid an infringement of the right to be presumed innocent as guaranteed in the Constitution.

6.28 Other examples of the presumption of the existence of certain facts as contemplated in Section 114 of the IEA may include:-

- (a) that the evidence of an accomplice is unworthy of credit, unless it is corroborated in all material respects;
- (b) a bill of exchange, duly accepted and endorsed, was accepted or endorsed for good consideration;
- (c) that a thing or state of things which has been shown to be in existence within a period shorter than that which such things or states of things usually cease to exist, is still in existence;

⁷⁴ 62 of 1955 (“the GLAA”).

⁷⁵ Section 37(1) excludes possession of stock or produce as defined in the Stock Theft Act, 1959. Section 37(3) of the Stock Theft Act however creates a similar presumption in the absence of reasonable cause for believing that stock or produce was properly acquired.

⁷⁶ (CCT25/99) [2000] ZACC 5; 200 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000).

- (d) that judicial and official accts have been regularly performed, unless it can proved otherwise;
- (e) that the common course of business has been followed in particular cases;
- (f) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
- (g) that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him; etc,

6.29 A final feature of the IEA which must be considered is the concept of *conclusive proof*. The concept of conclusive proof is defined in section 4 of the Act as follows:-

Conclusive proof – When one fact is declared by this Act to be conclusive proof of another, the Court *shall*,⁷⁷ on proof of the one fact, regard the other as proved, and shall not allow evidence for the purpose of disproving it.

6.30 A distinction must be made between “conclusive proof” as defined in the IEA and adequate or sufficient proof. The fundamental difference between *conclusive proof* and *adequate* or *sufficient proof* lies in whether the evidence allows for rebuttal and the certainty it establishes. *Conclusive proof* is final, shuts out all further evidence and cannot be contradicted. Adequate proof is evidence sufficient to establish a fact on a balance of probabilities or to raise a reasonable presumption, but it can still be rebutted.

6.31 Of particular importance in relation to the law of evidence is Section 31 of the IEA. Section 31 specifically provides that “admissions are not conclusive proof of the matters admitted but *may* operate as estoppels under the provisions hereinafter contained.” The provisions referred to in Section 31 are listed in Section 32 and relate to statements of relevant fact by a person who (i) is deceased or cannot be found, or (ii) are made in the course of business, or (iii) are against the interest of the maker; or (iv) give an opinion as to a public right or custom or matters of general interest, or (v) relate to the existence of a relationship, or (vi) are made in a will or deed relating to family affairs, or (vii) are in a document which relates to transactions mentioned in Section 13 (a) of the Act (i.e. transactions by which a right or custom was created, claimed, modified, recognised, asserted or denied or which was

⁷⁷ Emphasis.

inconsistent with its existence), or (viii) are made by several persons and express feelings relevant to a matter in question.

6.32 Part II of the IEA, which consists of 3 chapters, deals specifically with proof of facts. Chapter III deals with facts which need not be proved and facts which may be proved. Facts can be proved in two ways, by means of oral evidence or by means of documentary evidence. Oral evidence is dealt with in Chapter IV, which contains only two sections, namely Section 59 and Section 60; documentary evidence is dealt with in Chapter V, which consists of several sections.

6.33 Section 56 provides that “no fact of which the Court will take judicial notice of need to be proved”. Section 57 sets out facts of which the Court must take judicial notice of; in all instances mentioned in Section 57 and also on matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference. In terms of Section 58, facts that are admitted by the parties or their agents need not be proved.

6.34 Sections 59 and 60 deal with proof of facts by oral evidence. In terms of Section 59 all facts, except the contents of documents, may be proved by oral evidence. In terms of Section 60 oral evidence must be direct. Section 60 contains a proviso to the effect that if oral evidence refers to the existence or any condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

6.35 Section 61 deals with proof of the contents of documents and provides that the contents of a document may be proved either by primary or secondary evidence. Primary evidence is defined in Section 62 as meaning “the document itself produced for the inspection of the Court. Secondary evidence is defined in Section 63 as meaning and includes (i) certified copies, (ii) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies, (iii) copies made from or compared with the original, (iv) counterparts of documents as against the parties who did not execute them and (v) oral accounts of the contents of a document given by some person who has himself seen it.

6.36 In terms of Section 64 of the IEA, documents must be proved by primary evidence except in cases mentioned in Section 65. Section 65 makes provision for cases in which secondary evidence relating to documents may be given; it provides that secondary evidence may be given of the existence, condition or contents of a document when (a) the original is shown or appears to be in the possession or power of the person against whom the document

is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after notice such person does not produce it; (b) the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative; (c) the original has been destroyed or lost, or the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time; (d) the original is of such a nature as not to be easily movable; (e) the original is a public document;⁷⁸ (f) the original is a document of which a certified copy is permitted by the Act or by any other law to be given in evidence; and (g) the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

6.37 Section 65 of the IEA was amended by the insertion of Section 65A and Section 65B.⁷⁹ Section 65A specifically provides that the contents of electronic records may be proved in accordance with Section 65B. Section 65B(1) provides that “[n]otwithstanding anything contained in [the] Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be *deemed*⁸⁰ to be also a document, if the conditions mentioned in [the] section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.”

6.38 Section 65B(2) sets out the following conditions for the admissibility of electronic records:

- (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried over that period by the person having control over the use of the computer;
- (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained or derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was

⁷⁸ The meaning of ‘public document’ is set out in section 74.

⁷⁹ Inserted by Act 21 of 2000.

⁸⁰ Own emphasis.

out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

6.39 Section 65B(3) deals with information stored in or processed by a combination of computers, different computers operating in succession over a time, different combinations of computers operating in succession over a time or in any other manner involving the successive operation over a period, in whatever order, of one or more computers and one or more combinations of computers. It provides that all the computers used over a period shall be treated for the purposes of Section 65B as constituting a single computer; and references in the section to a computer shall be construed accordingly.

6.40 Section 65B(4) deals with instances where it is desired in any proceedings to give a statement in evidence by virtue of Section 65 either (a) identifying the electronic record containing a statement and describing the manner in which it was produced; or (b) giving particulars of any device involved in the production of an electronic record as may be appropriate for the purpose of showing that an electronic record was produced by a computer; (c) dealing with any of the matters to which the conditions mentioned in Section 65B(2). In such instances, a certificate purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities constitutes evidence of any matter stated in the certificate; it is sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

6.41 In terms of Section 65B(5), for the purposes of admissibility as provided for in Section 65B:- (a) information is taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is supplied directly or (with or without human intervention)⁸¹ by means of any appropriate equipment; (b) whether in the course or activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, is taken to be supplied to it in the course of those activities; and (c) a computer output is taken to have been produced by it directly or (with or without human intervention) by means of any appropriate equipment.

⁸¹ Newer technologies are emerging which enable allow humans to communicate with and control computers without touching them. Brain-computer interface via an electronic device implanted in the brain, for example, translates neural signals into actions which are able to control computers.

6.42 Section 66 of the IEA deals with rules as to notice to produce documents. Requires a party proposing or wishing to give secondary evidence of the contents of a document referred in Section 65(a) to give notice to the party in whose possession or power the document is. Notice is however not required in order to render secondary evidence admissible when (a) the document to be proved is itself a notice; (b) the adverse party must know from the nature of the case that he will be required to produce it; (c) it appears or is proved that the adverse party has obtained possession of the original by fraud or force; (d) the adverse party or his agent has the original in Court; and (e) the person in possession of the document is out of reach of, or not subject to, the process of the Court.

6.43 Section 67 deals with proof of the signature and handwriting of a person alleged to have signed or written a document. Section 67A deals with proof as to an electronic signature;⁸² it provides that “except in the case of a secure electronic, if the electronic signature of any subscriber is alleged to have been affixed to an electronic record the fact that such electronic signature is the electronic signature of the subscriber must be proved”.

6.44 Sections 68, 69, 70, 71 and 72 deal with proof of documents which are required by law to be attested. At least one attesting witness must be called to prove the execution of such document. If no attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. An attested document not required by law to be attested may be proved as if it was unattested.

6.45 Section 73 deals with deals with the comparison of signatures, writings or seals with other documents which have been admitted or proved in order to ascertain whether they are those of the person by whom they purport to have been written or made; Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

6.46 Section 73A deals with proof as to verification of digital signatures.⁸³ It provides that “[i] order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct (a) that person or the Controller or Certifying Authority

⁸² Subsequent amendment through substitution by Act 10 of 2009.

⁸³ Inserted by section 92 of Act 21 of 2000.

to produce the Digital Certificate; (b) any other person to apply the public key listed in the Digital Certificate and verify the digital signature purported to have been affixed by that person”.

6.47 Sections 74 to 78 deals with public documents. Public documents are described as (i) documents forming the acts or records of the acts of the government, official bodies and tribunals and public officers and (ii) public records kept of private documents. All other documents not forming part of public documents are regarded as private documents. Public documents may be proved by production of certified copies. Other documents may be proved as specified in Section 78.

6.48 Sections 79 to 90 deal with presumptions as to documents. They make provision for instances in which the *shall* or *may* make presumptions in relation to documents. The distinction between *shall* and *may* is significant. *Shall* indicates that the Court is obliged to accept a presumed fact as true if the basic fact is proven, unless rebutted by sufficient evidence (mandatory presumption); *may* indicates that the Court is allowed to presume the fact, but is not obliged to do so (permissive presumption).

6.49 Mandatory presumptions relate to:

- a) The genuineness of certified copies;⁸⁴
- b) Documents produced a record of evidence;⁸⁵
- c) Gazettes, private Acts of Parliament and other similar documents;⁸⁶
- d) Gazettes in electronic forms;⁸⁷
- e) Maps or plans made by authority of Government;⁸⁸
- f) Collections of laws and reports of decisions;⁸⁹
- g) Powers of Attorney;⁹⁰
- h) Electronic agreements;⁹¹
- i) Electronic records and electronic signatures;⁹²

⁸⁴ Section 79.

⁸⁵ Section 80.

⁸⁶ Section 81.

⁸⁷ Section 81A.

⁸⁸ Section 83.

⁸⁹ Section 84.

⁹⁰ Section 85.

⁹¹ Section 85A.

⁹² Section 85B.

- j) Electronic Signature Certificates;⁹³ and
- k) Attestation and due execution of documents not produced.⁹⁴

6.50 Permissive presumptions relate to:

- a) Certified copies of foreign judicial records;⁹⁵
- b) Books, maps and charts in general;⁹⁶
- c) Telegraphic messages;⁹⁷
- d) Electronic messages;⁹⁸
- e) Documents thirty or more years old;⁹⁹ and
- f) Electronic records five or more years old.

6.51 Sections 91 to 94 deal with the exclusion of oral evidence by documentary evidence. Section 91 excludes oral evidence if the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document; only the document itself, or secondary evidence of its contents is admissible to prove its terms.

6.52 In terms of Section 92, no oral evidence is admissible in respect of agreements which are by law required to be reduced to the form of a document, provided that:

- i) any fact may be proved which would invalidate the document, or which would entitle any person to an order relation thereto; such as fraud, illegality, lack of due execution, lack of capacity in any contracting party or mistake in fact or law;
- ii) the existence of any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms, may be proved, having regard to the degree of formality of the document;
- iii) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation may be proved;
- iv) the existence of any distinct subsequent oral agreement to rescind or modify the documented agreement may be proved, except in cases where the documented agreement is required to be in writing or has been registered according to the law applicable to registration of documents;
- v) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved, provided that the annexing of such incident would not be repugnant to or inconsistent with, the express terms of the contract;

⁹³ Section 85C.

⁹⁴ Section 89.

⁹⁵ Section 86.

⁹⁶ Section 87.

⁹⁷ Section 88.

⁹⁸ Section 88A.

⁹⁹ Section 90.

iv) any fact may be proved which shows in what manner the language of a document is related to existing facts.

6.53 Sections 94 to 98 deal with meaning and language in documents. In terms of Section 94, when language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. In terms of Section 95, when language used in a document is plain in itself but is lacking in meaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. In terms of Section 96, when the facts are such that the language used might have been meant to apply to anyone and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to. In terms of Section 97, when the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply. In terms of Section 98, evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

6.54 Section 99 of the IEA allows persons who are not parties to a document, or their representatives in interest, to give evidence of facts tending to show a contemporaneous agreement varying the terms of the document. Section 100 is a saving provision in relation to the provisions of the Indian Succession Act; it states that the provisions which deal with the exclusion of oral evidence by documentary evidence do not affect any of the provisions of the Succession Act as to the construction of wills.

6.55 Part III of the IEA is perhaps one of the most significant aspects of a model law of evidence. It consists of four Chapters, namely Chapter VII (Burden of Proof), Chapter VIII (Estoppel), Chapter IX (Witnesses) and Chapter X (Examination of Witnesses).

6.56 Section 101 codifies *burden of proof*. It places burden of proof on “[w]hoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts” and states that such person “must prove that those facts exist”. It states further that “[w]hen a person is bound to prove the existence of any fact, it is said that the burden of proof is on that person”. Section 101 therefore focuses more on proof of a fact rather than on proof of the outcome of the proceedings, such as the guilt of an accused person. In terms of Section 102 the burden of proof lies on that person who would fail if no evidence at all were given on either side.

6.57 Section 103 deals with the burden of proof as to a particular fact; it provides that “the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”. Section 104 deals with the burden of proving a fact to be proved to make evidence admissible; it provides that the burden of proof lies with the person who wishes to give such evidence.

6.58 Section 105 deals with the burden of proof that an accused person’s case falls within certain exceptions. The exceptions are those that are in the General Exceptions in the Indian Penal Code; they are essentially defences available to an accused person, such as mistake, acts done in faith without criminal intent, consent and private defence. In terms of Section 105 the burden of proving the existence of circumstances which bring the case within these exceptions or any other special exception is upon the person who seeks to rely on them; in the absence of proof, the court is obliged to presume the absence of such circumstances.

6.59 Sections 106 to 111 deal with the burden of proof in various instances. These include, among others: burden of proof of a fact especially within the knowledge of a person;¹⁰⁰ burden of proving death of a person known to have been alive within years;¹⁰¹ burden of proof as to relationships;¹⁰² burden of proof as ownership;¹⁰³

6.60 Sections 115 to 117 deal with estoppel. Estoppel, under these provisions, is a rule of evidence that prevents a person from denying the truth of a statement he has previously made, either through words or actions, if another person has reasonably relied on that statement to his detriment. Section 115 deals with general estoppel; it provides that [w]hen one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing”. Section 116 deals with the estoppel of tenants and of a licensee of person in possession and Section 117 deals with the estoppel of an acceptor of a Bill of exchange or licensee.

¹⁰⁰ Section 106.

¹⁰¹ Section 107.

¹⁰² Section 109.

¹⁰³ Section 111,

6.61 Section 118 deals with the competence of witnesses to testify. It provides that all persons are competent to testify, unless the Court considers that they cannot understand questions put to them, or cannot give rational answers to those questions, either because of their tender age, extreme old age, disease, whether of body or mind, or any other similar cause. In terms of Section 119 a witness who is unable to communicate verbally may give his evidence in any other manner in which he can make it intelligible, either by writing or signs made in open court, and such evidence is deemed to be oral evidence. In terms of Section 122, married persons are not compellable witnesses against each other. There are other provisions which deal with witnesses, such as that a witness is not compelled to disclose any confidential information between him and his legal representative,¹⁰⁴ and that an accomplice is an accomplice is a competent witness against an accused person.¹⁰⁵

6.62 Section 132 deals with self-incrimination. Self-incrimination forms part of the common law privilege against self-incrimination and is part of the constitutionally guaranteed right to silence. Section 132 of the IEA, however, expresses the privilege or right in an interesting way; it provides that “[a] witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend to directly or indirectly criminate, such witness, or that it will expose, or tend to directly or indirectly expose, such witness to a penalty or forfeiture of any kind.” This means that an accused person is not obliged to answer and may refuse to answer but cannot be excused from answering. The effect of this is that the court may, in its assessment and evaluation of the evidence in its totality draw inferences, which are either against or in favour of the accused, having regard to the accused’s decision not to, or refusal to, answer.

6.63 Chapter X deals specifically with the examination of witnesses. In terms of Section 135, the order in which witnesses are produced and examined is governed by the law and practice relating to civil and criminal procedure and, in the absence of any such law, by the discretion of the Court. Sections 137 to 139 deal with examination-in-chief, cross-examination and re-examination. The rest of the provisions deal with various aspects in relation to the examination of witnesses, including the prohibition of indecent and scandalous questions¹⁰⁶

¹⁰⁴ Section 129.

¹⁰⁵ Section 133.

¹⁰⁶ Section 151.

and questions intended to insult or annoy.¹⁰⁷ In terms of Section 153, evidence to contradict answers to questions which are aimed at testing the veracity of a witness's testimony is excluded.

6.64 To summarise, the overall scheme of the IEA is that it classifies the law of evidence into two categories, namely the evidence itself (i.e. its substance, type or nature) and its evaluation. Parties to proceedings may adduce only admissible evidence. Admissible evidence consists of either a "facts in issue" or a "relevant facts" which are not excluded from being adduced by any other provision of the Act. The meaning of "facts", "facts in issue" and "relevant facts" is clearly defined in the Act.

6.65 In terms of the IEA, facts can be proved in two ways, either orally or by documentary evidence, which includes electronic documents. Oral evidence consists of verbal depositions before the Court and includes verbal statements about physical objects as well. Documentary evidence consists of documents, meaning pieces of written, printed or electronic matter that provides information or evidence or that serves as a record of something.

6.66 Two concepts emerge from the overall scheme of the IEA in relation to the evaluation of evidence. The first concept is *direct proof*, the second concept is *presumptive proof*.

6.67 Direct proof is based on both oral and documentary evidence; the court must decide, on the basis of oral or documentary evidence, whether a particular fact is proved or not. The IEA clearly defines the meaning of 'proved' (proved, disproved or not proved). The concept of direct proof is closely related to the concept of sufficiency of evidence; if insufficient or no evidence is given, a fact is not proved.

6.68 The second concept, namely 'presumptive proof' is based on the concept of presumptions. The IEA contains many sections which allow the court to evaluate evidence on the basis of presumption; the presumptions are either peremptory or permissive. Finally, the Act also allows the Court to conclude a particular fact, in particular circumstances, as proved (conclusive proof), meaning that the Court must accept that fact as proven without allowing any evidence to be presented to disprove it.

¹⁰⁷ Section 152.

6.69 The IEA was replaced by the Bharatiya Sakshya Adhiniyam¹⁰⁸ in 2023.¹⁰⁹ “Bharatiya Sakshya Adhiniyam” translates to “Indian Evidence Act” in English. The BSA is aimed at streamlining, modernising and simplifying the rules and principles of evidence for conducting fair trial in India. It recognises and takes into account modern technological developments and seeks to adapt and adjust the law of evidence accordingly, while still retaining the core concepts, principles and rules of evidence encapsulated in the IEA.

6.70 The BSA thus replaces the outdated IEA with a more contemporary and progressive framework of the law of evidence. It streamlines the law of evidence by simplifying the rules and procedures for presenting and interpreting evidence, with the view of expediting judicial processes. It integrates technological developments by explicitly recognising and addressing the use of digital and electronic evidence, including cybersecurity issues. It provides clearer and precise definitions and interpretations of various types of evidence and thus reduces ambiguity, more specifically in relation to newer and emerging forms of evidential material and issues. It creates a more efficient and transparent justice system and addresses challenges that come with technological developments, including the protection of vulnerable groups. It also places greater emphasis on the protection of witnesses to ensure fair trials.

6.71 More fundamentally, the BSA includes provisions that safeguard individuals from custodial torture and abuse. It further addresses modern technology by incorporating provisions related to biometric data, cybersecurity breaches and technological surveillance, thus reflecting the constantly evolving technological landscape.

6.72 The BSA is designed to be more accessible and easier to understand as compared to the IEA. It aligns the law of evidence with international best practices and reduces complexities in legal proceedings, thus enabling faster trials and quicker resolution of cases.

6.73 It is not intended to consider and analyse all provisions of the BSA. The Act consists of 170 sections as opposed to the 167 sections in the previous IEA. Of the 167 sections in the IEA, 23 sections have been modified, five removed and one more section added.

6.74 There is one key aspect of the reform introduced by the BSA, however, which deserves some examination. This aspect is the revision of the rules relating to hearsay evidence and their exception in light of emerging developments and current demands. The examination

¹⁰⁸ “the BSA”.

¹⁰⁹ No. 47 of 2023.

focuses on significant sections of the BSA and considers their impact on maintaining fairness and improving judicial efficiency in criminal proceedings.

6.75 Stated simply, hearsay evidence relates to statements which were made by someone out of Court but presented by someone else in Court to establish the truth of their content. The common law and both the IEA and the BSA generally exclude hearsay because of its questionable reliability and absence of the protections of oath and cross-examination. Exceptions are permitted, however, when hearsay is considered reliable or essential. The IEA specifies exceptions to the hearsay rule in Sections 32 and 33. The BSA refines and organises the exceptions under Sections 26 and 27.

6.76 Section 32 of the IEA covers statements in relation to, among others, causes of death, business records and declarations against interest; Section 33 deals with statements from prior legal proceedings under certain conditions. Sections 32 and 33 of the IEA are reorganised into Sections 26 and 27 of the BSA and structured in such a way that they are more accessible. Section 26(a) of the BSA mirrors Section 32 of the IEA; it retains key exceptions such as dying declarations and business records, and then explicitly recognises electronic records within these categories. Section 27 of the BSA aligns with Section 33 of the IEA, but then emphasizes procedural safeguards such as the right to cross-examination in prior proceedings. This consolidation reduces redundancy and enhances clarity and is in line with the broader objective of simplifying the law of evidence.¹¹⁰

6.77 More fundamentally, the BSA has introduced a significant change in relation to electronic evidence. It explicitly recognises electronic and digital evidence as primary evidence under Sections 2(1)(d) and 61. This extends to hearsay evidence and render electronic statements such as e-mails, text messages and digital logs admissible under Section 26(a), provided that they meet the necessary conditions, such as the unavailability of the person who made the statement. Under the IEA,¹¹¹ electronic records were considered to be secondary evidence, as provided for in Section 65B; this created a procedural burden. The BSA eliminates the procedural burden implicit in Section 65B of the IEA by granting electronic records the status of primary evidence, thus reflecting advances in technology and streamlining legal proceedings.

¹¹⁰ See Anant Singhal "Hearsay Exceptions in Indian Criminal Trials: Balancing Fairness and Efficiency" **Indian Journal of Law and Legal Research**, Volume VII, Issue III at 362.

¹¹¹ As amended by the Information Technology Act, 2000.

6.78 Singhal has identified three implications for fairness in criminal trials which are discernible from the BSA.¹¹² First, it enhances reliability and access to evidence by recognising electronic hearsay as primary evidence and thus expanding the range of admissible statements to the benefit of both the prosecution and the defence. In order to ensure fairness, Section 63 of the BSA introduces stringent certification requirements to prevent tampering; however, as Singhal correctly points out, inadequate technological infrastructure or expertise may create disadvantages for under-resourced litigants.

6.79 Second, the BSA enhances the protection of accused persons' rights. It preserves generally accepted safeguards that are critical to a fair trial, such as the Section 27 requirement that prior-testimony must be subject to cross-examination. Greater reliance on electronic hearsay may, however, raise concerns about reliability, especially where the certification processes are weak, unreliable or fail. As Singhal notes, the admission of unverified digital or electronic statements could unfairly prejudice and accused person, making it essential for courts to exercise caution in evaluating such evidence.

6.80 Third and lastly, the BSA seeks to balance *truth* and *due process*. It seeks to achieve this purpose by refining hearsay exceptions, particularly those related to dying declarations and business records. Provisions which require expert validation and ensuring a proper chain of custody of digital and electronic evidence strengthen evidentiary integrity. In this regard, Singhal cautions, however, that courts must remain vigilant against excessive reliance on hearsay evidence, especially in cases where direct testimony is available (or ought to be available¹¹³) to maintain the adversarial system's fairness.

6.81 In the final analysis, the BSA also has implications for judicial efficiency in criminal proceedings. The implications are beneficial, but there is also a downside. The benefits are two-fold. First, the consolidation of hearsay evidence and simplification of electronic evidence is aimed at expediting trials. Under the IEA, disputes over the certification of secondary electronic evidence often resulted in delays. The classification of electronic records as primary evidence under the BSA removes bottlenecks and enables quicker adjudication.

6.82 Second, the BSA is aimed at reducing evidentiary disputes. It clarifies the hearsay provisions and modernises rules on electronic evidence, and thus minimises disputes over

¹¹² *Ibid* at 363.

¹¹³ Own emphasis.

admissibility. Vague regulations under the IEA regarding digital records often led to frequent challenges in court. The BSA provides a clearer framework which is aimed at reducing conflicts and challenges, thus allowing for more efficient trial proceedings.

6.83 There is also, however, a downside in the form of increased workloads and infrastructure demands. As Singhal notes, the efficiency gains must be viewed in light of the BSA's emphasis on electronic hearsay and expert verification, which may strain judicial resources. Verification of hearsay electronic evidence requires well-equipped and well-functioning cyber forensic laboratories and expert witnesses; high demand will lead to increased workloads, which could slow down implementation if not adequately supported. In addition, training for judges, prosecutors and legal professionals on the handling of digital and electronic evidence will be crucial in preventing procedural inefficiencies.¹¹⁴

6.84 In concluding this part, the BSA has significantly overhauled the outdated evidentiary system of the IEA, a relic of colonial times, even though based on an approximation of well-established and tested common law principles and rules of the law of evidence. The reality, however, is that any system of the law of evidence must either adapt or be overtaken by new developments and rapid advances in digital, information and communication technology.

6.85 One of the key areas of focus of the BSA is the handling of hearsay evidence, in particular, digital and electronic evidence. The BSA retains the principle that hearsay evidence is generally not admissible unless it meets the criteria of exceptions specified in Section 26. This principle echoes the traditional common law rule, which is limited in range and inflexible in use, that hearsay evidence is inadmissible except in certain circumstances and subject to the cautionary rule.

6.86 Another key area of significance of the BSA is the admissibility of statements and evidence of actions by conspirators. Section 8 of the BSA expands the doctrine of *res gestae* to include statements or actions of conspirators. If there is reason to believe that two or more individuals conspired to commit a crime, any statement or action by one conspirator that furthers their common design or purpose is admissible against all involved.

6.87 It is worthwhile and useful to briefly look at how other common law jurisdiction such as the United States (US), the United Kingdom (UK) and Canada approach and deal with hearsay evidence, especially in light of a proliferation of digital and electronic evidence. The US, the

¹¹⁴ *Ibid.* at 364.

UK and Canada are, like India and South Africa, common law jurisdictions which share historical ties in relation to the development of the common law. In all these jurisdictions, the rules applicable to hearsay evidence have evolved to prioritise flexibility over rigid rejection.

6.88 The United States, in its rules of evidence, adopts a detailed approach to the admissibility of hearsay evidence.¹¹⁵ Hearsay evidence is permitted if it meets reliability standards or the speaker is not available to testify in court. Rule 803 of the FRE allows certain statements which are considered inherently reliable to be admitted as evidence, regardless of whether the declarant is available or not; statements which are considered reliable enough to be admitted as evidence include statements as to present sense impressions¹¹⁶ and statements as to excited utterances.¹¹⁷ Rule 804 applies when a person who made an out-of-court statement is not available to testify in court. A declarant may be unavailable for various reasons, including being exempt from testifying due to legal privilege, refusing to testify even after a court order, testifying to a lack of memory of the subject matter, or being unable to be present due to death, physical or mental illness or other reasons.

6.89 Rule 807 of the FRE also makes provision for what is referred to as ‘residual exception’. Under Rule 807, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804 if (1) the statement is supported by sufficient guarantees of trustworthiness, after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts. A statement under the Rule 807 residual exception is, however, admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement, including its substance and the declarant’s name, so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing, or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

6.90 While Canada does not have a single, formalised “residual exception” to the hearsay rule such as the one in Rule 807 of the FRE, it does have a similar flexible and principled

¹¹⁵ Federal Rules of Evidence (“FRE”).

¹¹⁶ Statements describing or explaining an event or condition made while the declarant was perceiving it.

¹¹⁷ Statements or utterances relating to a startling event or condition, made while the declarant was under the stress of excitement caused by it.

approach, established by the Supreme Court of Canada. In *R v Khan*,¹¹⁸ the Supreme Court of Canada endorsed a residual exception to the jersey rule and held that hearsay evidence was admissible when, based on context or circumstances, the speaker cannot testify. This approach allows hearsay to be admitted if it meets two criteria, namely (i) necessity, in the sense that the statement is reasonably necessary to prove a fact, and (ii) reliability, in the sense that the context or circumstances provide a substitute for traditional safeguards, ensuring the statement's truth and accuracy. In assessing whether or not to admit the statement, the interests of justice become a major consideration. This approach was refined in *R v B (K.G)*,¹¹⁹ allowing prior inconsistent statements as evidence to prove the truth of their contents, if evidence such as video recordings ensured trustworthiness.

6.91 The UK's Criminal Justice Act, 2003, allows hearsay if it serves the interests of justice and it is in the public interest. In *R v Horncastle and Others*,¹²⁰ the UK Supreme Court held that hearsay from a deceased person was admissible if it was demonstrably reliable. The overarching 'interests of justice' test covers various situations and replaces specific common law exceptions, including those based on public interest in the form of public information such as published works or public documents.

6.92 Drawing on the IEA, the BSA and the Canadian and UK examples, South Africa can refine the law of evidence to promote a more just and reformed criminal justice system. One option could be a consolidation of the Law of Evidence Amendment Act, 1988 and the Electronic Communications and Transactions Act, 2002. A formal reliability test, with due regard to context, circumstances, timing and supporting evidence could codify the general rules of evidence, incorporate electronic and digital evidence and refine the hearsay rule. Another reform with respect to hearsay in particular could involve granting judges a discretion, as in France and the UK, to admit hearsay evidence where its exclusion would undermine public trust in the criminal justice system.

6.93 The IEA and its subsequent overall and reform through the BSA provides South Africa with a framework for aligning the law of evidence with global standards, thus responding appropriately to technological developments while at the same strengthening the criminal justice system.

¹¹⁸ [1990] 2 SCR 531.

¹¹⁹ [1993] 1 SCR 740.

¹²⁰ [2009] UKSC 14.

6.94 The three parts of the IEA and the BSA in relation to criminal proceedings are (i) relevance of facts, (ii) methods of proof and (iii) production and effect of evidence. Every part comprises of distinct clauses which, when taken together, create a thorough framework for the admissibility of evidence.

6.95 The first part, relevance of facts,¹²¹ describes the types of evidence that are accepted as relevant and allowed in court. It covers rules on the admissibility of facts that directly pertain to the issue at hand, as well as those that provide background knowledge or supporting data.

6.96 The second part, methods of proof,¹²² outlines the ways in which evidence can be proven in court. It sets out rules regarding witness examination, documentary evidence, admissibility and expert evidence.

6.97 The third part, production and effect of evidence,¹²³ addresses the formalities involved in presenting evidence in court. It contains guidelines for the level of proof required in various categories of cases, the burden of proof and the questioning and re-examination of witnesses.

6.98 The IEA and BSA serve as a model statutory law of evidence in criminal proceedings in a number of ways. First, they promote fair trials, which are essential to promoting and preserving public trust in the criminal justice system, by ensuring that only pertinent and trustworthy evidence is admitted in court. In addition to upholding the rule of law, fair trials serve as a powerful deterrent to potential offenders.

6.99 Second, by establishing precise rules for the gathering and presentation of evidence, the Acts encourage accountability and transparency within the criminal justice systems. The principles which underlie these rules reduce the possibility of fabricating, manipulating or interfering with the evidence.

6.100 Third, they strengthen investigations by guiding law enforcement in carrying out methodical and exhaustive investigations. They require due diligence and ensure that legal standards are followed in investigations by specifying procedures for the gathering, preservation and presentation of evidence. Efficient evidence collection and preservation of evidence are essential for the construction of solid cases against offenders.

¹²¹ Sections 5 – 55.

¹²² Sections 56 – 100.

¹²³ Sections 101-167.

6.101 Fourth, they promote victim and witness participation by providing significant protections to victims and witnesses. Securing convictions depends on the admissibility of witness evidence and witness protection laws.

6.102 Fifth, they reflect legal reform and adaptation. Reforms and adaptation are necessary to respond to and keep up with emerging issues, technological developments and developments in forensic science and technology. The Acts' adaptability ensures continued relevance in the midst of changing criminal tendencies and technological advances.

6.103 Lastly, they encourage legal and procedural fairness by placing a strong focus on procedural justice, thus preventing erroneous convictions and guaranteeing that justice is done. They protect the rights of the accused and the integrity of the criminal justice system by establishing guidelines for the admissibility of evidence and conduct of criminal trials.

CHAPTER 7: CHALLENGES

A Fragmentation of the South African Law of Evidence

7.1 Current South African law of evidence in criminal proceedings is fragmented, consisting of common and various pieces of legislation. The common law rules of evidence are themselves often fragmented, requiring the court to interpret and develop them in line with technological developments and the constitutional right to a fair trial. While the courts have largely interpreted and developed the common law rules of evidence to reflect new developments and to promote constitutional values, there is a strong need to consolidate and codify these rules in order to achieve greater uniformity, clarity and efficiency, particularly in light of the complexity of modern trials and the growing role of new technologies which bring with them a new dimension in the form of electronic and digital evidence.

7.2 While the Electronic Communications and Transactions Act, 2002, allows for the admission of electronic evidence under a functional equivalence approach with the aim of treating data messages as equivalent to traditional documents and therefore generally admissible, courts face challenges in reconciling this with traditional hearsay limitations, thus creating an untenable situation where a large amount of crucial evidence may be excluded. There is in essence a difficulty in applying established principles of the law of evidence to inherently different forms of modern data, which may lead to differing interpretations and applications of these principles by the courts.

7.3 The functional equivalence introduced by the Electronic Communications and Transactions Act, 2002, clashes with the traditional hearsay rules under the Law of Evidence Amendment Act, 1988, which requires a separate inquiry into admissibility for hearsay evidence to be admitted in the interests of justice. The conflict between the principle of admissibility in the Electronic Communications and Transactions Act and the Law of Evidence Amendment Act is untenable. The difficulty in making a distinction between 'real' evidence and 'documentary evidence in the context of further complicates the issue, although courts may err on the side of caution by treating them as documentary hearsay to ensure a proper inquiry.

B Consolidation and codification

7.4 The South African Law Reform Commission has already done some work on the consolidation and codification of the common law rules of evidence, primarily to create a single, uniform statute to govern evidence. This effort reflects a realisation of the fragmentation of rules across various statutes and the large body of common law rules residing within the common law as well as the development and adaptation of these rules in case law.

7.5 While the Criminal Procedure Act of 1955 was an early attempt to consolidate the laws related to criminal procedure and evidence, and the subsequent Criminal Procedure Act of 1977 also played a significant role, the South African Law Commission's Issue Paper 26 of 2008 proposed further consolidation and codification, especially in relation to documentary and electronic evidence, to improve uniformity and accessibility. However, various concerns were raised and discussed in Issue Paper 27 of 2010. What appears from the work of the Commission on the law of evidence is that it supports amending existing legislation or repealing provisions to introduce a more uniform framework.

7.6 A critical question which arises is: what form should the framework take? This question arises because of the legal policy considerations of making a distinction between civil proceedings and criminal proceedings. In view thereof that criminal proceedings are clearly distinct from civil proceedings, the question is whether to consolidate and codify the laws pertaining to evidence in a single piece of legislation which covers both civil and criminal proceedings or in a self-standing piece of legislation which deals only with criminal proceedings.

C Legal policy considerations

7.7 A separate self-standing piece of legislation which focuses only on criminal proceedings is justified because of the differences between criminal and civil proceedings. The Criminal Procedure Act, for example, focuses only on criminal proceedings.

7.8 There is a fundamental difference in the standard of proof in criminal proceedings. The standard of proof in criminal proceedings, namely proof beyond a reasonable doubt, is much higher and has a huge impact on the law of evidence. The higher standard of proof in criminal proceedings is aimed at protecting individual liberty; given that the consequences of criminal proceedings are more severe, such as imprisonment, a significant burden is placed on the

state to prove guilt. The evidence required in criminal proceedings must be such that it has a higher degree of probability and instils confidence in the accused person's guilt.

7.9 There are constitutional implications, involving a balance between state power and individual liberty, in criminal proceedings. Criminal proceedings are more directly concerned with constitutional rights, such as the right to personal freedom, the right to privacy and the right to a fair trial, more particularly the right to be presumed innocent until proven guilty, which demands careful scrutiny. The heightened constitutional scrutiny justifies stricter rules in criminal evidence to protect fundamental rights, which are not as prominent in civil cases.

7.10 While a unified approach which covers both criminal and civil proceedings could offer consistency and reduce complexity, it might fail to adequately address the unique legal policy considerations of each legal sphere. A criminal conviction carries a far greater societal and impact on, for instance, the liberty of a person than a civil judgement, thus making a one-size-fits all approach problematic. Separate legislation allows for the development of nuanced rules that reflect the distinct nature, stakes and potential consequences inherent in criminal litigation.

7.11 Zimbabwe and Botswana both have Criminal Procedure and Evidence legislation which serves as primary legislation for criminal cases, though the two pieces of legislation are distinct. The Zimbabwe legislation¹²⁴ details investigation, trial and sentencing procedures. The Botswana legislation¹²⁵ regulates criminal proceedings and has a recent addition which establishes procedures for undercover operations and the collection of evidence.¹²⁶

7.12 Part XIV of the Zimbabwe legislation deals specifically with witnesses and evidence in criminal proceedings. Sections 244 to 248 deal with competency of witnesses; Sections 252 to 266 deal with admissibility of evidence, including hearsay evidence and issue estoppel; Sections 267 and 268 deal with the evidence of an accomplice; Sections 269 to 273 deal with sufficiency of evidence; Sections 275 to 284 deal with documentary evidence; Sections 285 to 289 contains special provisions as to bankers' books; Sections 290 to 297 deal with privileges of witnesses; Sections 298 to 310 deal with special rules of evidence in particular cases, such as treason, counterfeiting and receiving property; Sections 311 to 319 make

¹²⁴ Chapter 9:07, Criminal Procedure and Evidence..

¹²⁵ Chapter 8:02., Criminal Procedure and Evidence.

¹²⁶ Criminal Procedure and Evidence (Controlled Investigations) Act, 2022.

provision for miscellaneous matters relating to evidence in criminal proceedings, such as impounding of documents, admissions of fact and cases not provided in the legislation. More fundamentally, provision is made for the protection of vulnerable witnesses.¹²⁷

7.13 Similarly, part XIV of the Botswana legislation deals specifically with witnesses and evidence in criminal proceedings. It also addresses admissibility of evidence, the evidence of accomplices, sufficiency of evidence, documentary evidence, privileges of witnesses and special rules of evidence in particular criminal cases. However, unlike the IEA and its modernised successor, the BSA, both the Zimbabwe and Botswana legislation do not go far enough insofar as the consolidation, codification and modernisation of the law of evidence is concerned.

7.14 In Namibia, the Criminal Procedure Act 25 of 2004 was passed to overhaul the 1977 Act, focusing on victim-centred litigation and procedural law, but it never formally came into operation. Following concerns over its operation, the 2004 Act was repealed by the Criminal Procedure Act Repeal Act 14 of 2018, which resulted in the Criminal Procedure Act 51 of 1977 remaining in force.

7.15 Both the IEA and the BSA exemplify a more thorough and comprehensive approach to the consolidation, codification and modernisation of the law of evidence. The BSA, in particular, demonstrates a legislative effort to modernise the law of evidence, more especially in relation to a revision of the hearsay evidence rules and their exceptions and the expanded admissibility of electronic records and statements made under specific conditions. The BSA has introduced a framework which is conducive to adopting a more practical approach to the consolidation, codification and modernisation of the law of evidence.

D A more practical approach to the law of evidence

7.16 In order to develop a practical approach to the law of evidence, it is perhaps useful to reconsider the etymological origin of the word 'evidence'. The word 'evidence' is derived from the Latin word *evidens* or *evidere*. It means 'to show clearly; to ascertain or to prove.' The rules of evidence assist courts in establishing facts in order to pronounce judgements based on facts placed before them.

¹²⁷ Part XIVA.

7.17 In practical terms, the evaluation of evidence by courts in both criminal and civil proceedings is generally based on a rational and practical approach, with due regard to well-established principles of law¹²⁸, procedure¹²⁹ and evidence.¹³⁰ Courts evaluate evidence based on fundamental factors which are aimed at ensuring a just outcome.

7.18 Traditionally, courts have largely relied on eye-witness and oral evidence as the first port of call when deciding cases. Eye-witnesses can provide very compelling testimony in criminal proceedings, but rather than recording their experiences and observations flawlessly, their memories are susceptible to a variety of errors and biases. They can make errors in remembering specific details and can even remember whole events that did not actually happen. Reforms of the law of evidence must therefore be aimed at addressing issues such as the fallibility of human memory and adapting the law to new forms of evidence.

7.19 In criminal proceedings, the evidentiary standard of proof beyond a reasonable doubt raises the bar for a conviction based purely on eye-witnesses; it acknowledges human fallibility and requires credible, reliable and trustworthy evidence that must leave a fact-finder with no doubt of an accused person's guilt. Human fallibility is also mitigated by the presumption of innocence and a holistic and critical evaluation of all the evidence.

7.20 While eye-witness testimony enables the court to observe a witness and to make its own assessment of his demeanour and his reliability as a witness, digital and electronic evidence pose challenges. These newer forms of evidence are way too different from eye-witness evidence and need to be approached with care, much in the same way as hearsay evidence. Reforms must therefore be aimed at adapting the new forms of evidence and shaping easily accessible standards of reliability and admissibility.

7.21 The reliability of electronic records in particular, is ensured through certification and requirements for consistent electronic operation and accurate data input in order to reduce issues of evidence manipulation and authenticity. While, on the other hand, hearsay evidence should continue to be viewed as unreliable and generally inadmissible, provision must be

¹²⁸ Principles of Criminal law regarding criminal liability and type of crime in criminal proceedings and, in general, principles of the law of delict in civil proceedings, although various other principles may apply in civil proceedings may apply, depending on the area or specific field of law involved.

¹²⁹ The Criminal Procedure Act and Rules of Court applicable to civil proceedings.

¹³⁰ The common law of evidence and various pieces of legislation which deal with evidence.

made for exceptions for specific circumstances, such as statements from deceased persons or those who cannot be called as witnesses.

7.22 Relevant, authentic and properly obtained evidence promotes the reliability and accuracy of information presented in court. It ensures that judicial decisions are based on trustworthy and verifiable facts. It ensures fairness in proceedings; it protects the rights of individuals; it promotes reliability and accuracy; it enhances the efficiency of the judicial system; it balances competing interests; and it adapts to technological developments.

7.23 An important issue that must be addressed and emphasized in regard to electronic evidence is 'notice' and 'discovery'. It is important to inform other parties of an intention to make use of electronic evidence and to exchange the relevant documents, records and information. This ensures a fair trial and may have consequences for a party that fails to give notice of or to exchange relevant documents.

7.24 In the final analysis, Section 35(5) of the Constitution plays a pivotal role with regard to the admissibility of electronic evidence in particular. Section 35(5) mandates the exclusion of evidence obtained in violation of the Bill of Rights if its admission would render a trial unfair or be detrimental to the administration of justice. It ensures that evidence obtained illegally or unconstitutionally is not used against accused persons, thus protecting their rights and upholding the integrity of the judicial process.

7.25 A question which arises is whether there are relevant factors which should be considered in applying Section 35(5) and whether these should form part of framework of the law of evidence. These factors are the seriousness of the offence; the nature of the constitutional violation; the impact of exclusion on the administration of justice; the availability of alternative, lawful means in obtaining the evidence; and the presence of good faith on the part of law enforcement officials.

7.26 Ideally, electronic evidence should be obtained by way of a properly authorised search and seizure warrant. There are, however, a myriad of challenges in obtaining electronic evidence. The challenges are threefold: (1) technical challenges; (2) procedural and legal challenges; and (3) human and management challenges.

7.27 Technical challenges relate to the volume and complexity of electronic information, encryption and anti-forensics, volatile data loss and evolving technology. The digital world contains vast amounts of data, making it difficult to locate relevant evidence within a labyrinth

of potential information. Data can also be protected by encryption and passwords, and sophisticated computer techniques and hide or even destroy digital evidence. Data stored in RAM (random access memory) is volatile and can be lost if devices are not handled carefully; this requires quick and precise action by investigators. New technologies are constantly emerging, requiring continuous adaptation of forensic tools, techniques and advanced law enforcement training to keep pace.

7.28 Procedural challenges relate to the chain of custody, integrity and authenticity, legal frameworks and jurisdictional issues. Proper documentation and handling of electronic evidence throughout the entire process are crucial for admissibility, and errors can easily occur. Investigators must ensure that the evidence they collect is an accurate and unaltered representation of the original digital data. Legal rules for the admissibility of digital evidence vary by jurisdiction and often do not keep up with rapid technological developments, thus creating inconsistencies and hurdles for the prosecution. Data stored across different locations or in the cloud can create complex jurisdictional challenges, especially when dealing with cross-border and international investigations.

7.29 Finally, there are human and management challenges. Human error in handling, documenting or analysing digital evidence can lead to it being deemed inadmissible in court. There is a critical need for trained prosecutors and investigators who specialise in digital evidence to effectively manage, preserve and present such information. Sharing information and managing cases across different components and agencies involved in digital evidence investigations can be complex. Forensic reports need to be presented in a way that the defence and presiding officers can understand; this requires effective communication and contextualization of the technical findings.

7.30 One final issue that needs to be addressed in relation to electronic evidence is the use of electronic media when dealing with vulnerable witnesses. It is common cause that vulnerable witnesses require special measures to give their best evidence due to factors like age, mental or physical condition or disability or some other special circumstances.

7.31 Section 158(2)(a) of the CPA allows a court, on its own initiative or on application by the prosecutor, to order that a witness or an accused, if the witness or accused consents thereto, give evidence by means of closed circuit television or similar electronic media. The use of technology in criminal proceedings requires the law of evidence to recognise and provide methods of taking and presenting evidence remotely. The definition of 'evidence' in

the BSA, for example, includes statements given electronically which the Court permits or requires to be made before it.

7.32 The future of criminal proceedings is going to be greatly dependent on technology and its use. The use of technology could, for example, facilitate the testimony of expert witnesses, where an expert witness could testify remotely in a laboratory setting through two-way connection. Such evidence would not only allow an expert to make real-time demonstrations and clarify the expert evidence but would also reduce litigation costs.

CHAPTER 8: CONCLUSION

8.1 The scope of this paper does not permit a comprehensive examination, analysis and review of the whole of the global spectrum of the law pertaining to evidence. The main purpose was to undertake a limited review of the law of evidence in criminal proceedings in South Africa and within the confines of the scope of the South African Law Reform Commission's review of the criminal justice system.

8.2 Moreover, a clear distinction had to be made between the law of evidence in common law jurisdictions, civil law jurisdictions and in a mixed system. The adversarial nature of the common law system is underpinned by strict rules of admissibility of evidence, with the presiding officer acting as the primary fact-finder. In contrast, civil law systems are more inquisitorial and rely on a judge to find the facts, with fewer rigid rules about what evidence is permissible. Mixed jurisdictions, on the other hand, blend elements of both adversarial and inquisitorial systems, creating unique approaches to evidence, incorporating common law principles within a rational and progressive system.

8.3 As can be discerned from the paper, the development of the South African law of evidence was shaped by the broad common law framework, judicial interpretation and local statutes like the Criminal Procedure Act, 1977 and the Law of Evidence Act of 1988. The current system is thus a mix of English common law principles and statutory provision, with the Constitution also playing a prominent role.

8.4 As can be surmised from the paper, the future of South African law of evidence, more specifically in relation to newer and emerging types of crimes and the requisite evidence in relation thereto, there is clearly a need for reform. This invariably applies to digital evidence in particular.

8.5 While South Africa has attempted to address digital evidence through the Electronic Communications and Transactions Act (ECTA) of 2002 and the Cybercrimes Act of 2021, significant gaps remain. Shortcomings related to common law principles, procedural challenges and the rapid evolution of technology must be addressed.

8.6 In the final analysis, the IEA and the BSA, with their origin in English Common law, should provide a shining torchlight for review of the South African law of evidence. Strangely enough no attempt, other than the IEA and the BSA, has been made to provide a framework

which incorporates into, consolidates with and organise in comprehensive legislation the common law of evidence, both in relation to evidence in general and in criminal proceedings in particular.

8.7 The outcome of criminal court cases in South Africa is determined primarily by the prosecution's ability to prove the accused's guilt beyond a reasonable doubt, based on admissible evidence presented in court. The South African adversarial system places the burden of proving all the elements of a crime on the state. If the state fails to meet the high standard of proof beyond a reasonable doubt, the accused must be acquitted.

8.8 The common law of evidence is centred around three types of evidence, namely (i) testimonial or witness evidence which must be credible and be subjected to rigorous testing through cross-examination, (ii) physical and forensic evidence such as DNA, fingerprints, ballistics, etc, which can be powerful but is subject to strict rules regarding collection, preservation and expert interpretation to ensure reliability and relevance and (iii) documentary and digital or electronic evidence, which must adhere to specific rules for authenticity.

8.9 There are currently challenges in the South African law of evidence in criminal proceedings. First, the current law of evidence contains some outdated elements which have not kept pace with new technology and societal changes. Second, while Chapter 24 of the Criminal Procedure Act, 51 of 1977, is titled "Evidence", it is not sufficiently coherent and comprehensive to cover the central conceptions in the law of evidence. Thirdly, there is fragmentation in that the admissibility of certain types of evidence such as hearsay evidence and digital or electronic evidence are dealt with in separate legislation.

8.10 In turn, outdated elements of the law of evidence, the absence of a coherent and comprehensive framework dealing with evidence within the Criminal Procedure Act and fragmentation create systemic challenges. There is also a constitutional imperative to transform the criminal justice system to be more effective, efficient, victim-centric and in line with the values of human dignity, equality and human rights.

8.11 In order to address these challenges, a reform of the Criminal Procedure Act insofar as it relates to evidence in criminal proceedings is pertinent. Borrowing from the IEA and its reform through the BSA, it would make more sense to define the central concepts of evidence more clearly and precisely. The admissibility of hearsay evidence as provided for separately in the Law of Evidence Amendment Act, 45 of 1988, ought to be incorporated into the Criminal Procedure Act, taking into account the approach of the Constitutional Court in the *Kapa* case.

8.12 More fundamentally, the admissibility and evidential weight of digital and electronic evidence must be catered for in the Criminal Procedure Act. The admissibility of such evidence as provided for in the Electronic Communications and Transactions Act, 25 of 2002, as it stands, is far from being satisfactory. As already observed, digital and electronic evidence ought to be treated in the same way as documentary evidence, with clearly defined requirements for reliability and authenticity. There is also a need to harmonise the Cybercrimes Act, 19 of 2020, with the law of evidence, especially insofar as it relates to the criminalisation of cybercrimes and the concept of “harmful data messages”.

8.13 In sum, a reform of the law of evidence insofar as it relates to criminal proceedings must encapsulate a clear definition and meaning of the concept “evidence”. Secondly, the concepts of relevance, admissibility and probative value must be articulated and encapsulated. Thirdly, a clear distinction must be made between different types or classes of evidence. Lastly, the concept of documentary evidence must be defined to include digital or electronic records.

CHAPTER 9: PROPOSALS AND DRAFT FORMULATION

A Proposals

9.1 In view thereof that the focus is on a review of the criminal justice system, and the Criminal Procedure Act in particular, the proposal which is made is confined to Chapter 24 of the Criminal Procedure Act, which deals specifically with evidence.

9.2 The proposal is that consideration should be given to formulating Chapter 24 of the Criminal Procedure Act in a more structured manner. The formulation should be organised and presented in a systematic manner, reflect the nexus between the law of evidence and the criminal justice system and be based on the basic principles of the law of evidence.

9.3 A systematic framework of evidence, which reflects the nexus between the law of evidence and the criminal justice system and is based on the basic principles of the law of evidence on six legs, namely what may be referred to as “the threshold test”, the “admissibility sieve”, “classification of evidence”, “evaluation of evidence”, “burden and standard of proof” and “special procedures. All these legs are permeated by and must take into account modern technological developments.

9.4 A systematic framework permits a structured, hierarchical evaluation of evidence to determine its relevance, admissibility and weight. It upholds the presumption of innocence and ensures a fair trial. The process involved acts as a “gatekeeper” (admissibility rules) and as a guide to proving facts (probative value).

9.5 The proposal is that Chapter 24 of the CPA should be amended as follows:

9.5.1 The heading of section 208 of the CPA should be reformulated to “Conviction may follow on evidence of one or more witnesses”.

9.5.2 The meaning of “evidence” should be defined to include documentary evidence. The meaning of “document” should be defined. The meaning should be based on the classification of evidence.

9.5.3 The threshold test of “relevance” should be incorporated into the Chapter.

9.5.4 The admissibility sieve, based on inclusionary and exclusionary rules, should be incorporated into the Chapter.

- 9.5.5 The burden of proof must be included in the Chapter.
- 9.5.6 The question of witnesses (or who may testify) and the examination of witnesses must be included in the Chapter.
- 9.5.7 Section 206, which deals with the law as to competency, compellability or privilege of witnesses which was in force on 30 May 1961 must be done away with and replaced by a catch-all section which makes the common law applicable in cases not dealt with adequately in Chapter 24.
- 9.5.8 Section 242, which deals with evidence on a charge of defamation has become obsolete and must be done away with.
- 9.5.9 Section 252, which deals with the law as to admissibility of evidence which was in force on 30 May 1961 must be done away with and replaced by a catch-all section which makes the common law applicable in cases not dealt with adequately in Chapter 24.

B Draft Formulation

9.6 “208. Conviction may follow on evidence of one or more witnesses

- (1) An accused may be convicted on the evidence of one or more competent witnesses, provided that the evidence of only one witness is entirely reliable, trustworthy and sufficient to convict even without corroboration.
- (2) Evidence means and includes –
- (i) all statements made orally, including statements given electronically, which the Court permits or to be made before it by witnesses in relation to matters of fact facts under inquiry in terms of this Act and such statements are called oral evidence;
 - (ii) all documents, including electronic or digital records produced for the inspection of the Court and such documents are called documentary records.”

9.7 “208A. Relevancy of facts

- (1) Evidence may be given of the existence or non-existence of every fact in issue and of such other facts which are declared by the Court to be relevant to a fact in issue.
- (2) Facts which, although not in issue, are so connected with a fact in issue or a relevant fact as to form part of the same transaction, shall be deemed relevant, whether they occurred at the same time and place or at different times and places.

- (3) Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.
- (4) Any fact which shows or constitutes a motive or preparation for any fact in issue or relevant fact is relevant.
- (5) When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.
- (6) Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything, or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant insofar as they are necessary for that purpose.
- (7) Where there is reasonable ground to believe that two or more persons have conspired to commit an offence, anything said, done or written by any one of such persons in reference to the their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact against each of the persons believed to be so conspiring, as well as as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.
- (8) Facts not otherwise relevant are relevant –
 - (i) If they are inconsistent with any fact in issue or relevant fact;
 - (ii) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.
- (9) Where the question is as to the existence of any right or custom, the following facts are relevant –
 - (a) any transaction or occurrence by which the right or custom in question was created, claimed, modified, recognised, asserted, denied, or which was inconsistent with its existence;
 - (b) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from.
- (10) Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

- (11) When there is a question whether an act was accidental, intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.
- (12) When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact."

9.8 **"208B. Statements by persons who cannot be called as witnesses and under special circumstances**

- (1) Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant in the following cases, namely:-
- (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;
 - (b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him;
 - (c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or an action for damages;
 - (d) when the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;
 - (e) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of

knowledge, and when the statement was made before the question in dispute was raised;

- (f) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the dispute in question was raised;
 - (g) when the statement is contained in any deed, will or other document, which relates to any transaction by which a right or custom was created, claimed, modified, recognised, asserted or denied;
 - (h) when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.
- (2) Entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge or convict any person with liability”.

9.9 **“208C. Opinions of third persons when relevant**

- (1) When the Court has to form an opinion upon a point or question of science or art, or any other field, or as to identity of handwriting or fingerprints or DNA (Deoxyribonucleic Acid) the opinions upon that point or question specially skilled in such science or art, or any other field, or as to question of identity of handwriting or finger impressions or DNA are relevant facts and are called expert evidence.
- (2) When in criminal proceedings, the Court has to form an opinion on any matter relating to any information stored or transmitted in any computer resource or any other electronic or digital form, the opinion of a Digital Forensic Examiner or Investigator, is a relevant fact.
- (3) Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinion of an expert, when such opinion is relevant.
- (4) When the Court has to form an opinion as to a person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

- (5) When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right, of persons who would be likely to of its existence if it existed, are relevant.
- (6) In criminal proceedings, the fact that the accused has a bad character is irrelevant, unless evidence has been given that he has a good character, in which event it becomes relevant.”

9.10 **“208D. Oral evidence**

- (1) All facts, except the contents of documents, may be proved by oral evidence.
- (2) Oral evidence, in all cases whatever, be direct; if it refers to, -
 - (a) a fact which could be seen, it must be the evidence of a witness who says he saw it;
 - (b) a fact which could be heard, it must be the evidence of a witness who says he heard it;
 - (c) a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
 - (d) an opinion or to the grounds on which that opinion is held, it must be the evidence of the persons who holds that opinion on those grounds.”

9.11 **“208E. Documentary evidence**

- (1) The contents of a document may be proved either by primary or by secondary evidence.
- (2) Primary evidence means the document itself produced for the inspection of the Court.
- (3) Secondary evidence includes –
 - (a) certified copies of the original;
 - (b) copies made from the original by mechanical processes which in themselves ensures the accuracy of the copy; and copies compared with such copies;
 - (c) copies made from or compared with the original;
 - (d) counterparts of documents as against the parties who did not execute them;
 - (e) oral accounts of the contents of a document given by some person who has himself seen it;

- (f) oral admissions;
- (g) written admissions;
- (h) evidence of a person who has examined the document, the original of which consists of numerous accounts or other documents which cannot conveniently be examined in Court, and who is skilled in the examination of such documents.
- (4) Secondary evidence may be given of the existence, condition, of a document in the following cases, namely:-
- (a) when the original is shown or appears to be in the possession or power –
- (aa) of the person against whom the document is sought to be proved; or
- (bb) of any person out of reach of, or not subject to, the process of the Court; or
- (cc) of any person bound to produce it,
- and when, after notice, such person does not produce it;
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (d) when the original is of such a nature as not to be easily movable;
- (e) when the originals consist of numerous accounts or other documents which cannot be conveniently examined by the Court, and the fact to be proved is the general result of the whole collection.
- (5) Secondary evidence of the contents of the documents referred to in clause (a) of sub-section (4), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his legal representative, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-

- (a) when the document to be proved is itself a notice;

- (b) when, from the nature of the case, the adverse party must know that he will be required to produce it;
 - (c) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
 - (d) when the adverse party or his agent has the original in Court;
 - (e) when the adverse party or his agent has admitted the loss of the document;
 - (f) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.
- (6) The contents of electronic records may be proved in accordance with the provisions of sub-section (6).
- (7) Notwithstanding anything contained in this Chapter, any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.
- (8) The conditions referred to in sub-section (6) in respect of a computer output shall be the following, namely:-
- (a) the computer output containing the information was produced by the computer or communication device during the period over which the computer or communication device was used regularly to create, store or process information for the purposes of any activity regularly carried on over that period by the person having lawful control over the use of the computer or communication device;
 - (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer or communication device in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer or communication device was operating properly, or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

- (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer or communication device in the ordinary course of the said activities.
- (9) Where over any period, the function of creating, storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in clause (a) of sub-section (7) was regularly performed by means one or more computers or communication devices, whether –
- (a) in standalone mode; or
- (b) on a computer system; or
- (c) on a computer network; or
- (d) on computer resource enabling information creation or providing information processing and storage; or
- (e) through an intermediary.

all the computers or communication devices used for that purpose during that period shall be treated for the purpose of this section as constituting a single computer or communication device; and references in this section to a computer or communication device shall be construed accordingly.

- (10) In any criminal proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:-
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer or a communication device referred to in clauses (a) to (e) of sub-section (8);
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (7) relate,

and purporting to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate.

- (11) For the purposes of this section, -

- (a) information shall be taken to be supplied to a computer or communication device if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) a computer output shall be taken to have been produced by a computer or communication device whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment or by electronic means.
- (12) If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.
- (13) Except in the case of a secure electronic signature, if the electronic signature of any subscriber is alleged to have been fixed to an electronic record, the fact that such electronic signature is the electronic signature of the subscriber must be proved."

9.12 **208F. Witnesses**

- (1) All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
- (2) A witness who is unable to speak may give his evidence in any other manner which he can make it intelligible, as by writing or signs; but such writing must be written and the signs made in open Court and evidence so given shall be deemed to be oral evidence:

Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of a suitable interpreter or special educator in recording the evidence.
- (3) In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.
- (4) No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to who he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents except in proceedings in which one married person is prosecuted for any crime committed against the other.

9.13 **208G. Examination of witnesses**

- (1) The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to criminal proceedings.

- (2) When either party proposes to give evidence of any fact, the Court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Court shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.
- (3) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before the evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.
- (4) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.
- (5) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
- (6) The examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
- (7) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.
- (8) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction or incident concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction or incident was at that time fresh in his memory:

Provided that the witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it, he knew it to be correct.
- (9) Any question suggesting the answer which the person putting it wishes or expects to receive is a leading question.
- (10) Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.
- (11) The Court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion, been already sufficiently proved.
- (12) Leading questions may be asked in cross-examination.
- (13) The court may forbid any questions which regards as indecent or scandalous, although such questions may have some bearing on the questions before the Court.

unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

- (14) The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.”

9.14. **208H. Burden of Proof**

- (1) Any person who desires the Court to make a ruling or give judgment in his favour on any issue dependent on the existence of facts which he asserts must prove that those facts exist, and when a person is bound to prove the existence of any fact, the burden of proof lies on that person.
- (2) The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person.
- (3) When a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any general exception of the law or within any special exception of the law, or in any law defining the offence, is upon him, and in the absence of such proof the Court shall presume the absence of such circumstances.
- (4) When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
- (5) The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common cause of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
- (6) In a prosecution of rape under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, where sexual intercourse by the accused is proved and the question is whether the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

9.15. **253A. Common law**

“In any instance where provision is not made in this Chapter the common law as interpreted and applied by the Courts shall apply”.

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