

## **The rise of the machines – *understanding electronic evidence***

By Michel O Takombe

In recent years, technology has revolutionised the way we communicate, the way business is transacted and ultimately the way lawyers practise law. The advancement of technology has created an entirely new source of evidence: Electronic evidence. The rising importance of this new brand of evidence has vastly outpaced the rate at which lawyers have adapted to this new reality.

### **Relevance of electronic evidence for lawyers**

One reason the electronic evidence explosion is affecting virtually every lawyer, regardless of practice area, is that the world is experiencing a revolution on a massive scale, leaving no person untouched. It is difficult to identify any business transaction that is not created or passed through a computer. All of this activity creates a mountain of information that has to be identified, collected, searched, reviewed, and produced in the event of civil litigation. In addition, electronic evidence plays a key role in criminal law – either as the instrumentality of the crime or the primary source of evidence relating to a more traditional charge (M CS Lange and KM Nimsger 'Electronic Evidence: Law and Practice' (Chicago: ABA Publishing, 2004) 2).

### **Sources of law of electronic evidence**

#### ***The Civil Proceedings Evidence Act 25 of 1965 (CPEA)***

In terms of s 28 of the CPEA, records of the bank shall be admissible as *prima facie* evidence of the matters, transactions and accounts recorded therein. This is subject to proof by affidavit that such records are or have been the ordinary books of such bank; they have been made in the usual and ordinary course of business; and they are in or come immediately from the custody or control of such bank.

In addition, s 34(1) of the CPEA states where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact provided certain conditions are met, such as personal knowledge by the person who made the statement; statement made in the performance of a duty to record information; and impossibility for the person to attend as a witness for valid reasons.

Under particular conditions the presiding officer has an overriding discretion to admit a statement (s 34(2)) and to decide exactly how much evidential weight should be attached to the statement concerned (s 35(1)).

In *Narlis v South African Bank of Athens* 1976 (2) SA 573 (A) the Appeal Court examined the trial court's decision that computer printouts were admissible as *prima facie* evidence of the statements contained therein under s 34(2) of the CPEA. The Appeal Court correctly pointed out that although s 34(2) gives the presiding officer discretion to admit certain statements as evidence, that discretion can be exercised only with reference to s 34(1) which clearly refers only to 'any statement made by a person in a document'. The court held thus that there was no basis for any discretionary admissibility of the computerised statements under s 34(2) of the CPEA.

#### ***The Computer Evidence Act 57 of 1983 (CEA)***

In terms of s 3(1) of the CEA, 'in any civil proceedings an authenticated computer print-out shall be admissible on its production as evidence of any fact recorded in it of which direct oral evidence would be admissible'.

Overall, comment on the CEA was negative. Staniland, French, Skeen, Delport, Ebdon and Van der Merwe, among others, criticised this legislation (Van der Merwe 'Information and Communications Technology Law 2008: 108). Its repeal by the Electronic Communications and Transactions Act 25 of 2002 was, therefore, welcomed.

### ***Law of Evidence Amendment Act 45 of 1988***

This piece of legislation, *inter alia*, lays down general requirements for the admissibility of hearsay evidence.

An interesting question one may ask is whether electronic evidence can fall under the definition of hearsay evidence in terms of the Law of Evidence Amendment Act and, therefore, be admissible under this Act. This question was answered in *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W) where a distinction was made between two scenarios:

- Where the probative value of the information contained in the electronic evidence depends on the credibility of a natural person, that electronic evidence would be hearsay and admissible in evidence in criminal or civil proceedings only if the requirements of the Law of Evidence Amendment Act are met.
- Where the probative value of the electronic evidence depends on the 'credibility' of the computer (because information was processed by the computer), that evidence will not qualify as hearsay evidence.

Van Zyl J in *S v Ndiki* [2007] 2 All SA 185 (Ck) (in a dissenting opinion at para 7) distinguishes between computer evidence that falls within the definition of hearsay evidence in s 3 of the Law of Evidence Amendment Act and admissible under that Act, and evidence that depends solely on the reliability and accuracy of the computer itself and its operating systems or programs, which constitutes real evidence.

### ***Criminal Procedure Act 51 of 1977 (CPA)***

Section 221 provides that if direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, upon the production of the document, be admissible as evidence of that fact provided certain conditions are met, such as the document is or forms part of a record to a trade or business established from information supplied by a person with personal knowledge but who is not in a position to attend as a witness.

In *S v Harper and Another* 1981 (1) SA 88 (D) the court found that the definition of 'document' in terms of s 221(5) was too narrow in scope to accommodate a computer, because a computer does not only record and store information but also sorts and collates information. However, the court was able to admit the electronic evidence on other grounds (s 221(1)).

### ***Electronic Communications and Transactions Act 25 of 2002 (ECT Act)***

Section 11(1) of the ECT Act recognises information in electronic form and not simply computer printouts, as done by most of its predecessors.

#### **• *Admissibility of data messages***

Section 15(1) of the ECT Act provides:

'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.'

As pointed out in the *Ndlovu* case, this subsection facilitates admissibility by excluding evidence rules that deny the admissibility of electronic evidence purely because of its electronic origin. Section 15 places electronic information on the same footing as traditional paper-based transactions, and thus does not do away with the requirements governing the admissibility of documentary evidence which are relevance, authenticity and originality.

It is important to note that the 'best evidence' rule can be useful in overcoming the difficulty of determining whether a data message is in its original form or not as it was the case in *S v Koralev and Another* 2006 2 SACR 298 (N) where photographic images found on the appellant's computer were held not to be original images since they had been either downloaded from the Internet or transferred from a digital camera.

#### • **Evidential weight of data messages**

Once a data message is admitted in evidence, it must be given due evidential weight in terms of s 15(2) of the ECT Act. In assessing the evidential weight of a data message, regard must be had to the reliability of the process of generation, storage and communication of the data, of the preservation of integrity, of the identification of the originator (proof of authenticity) and any other relevant factor (s 15(3)).

#### • **The 'shopbook' exception**

Section 15(4) provides an exception to the manner of proof and evidential weight ordinarily to be accorded to a data message. In *Ndlovu's* case the court held that s 15(4) does not require a qualitative inquiry to be made in terms of s 15(2) or (3) in regard to the weight to be attached thereto (173). It provides for its own weight, namely that the facts contained therein will be rebuttable proof – namely if not rebutted, then they will stand as evidence.

In *Trend Finance (Pty) Ltd and Another v Commissioner of SARS and Another* [2005] 4 All SA 657 (C) the electronic evidence adduced was rejected because it did not satisfy the definitional requirements of a 'printout' in terms of s 15(4).

### **Conclusion**

Information and communication technologies have changed the world in which we live and along with it, the way we communicate, transact and work. This has given rise to electronic evidence. It is important for lawyers to acquaint themselves with this entirely new source of evidence and know and understand it with all its unique technical and legal features in order to discharge their duties to their clients.

#### **Electronic evidence definitions**

**Data:** Data comprises of the output of analogue devices or data in digital format. It is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system.

**Metadata:** This refers to data providing information about one or more aspects of the data. Metadata constitutes very useful information in the analysis of an electronic document.

#### **Where to find electronic evidence?**

With the constant development of new technologies, storage locations for electronic evidence are virtually endless. Electronic evidence can be found in or on –

- networks and workstations;
- removable disks;
- temporary files;
- swap files;

- mirror disks;
- program files;
- websites;
- cookies;
- e-mails;
- laptops and home computers; and
- smart phones, etcetera.

**‘Shopbook exception’:**

The ‘shopbook exception’ is a rule of evidence inherited from British law which make documents produced in the course of trade or business (or copies thereof) admissible with a rebuttable presumption for their correctness. It is a general exception to the hearsay rule.

Michel O Takombe *LLB (Université Protestante au Congo) LLM (Unisa)* is a legal consultant in Pretoria.