

Revolutionising The Civil Courts In South Africa Through Information Technology

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Abstract: A consultative approach was undertaken by a handful of academics in assessing the information technology of court systems from a global perspective inter alia southern hemisphere countries to European trends, which resulted in academics writing critically about this process in revolutionising the case management process and technology. Chief Justice Mogoeng Mogoeng of the Constitutional Court in South Africa remarked that the e-filing system was required to address some of the problems that judicial officers face in hearing appeals when dockets are lost in their entirety. In this specific context there is needed reform for the case management structure of matters that appear on the court roll. The time delay in transcribing records for Judges/Magistrates to access the evidence for writing their judgments inevitably creates backlogs of judgments only being delivered eight months after the trial. This is unfavourable for the litigants that have their matter unduly delayed and causes an incremental rise in litigation fees. A possible solution is for the technology that enables and allows for 'real-time transcript,' which ensures that when evidence is given in court it is automatically transcribed. This means that the Judge/Magistrate has immediate visual access to it on the computer. This particular technology could save costs and allow for accurate information to be given to the Judge/Magistrate for faster digestion of the matter before them. The paper-based system perpetuates that copious amounts of pages are filed at court. An environmental lawyer's worst nightmare of seeing so many pages that have to be printed instead of referring to a 'soft' copy. To a litigant aghast, after the very tedious process of paginating the court files and their own files and on the day of the trial/application the court file goes walkabout. The result is that it is impossible for the matter to proceed on the same day, accordingly the trial is postponed to locate the file and the originals alternatively for the respective litigants to file the necessary copies to ensure that the matter can proceed with a copied file for a civil dispute. However from a criminal perspective when the docket is lost, then the case is postponed for the location of the docket and if it cannot be found then the matter is removed from the roll, until it can be found and then the matter will then be re-enrolled on the court roll, sometimes matters take years to re-appear if at all. The result sadly is that when documents go missing that criminals are released into society once again. European countries have adopted e-Courts that function on an online basis where witnesses can attest to evidence through online mediums akin to skype. In the Southern Hemisphere countries such as Singapore and Australia have some of the most advanced Information Technology systems such as e-filing systems and video conferencing are some of the developments that contribute to the 'dawn of a new era of cybercourts.' Australia had initially developed the online court system for matters that were 'complex' but then a particular necessity for it evolved and as a result at least one permanent cyber court sits in each court. Another reason for using information technology in Australia was to ease the backlog of a paper-based system. The trends in technology is not only to revolutionise business and marketing but also has its place in court. Advanced technology usually sums up convenience and especially in the struggle for access to justice 'convenience' is a fad that can address access to justice. A major drawback of information technology is that it is an expensive system, but surely government may address the cost concern if it weighs the successes of the system to paper-based outdated systems. In Singapore the courts have converted to an electronic litigation system, meaning every iota of the litigation is computerised. This paper shall only deal with an analysis of the court online system to revolutionise the civil system within a South African context.

Keywords: court information process revolutionise technology

Introduction

In South African civil Magistrates' Courts and civil Regional Courts' litigation process are based on paper based exchange of pleadings. [1] Similarly the High Court and Supreme Court of Appeal seem to operate in relation to the paper based pleadings as well. The procedure of the courts are based on the rules of court that dictate the method of paper pleadings, which requires a physical exchange of pleadings in adherence with the rules of court. Justice Mogoeng Mogoeng stated that: "*South Africa is in an unfortunate situation where dockets disappear even in the custody of prosecutors,*" "*We as the judiciary developed a plan regarding the modernisation of the court system after visiting and studying what other countries such as the USA and Russia are doing. It simply requires an electronic recording system where one or two people have a pin and manage the electronic filing system,*" [2] The rules board have amended the rules of court to allow for service of pleadings through email. However these are just recent changes, which are still subject to consensus between parties to accept the service of either action/application proceedings through email.

In the criminal courts there have made progressions in preparation for the accused case, certain magistrates court are able to save the contents of the dockets known as the further particulars (contents of the dockets), which is the State's case consisting of the charge sheet as well as the affidavits that have been deposed to in support of the State's case. The reason for this is to ensure that the accused may adequately prepare against the State's case.

South African High Court rolls for motion court as well as the trial motion court roll is published on saflii [3] the day of the action/application practitioners may easily access the court roll online. These minor progressions in technology is simply a far cry away from major progressions of information technology. There were government initiatives to allow for wi-fi in courts, however this is not to all courts but simply certain courts such as your superior courts.[4]

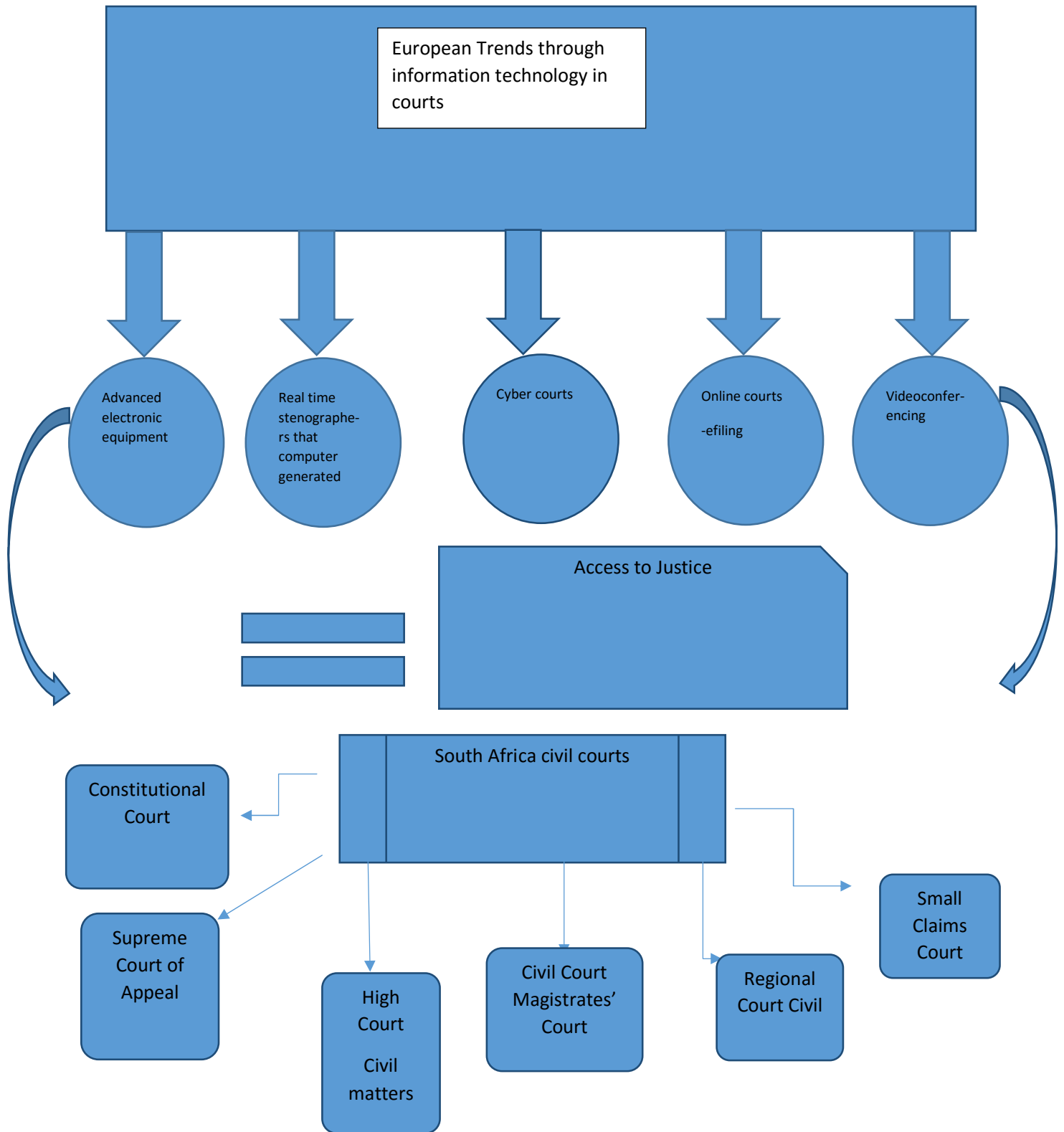
It is of utmost importance to consider all the current advancements in technology to improve the paper based litigation procedure in South Africa by adopting online procedures, which are supported with software such as cloud technology or dropbox, software created on the internet that allows for the storage of data.

Vogel argues that '*even more so than the courts' response to these previous technological changes, courts must quickly find ways to update their rules and procedures to respond to the instant forms of communication created by the Internet and social media.*'[5] This aspect is the departing point of this paper because there is a need in a South African context to ensure that our civil courts are updated with relation to information technology and ensures the fluidity of updates to the global trend of information technology in courts.

This paper will be discussed under the following headings as follows:

- Civil Courts
- Information Technology
- Rules of court and IT
- Significant cases and IT
- Case management
- E-filing
- E-court
- Electronic court
- Online courts
- Oral testimony through eservices
- Electronic Litigation
- Conclusion

Schematic Diagram of the influence of Information Technology and the courts in South Africa through adopting European trends



Civil Courts in South Africa

In South Africa for a civil dispute there are different courts to approach in relation to the nature of claim and quantum. A litigant may pursue their claim either in the Small Claims Court, District Magistrates' Court, Regional Magistrates' Court, High Court, Supreme Court (Appeals) or Constitutional (constitutional infringement).

Rule 62[6] of the Uniform rules sets out the process and appearance of pleadings and the manner in which they must be filed and states that:

'(1) Where a matter has to be heard by more than one judge, a copy of all pleadings, important notices, annexures, affidavits and the like shall be filed for the use of each additional judge. (2) All documents filed with the court, other than exhibits or facsimiles thereof, shall be clearly and legibly printed or typewritten in permanent black or blueblack ink on one side only of paper of good quality and of A4 standard size. A document shall be deemed to be typewritten if it is reproduced clearly and legibly on suitable paper by a duplicating, lithographic, photographic or any other method of reproduction. (3) Stated cases, petitions, affidavits, grounds of appeal and the like shall be divided into concise paragraphs which shall be consecutively numbered. (4) An applicant or plaintiff shall not later than five days prior to the hearing of the matter collate, and number consecutively, and suitably secure, all pages of the documents delivered and shall prepare and deliver a complete index thereof. (5) Every affidavit filed with the registrar by or on behalf of a respondent shall, if he is represented, on the first page thereof bear the name and address of the attorney filing it. (6) The registrar may reject any document which does not comply with the requirements of this rule. (7) Any party to a cause, and any person having a personal interest therein, with leave of the registrar on good cause shown, may at his office, examine and make copies of all documents in such cause.'

Uniform rules relating to the registrar, which allows the registrar to accept electronic copies of pleadings for the file but a hardcopy must still be filed: Rule 4 also provides for instances when the registrar may reject the pleadings if it is not in compliance with the rules.

Registrar

Rule 4(Erasmus, 2014)

Filing of documents.—

(1) (a) The registrar may refuse to accept any document tendered for lodging if, in the registrar's opinion, it does not comply with these rules: Provided that if proper copies of the rejected documents are submitted within 10 days of rejection, such lodging shall not be deemed untimely. (b) The registrar may provisionally accept, in lieu of the original document tendered for lodging, a copy (including a facsimile or other electronic copy) thereof, but the original shall be filed within 10 days thereafter.(c) The registrar may not accept documents in relation to an appeal on the date of the hearing of that appeal.

Maintaining of court records.—

(2) (a) A notice of appeal or the first application in an intended appeal shall be numbered by the registrar with a consecutive number for the year during which it is filed. (b) Every document lodged afterwards in such a case shall be marked with that number by the party lodging it and shall not be received by the registrar until so marked. (c) All the documents delivered to the registrar to be filed in a case shall be filed by a registrar in a case file under the number of such case. (d) The registrar shall maintain the Court's records and shall not permit any of them to be removed from the court building, except as authorised by the registrar. (e) Any document lodged with the registrar and made part of the Court's records shall not thereafter be withdrawn permanently from the official court files.

Inspection and copying.—

(3) (a) Documents filed for Court purposes are public documents and may be inspected by any person in the presence of the registrar.

Rule 8(6)

(a) The copies of the record shall be clearly typed on stout A4 standard paper in doublespacing in black record ink, on one side of the paper only.

(b) Legible documents that were typed or printed in the original, including all process in the court a quo forming part of the record on appeal, and documents such as typed or printed contracts and cheques (whether handwritten, typed or printed) and the like shall not be retyped and a clear photocopy shall be provided instead.

(c) The pages shall be numbered clearly and consecutively, and every tenth line on each page shall be numbered and the pagination used in the court a quo shall be retained where possible. (d) (i) At the top of each page containing evidence, the name of the witness and, at the top of each page containing exhibits, the number of the exhibit, shall appear. (ii) All references in the record to page numbers of exhibits shall be transposed to reflect the page numbers of such exhibits in the appeal record. (e) The record shall be divided into separate conveniently sized volumes of approximately 100 pages each. (f) The record shall be securely bound in suitable covers disclosing—(i) the case number;(ii) the names of the parties;(iii) the volume number and the numbers of the pages contained in that volume; (iv) the total number of volumes in the record; (v) the court appealed from; and (vi) the names and addresses of all the parties for service. (g) (i) The volume number and the numbers of the pages contained in a volume shall also appear on the upper third of the spine of the volume. (ii) Each volume shall be so bound that upon being eased open it will lie open without any manual or other restraint and upon being so opened and thereafter repeatedly closed, the binding shall not fail. (h) The—(i) judgment and order appealed against;(ii) judgment and order granting leave to appeal; and (iii) notice of appeal, shall, if the record consists of more than one volume, be contained in a separate volume.(i) The record, in the first or in a separate volume, shall contain a correct and complete index of the evidence, documents and exhibits in the case, the nature of the documents and exhibits being briefly stated therein. (j) Unless it is essential for the determination of the appeal and the parties agree thereto in writing, the record shall not contain—(i) argument and opening address;(ii) formal documents;(iii) discovery affidavits and the like;(iv) identical duplicates of any document; or (v) documents not proved or admitted, and the registrar shall mero motu disallow the costs, also between attorney and own client, of such documents.

Constitutional Court Rule 1(3) provides for the copious amounts of copies that must be filed and it can be surmised for the research clerks and registrars, as 11 judges hear the constitutional matter.

Any reference in these rules to a party having to sign documents shall be construed as including a reference to a legal representative representing such party, and a reference to lodging documents with the Registrar as including prior service of such documents on other parties and the lodging of 25 copies of all relevant documents and an electronic version thereof that is compatible with the software used by the Court, with the Registrar.

Supreme Court Appeal rule 1(1) there are only fewer judges hearing the appeal from 3-5 judges and their research clerks and registrars that will assist in relation to research for the judge to draft the judgment 'lodging of documents'. *Practice Direction 2-lodging of records provides that until the formal amendment of rule 1(3), parties lodging documents with the registrar are permitted to lodge only 12 (not 25) copies, plus an electronic version that is compatible with the court's software.*

Constitutional Court Rule 1(4) provides for one electronic copy of the pleadings to be filed.

Notices, directions or other communications in terms of these rules may be given or made by registered post or by facsimile or other electronic copy: Provided that, if a notice or other communication is given by electronic copy, the party giving such notice or communication shall forthwith lodge with the Registrar a hard copy of the notice or communication, with a certificate signed by such a party verifying the date of such communication or notice.

From the abovementioned rules of court it is apparent that copious amounts of pages are filed at court for litigation matters, although there electronic copies that may be filed, the court file is still a paper file.

Information Technology

Information Technology is defined as 'a term used to describe the application of modern computer-based techniques to the management of the collection, storage, retrieval and processing of information.'[7] Information technology is transferred through different mediums of computer software through the internet such as the exchange of information via facebook pinterest, skype and twitter, amongst other social networks, it is these types of network that can also be used as service provider to update information technology in courts. (Vogel, 2009-2010) Information technology is software that stores information online that is easily accessible through bandwidth. The relevance of information technology is that although it has made communication easier and quicker creating a record that can still be transcribed such as exchange of emails. The old method of post office delivery is still used for registered mail, ordinary mail or speedy services. The convenience of quicker exchange of information can be transcended to the court process in order to make it more streamline and ensure access to justice to more complainants, applicants and plaintiffs. The South African Law Reform Commission recommended using computer equipment to improve the civil court systems.[8] The European Union Commission aim for Europe was:

‘The overall aim of the Digital Agenda is to deliver sustainable economic and social benefits from a digital single market based on fast and ultrafast Internet and interoperable applications.’[9]

Rules of Civil Courts and IT

Rules of civil courts with relation to information technology is a rarity. The rules that relate to information technology regarding service and rules of discovery relating to electronic equipment, devices or recordings that must be made available in relation to all the courts.

(9)(a) Service of any notice, request, statement or other document which is not process of the court may be effected by delivery by hand at the address for service given in the summons or appearance to defend, as the case may be, or by sending it by registered post to the postal address so given: Provided that, subject to rules 5 and 13, service of such notice, request, statement or other document may be effected by sending it by facsimile or electronic mail to the facsimile address or electronic mail address given in the summons or notice of intention to defend, as the case may be. (b) An address for service, postal address, facsimile address or electronic address so given as contemplated in paragraph (a) may be changed by the delivery of notice of a new address and thereafter service may be effected as provided for in that paragraph at such new address.[10] (ii) Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 is applicable to service by facsimile or electronic mail. (Loggerenberg, 2015)

Significant cases dealing with IT

In the case of CMC Woodworking Machinery (Pty) Limited v Pieter Odendaal Kitchens[11] the facts dealt with the plaintiff in the main action claiming monies for woodwork machinery that was delivered to the defendant. The interlocutory application before the court was an interlocutory application namely an application for substituted service. This application in terms of rule 4A allows another method of service such as electronic service. The applicant now sought service of the trial date through facebook together with notice in the local newspaper for the defendant’s attention that is a juristic company. The judge granted the substituted service in the circumstances as it was sufficiently illustrated on affidavit that the necessary measures were taken for service but the defendant was avoiding service.

Rule 4(2) that deals with substituted service states that: *‘If it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be effected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic, but whose whereabouts therein cannot be ascertained, the provisions of subrule (2) of rule 5 shall, mutatis mutandis, apply.’(Erasmus, 2014)*

The substituted service application should be understood in the context in which it was launched and the cogent reasons submitted on behalf of the applicant in support of the application. Each case will have to be decided on its own merits and on the type of document that needs to be served on the party concerned. This application has reminded me that even courts need to take cognisance of social media platforms, albeit to a limited extent, for understanding and considering applications such as the present.(Paragraph 14 of CMC case) (my emphasis)

It is apparent that Judge Steyn is emphasising the importance of social media as a platform for consideration of matters as the dawn of a techno era is here due to the progressions in technology.

In a Canadian case the judge also ordered substituted service through facebook, since there was no other manner of obtaining personal service upon the defendant, so a private message was sent through facebook messenger.[12]

Case management

Case Management in the South African Magistrates’ Court as well as in the High Court is governed by party autonomy.[13] It is the parties to the disputes that govern the process, in that a party to the action or an application exchanges pleadings and ensures that there is adequate service of pleadings in terms of the rules of court. Once pleadings have closed in an action or in application process in that the replying affidavit has been served then the court file is indexed and paginated by the plaintiff to the action or to the applicant for the application. The plaintiff and defendant must ensure that all pleadings are original and are filed in court or filed in the court file correctly by the clerk of the court in the Magistrates’ Court or the registrar of the High Court. Usually a practitioner files a copy and when they index the court file then they insert the originals in the court file. Too often documents are misfiled at court due to the excess of pleadings that clerks/registrars file.

E-filing

E-filing is a concept that the Supreme Court of Appeals in South Africa is familiar with in that an appellant can file all pleadings directly to the registrar that creates a file, however in accordance with the rules of the supreme court of appeals the appellant must still ensure that a correspondent attorney still goes physically to court and files the respective appeal application to be heard before the supreme court of appeal. In the Constitutional Court an electronic copy of all pleadings are emailed to the registrar however the physical copies of pleadings and heads of arguments must also still be physically filed in the court file.

However the concept of e-filing is a concept that is still not practiced in the High Court or the Magistrates Court, the parties will still need to physically file all the papers in the file for the court's consideration. In the High Court the litigants have email access to the registrars of the court that are assigned to the judge that presides over the respective dispute, however it is presumed that the file is court ready and all the respective pleadings would be on the file.

E-court

The e-court in Australia is a court that uses a combination of email and video-conferencing, which provides that orders are made available online.[14]

Electronic Court

Electronic courts are courts that are fully equipped with electronic equipment such as computers for all the clerks as well as the judicial officers, videoconferencing equipment as well as screens, cd-rom burners, scanners, cables amongst other advancements in technology.(Wallace, 2004)

Online courts

Online courts is a concept that are familiar to Singapore in that it is a world renown court that allows for parties to be scattered across the world but are still able to link up through online courts and give their testimony, which allows matters to heard at an expeditious rate and obliterate a backlog.[15]

Oral testimony through eservices

Oral testimony through eservices or video conference is not a concept that is unfamiliar in the criminal courts, as children are allowed to give their evidence in another room that is separate from the accused to ensure the trauma suffered by the child is minimal and prevents the child from experiencing fear or influence from the accused when the testimony is given.[16] However this is an exception.

Oral testimony through eservices in the Europe such as Norway, Italy and also in Asian court such as in Singapore allow for oral testimony to be transcribed immediately on computers that are before the presiding officer so there is no need for a stenographer. As the witnesses or experts give their testimony then the evidence is transcribed immediately so that if a presiding officer finds it difficult to follow the witness the presiding officer can always refer back to the evidence that was delivered five minutes or one minute ago.(T Yee Sze, 2004)

Electronic Litigation

A system that provides for all pleadings to be exchanged through email that there are no hard copies (known as paper based copies) but only soft copies. Electronic litigation allows for information technology to support the case manager and judiciary. The judiciary have access to computers and there are computers for all the parties, where parties refer to the copies of pleadings on their computers in real time and the court folder is an e-file that can be shared and accessed by all parties to the litigation. (T Yee Sze, 2004)

Access to Justice

Access to Justice is to ensure that complainants and disputants are able to access the law at a cost effective rate and expeditious manner. Through information technology allows more people access to justice in that it allows more time for matters to be dealt with and can be easier finalised as the judicial officers are able to access all the evidence at their fingertips without the undue waiting period for all the evidence to be transcribed. It has been proposed that lawyers must also update their access to and use of information technology.[17] Another manner in which information technology and real time transcripts can create access to justice is by using the technology to transcribe languages that are not always translated by an interpreter correctly.[18]

The creation of online services purpose is for self-help for the poor people that cannot afford lawyers but are able to obtain information from libraries through computers. Illinois Legal Aid Online, New York CourtHelp and the

California Courts' Online that provides for access to court information such as e-filing and being able to monitor the progress of their matters electronically.[19]

In the digital age of technology court websites have been updated and legal organisations provide cellphone mobile access for users. If the user requires the assistance of an attorney there are attorneys that provide their pro bono services and the whole process is anonymous to ensure confidentiality and privacy. (J Ribadeneyra,2012-2013)

'It is also essential that court technology implementers strive to ensure that technology solutions improve not only access to justice, but also the appropriateness and neutrality of substantive outcomes.'[20] This is the crux of one of the aims of using information technology to create access to justice but also ensures just and fair decisions are made, and that there is no compromise of the delivery of justice by judicial officers.

Conclusion

The world of information technology and equipment/devices are the global trend of communication. South African courts can create better access to justice through the development of information technology in the courts such as e-courts, e-filing, real time transcripts. There is a necessity for it as courts will not be able to misplace or lose files or contents of same. The norm of a file going walkabout causes unnecessary postponements shall become a forgotten memory through the implementation of information technology.

The support of government and the judiciary to become an e-justice system akin to Singapore, which is one of the busiest judicial systems and is efficient through enhanced information technology, which allows for the litigation process to become more streamlined for the parties to the dispute.

In South Africa with the adoption of new information technology systems there will be a few stumbling blocks such as monetary funding, maintenance of the software and updates of technology. However since the Judiciary has indicated their support for e-filing is one step in the direction for change towards the trend of a digital age.

Indeed information technology is a method of innovative techniques to allow for poor people to access the law and also through online self-help programmes is another method for attorneys to contribute towards their pro bono hours.

In South Africa case law has illustrated that courts recognise the social media of Facebook for a litigious party to effect substituted service of documents on the defendant. The next step is for the rules board and the Department of Justice to work together to change the face of civil courts through information technology.

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