

## **E-mail Communication for Provisional Sentence Summons**

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**Abstract:** Traditional rules of evidence deny the admissibility of data messages on the mere ground that it is digitised. The South African Electronic Communication and Transaction Act (ECT) was enacted to enable the courts to admit data messages. South African legislation in this regard has followed a similar approach taken by the United Kingdom, the United States, Canada and the Model law. The use of electronic documents as evidence in court initially posed a number of conceptual challenges to the traditional statutory and common law in South Africa. On a close reference to provisional sentence summons in civil courts, South Africa has not yet amended the rules of civil practice to accommodate modern technology, for example, electronic discovery. The success of provisional sentence summons as one of the civil procedures to recover a debt is highly dependent on the liquidity of a document. Clearly, the authors of the definition of a liquid document may not have anticipated the development of technology to the extent that the traditional paper can be replaced completely by the electronic document. This paper seeks to discuss the challenges that may be faced by the courts when determining the admissibility of e-mail communication for the purpose of granting provisional sentence in South African civil courts. The ECT Act excludes liquid documents such as cheques and promissory notes. Therefore the focus of the paper is to discuss whether the requirements of a liquid document for purpose of provisional sentence summons can be met through the use of an e-mail evidence and the challenging aspects in that regard.

### **1. Introduction**

Information technology with its ability to store the information in digital form is gradually replacing the use of traditional paper based documents. Computerized machineries, like cellular phones, can easily create electronic documents and legal agreements may also be concluded on these devices. In all probability, a debtor may also acknowledge his or her debt while on electronic communication. As a result a liquid document can be created but as an electronic or data message.

The microelectronic technology that resulted from electronic communication brought about methods of capturing, storing, retrieving and analysing information by computers<sup>1</sup>. Computer technology has revolutionized the way we deal with information and the way we run our business<sup>2</sup>. Increasingly, the important information is being created, stored and communicated electronically.

The admissibility of computer generated-evidence in South Africa, for instance computer printouts, was first dealt with in *Narlis v. South African Bank of*.<sup>3</sup> The respondent sued the appellant as surety and co-principal debtor in respect of an overdraft debt. The bank records were computerized and were presented by the manager of the bank as evidence. The appellate division held that the computer records produced by the bank were

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<sup>1</sup> Jie ZHENG/*E-mail Evidence Preservation: "How to Balance the Obligation and the High cost"*, *Lex Electronica*, Vol 14 n 2/ fall 2009, page 13, in his conclusion of the article, Jie Zheng said the following: "Electronic is now being routinely requested during the course of litigation. E-mail as a distinctive type of electronic evidence, becomes more and more important in electronic discovery. In order to fulfil the legal obligation to produce e-mail evidence by requesting party and reduce the risk of losing the case by failure to provide evidence, companies are advised to preserve the relevant e-mail evidence."

<sup>2</sup> *Ibid.*

<sup>3</sup> *Narlis v South African Bank of Athens 1976 (2) SA 573 (A)*

inadmissible in evidence because the computer is not a person. Section 34 of the Civil Proceedings Evidence Act 25 of 1965 did not provide for admissibility issues relating to computer printouts. The section provided for admissibility under specific circumstances of a statement made by a person in a document, but a computer was not regarded as a person. Consequently, in 1983, the legislature passed the Computer Evidence Act 57 of 1983 which was to apply to civil proceedings.

At the later stage, the Act was repealed in its entirety because difficulties were experienced in meeting the overly technical requirements<sup>4</sup>. The new Electronic Communications and Transactions Act 25 of 2002 commenced on the 30<sup>th</sup> of August 2002 and moved beyond the concept of computer printout and focused on “data” and “data messages”.<sup>5</sup>

## **2. Background: Provisional Sentence Summons**

Provisional sentence is a mode of procedure provided for in the rules of court, and existed even in Roman-Dutch law, under the appellation ‘*namptissement*’ or ‘*handvulling*’<sup>6</sup>. The essence of the procedure then and now is that it provides a creditor, who is armed with sufficient documentary proof (liquid document) with a speedy remedy for the recovery of money due to him without his having to resort to the more expensive, cumbersome and often dilatory machinery of an illiquid action<sup>7</sup>. Where a creditor possesses a liquid document, such document in which the debtor acknowledges or is in law deemed to have acknowledged his indebtedness to the creditor in a fixed and determinate sum of money, a rebuttable presumption of indebtedness arises.

The plaintiff’s cause of action is really the obligation evidenced by the document signed by the defendant; therefore, the practice of granting provisional sentence is based upon ‘such strong prima facie proof of debt, or written undertaking of payment. The judgement is founded entirely upon the presumption of indebtedness created by the document, and the court would grant provisional sentence only on a document which is truly liquid in the sense that it *per se*, and without the aid of extrinsic evidence, discloses an actual indebtedness.’<sup>8</sup>

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<sup>4</sup> As noted by Schwikkard: “Although in *Ex Parte Rosch 1998 1 SA 319 (W)* It was held that the Act does not restrict the use, as evidence, of information retrieved from a computer to only those instances when the provisions of the Act apply. ‘It is facilitating act, not a restricting one’. (at 327). In that case, even though the provisions of the Act had not been met, the particular computer printouts in question (automated recordings of telephone calls) were held to be admissible as their trustworthiness had otherwise been established.

<sup>5</sup> The ECT Act 25 OF 2002 defines data as “electronic representations of information in any form” and data message as “data generated, sent, received or stored by electronic means and includes-(a) a voice, where the voice is used in automated transaction, and (b) a stored record”.

<sup>6</sup> Herbstein and Van Winsen, 4<sup>th</sup> Edition: *The Civil Practice of the Supreme Court of South Africa* 960. The following Points that merits attention may be summarized as follows:

- (a) The document must attest to a monetary debt. An obligation to do something other than the payment of a sum of money (for example to perform a specific act) constitutes an unliquidated claim.
- (b) The amount of the debt must be certain and ascertainable. Obviously, this amount must be clearly apparent from the document itself. An undertaking in a deed of sale to pay “agents” commission according to the prevailing scale does not comply with this requirement, for extrinsic evidence must be led in order to determine the amount.
- (c) The indebtedness must appear unconditionally and clearly *ex facie* the document. If evidence is necessary to establish the indebtedness, the document cannot be regarded as a liquid document, in other words, the document must contain an unconditional acknowledgement of debt.
- (d) Where payment is made, in contradistinction to the indebtedness- in terms of the document is made to depend on the happening of some simple event, the liquidity of the document is not destroyed thereby. In this case, extrinsic evidence concerning the occurrence of the simple event may be placed before the court if such event is disputed. If is not disputed, it is proved merely by alleging in the summons that the simple event occurred. See Herbstein and Van Winsen 960-962.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

The principles underlying the doctrine of provisional sentence are fundamentally the same in modern practice as in Roman-Dutch law<sup>9</sup>, although changing circumstances and conditions have resulted in different interpretations as to what documents are liquid. The tendency of the courts has been to extend the publication of provisional sentence since it is a speedy and cheap remedy<sup>10</sup>, although the tendency has been criticized.

As noted by Herbstein and Van Winsen (2009), provisional sentence is a speedy remedy and it is also an extraordinary one<sup>11</sup>. Accordingly, a plaintiff who approaches the court for relief by way of provisional sentence ought, in principle, to have his papers in order.<sup>12</sup>

Therefore, a court will grant provisional sentence if the plaintiff sues on a liquid document and the defendant is unable to adduce the counterproof to satisfy the court that in the principles case the probabilities of success are against the plaintiff.<sup>13</sup>

### *2.1 Provisional sentence with respect to Negotiable instruments*

Bills, cheques and notes are liquid documents on which provisional sentence may be granted to the holder. The holder's claim for provisional sentence is founded on the instrument which prima facie evidences liability.<sup>14</sup> The South African Bills of Exchange Act 34 of 1964 deals with bills of exchange, cheques and promissory notes. These are known as negotiable instruments. The Bills of Exchange Act requires that bills of exchange, cheques and promissory notes should be in writing and signed. A document that does not satisfy these requirements will not be regulated by the Bills of Exchange Act, although it may be legally effective in other ways.<sup>15</sup>

Schedule 1, item 3 of the ECT Act states that subsections 12 and 13 of the ECT, which allow the use of data messages and electronic signatures when the law requires writing and signing, do not apply to the Bills of Exchange Act. Schedule 2, item 4 says that the ECT Act must not be taken to give validity to executing a bill of exchange.<sup>16</sup> The ECT Act therefore does not allow electronic bills of exchange and that has the effect that it is indisputable whether the court would discuss the admissibility of electronic cheque or promissory note for purpose of provisional sentence summons. Although a cheque, for example, may be a liquid document, it is still expected that it should be in a traditional paper and written in ink in order for it to be effective in provisional sentence summons.

## **3. Liquid Documents Defined**

Herbstein and Van Winsen (2009) define a liquid document as “a document in which the debtor acknowledges over his signature, or that of a duly authorized agent, or is in law regarded as having acknowledged without his signature being actually affixed to the document, his indebtedness in a fixed and determinate sum of money”.<sup>17</sup> Examples of documents to which the debtor or his agent has affixed his signature are cheques, promissory notes, mortgage bonds, acknowledgement of debt and deeds of sale. A letter which, on the facts, embodied a clear and unambiguous promise to pay a fixed monthly amount was held to be a liquid document, but an extract from the minutes of the directors of a company which recorded an acknowledgement of the company's

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<sup>9</sup> Buchanan: ‘Prefatory Remarks’ 7. Rule 8 is merely procedural and has not altered the substantive law: *C G E Rhoades Construction Co (Pty) Ltd v Provincial Administration*, Cape, and another 1976 (4) SA 925 (C) at 928 in fine-929pr.

<sup>10</sup> *Pepler v Hirschberg* 1920 CPD 438, *Land & Agricultural Bank of SA v Estate, Van Zyle* 1931 CPD 179.

<sup>11</sup> *Barclays National Bank Ltd v Chaldon Investments Ltd & another* 1974 (1) SA 131 (W) at 132 in fine-133A, *Argus Printing and Publishing Co Ltd v Parsons and others* 1977 (3) SA 707 (D) at 710pr-A

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> FR Malan, JT Pretorius, SF du Toit, *Malan on Bills of Exchange, cheques and Promissory notes*, Fifth Edition.

<sup>15</sup> Julian Hofman: “The meaning of the Exclusions in section 4 of the Electronic Communications and Transactions Act 25 of 2002,” *The South African Law Journal*, 266.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* at 6 (Herbstein and van Winsen) p 960.

indebtedness was held not to constitute a liquid document. The link between a liquid document and provisional sentence arises from the fact that, the latter is an enforcement procedure which is allowed by the courts provided that the plaintiff's claim is based on a liquid document. Provisional sentence has been granted in terms of a mere acknowledgement of a debt where the court was satisfied that a contract had already been made in terms set out in the draft.<sup>18</sup>

#### **4. Acknowledgement of a debt through the Electronic mail: is it possible for provisional sentence summons in South Africa?**

Electronic mail communication can only be produced as evidence by using an output device, such as a computer screen, printer or data projector.<sup>19</sup> The preferred method of production in South African courts is a computer printout in view of the fact that South Africa is not yet prepared for electronic discovery<sup>20</sup>. Section 17(1) of the ECT Act allows the production in an electronic form subject to the following conditions:

“Considering all the relevant circumstances at the time that the data message was sent, the method of generating the electronic form of that document provided a reliable means of assuring the maintenance of the integrity of the information contained in that document, and At the time of the data message was sent, it was reasonable to expect that the information contained therein would be readily accessible so as to be usable for subsequent reference”.

Section 17(2) further provides that the integrity of the information is maintained if the information has remained complete and unaltered except for (a) addition of any endorsement, or (b) an immaterial change, which arises in the normal course of communication, storage or display'.<sup>21</sup> E-mail is one of the common methods of communicating over the internet. E-mail became popular with the rise of local area networks (“LANs”), or computers within an organization that were linked to a closed network. The business world has been described as addicted to e-mail.<sup>22</sup>

In most cases, e-mail is drafted with far too little thought. An e-mail message may be stored on the hard drive of the recipient or anyone to whom the message was forwarded, as well as on network servers, archival tapes containing periodic back-ups of a company's computer data. On a closer reference to computer printout created through electronic communication such as an e-mail, it is clear that it would become a data message and be equated with traditional paper for purpose of admissibility in court. In addition, South Africa has adopted the ‘functional equivalent approach’ in terms of which the latter recognises the difference between written and electronic communication. Rather than using a legal fiction to create an artificial identity between the two, the functional equivalent approach regulates electronic documents so that they can perform the same commercial functions as non-electronic documents.<sup>23</sup> In view of the above, this author opines that although data messages are generally admissible in court, e-mail communication produced through an output device is likely to be challenged for reasons of authenticity. Computer printout produced without the involvement of telecommunication network is fairly easy to be used as a reliable document for provisional sentence, but not

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<sup>18</sup> Mark. D Robins: *Evidence at the Electronic frontier: Introducing E-mail at Trial in Commercial Litigation*.

<sup>19</sup> Professor Murdoch Watney, University of Johannesburg: “*Admissibility of Electronic Evidence in Criminal Proceedings: An outline of the South African Legal Position*,” *Journal of Information, Law and Technology*, page 6.

<sup>20</sup> Rules Regulating the Conduct Of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa\* (also referred to as the UNIFORM RULES OF COURT) section 35 is not amended yet to include discovery of electronic evidence.

<sup>21</sup> Ibid at 13

<sup>22</sup> Tony Kontzer, *More than an in-box*, E-mail is moving to a broader Business Purpose, INFORMATION WEEK, May 6, 2002, at 51

<sup>23</sup> Julian Hofman: *Electronic Evidence in South Africa*: “the functional approach of data messages as evidence is clearly necessary to make the functional equivalence of data messages as documents effective.” Treating electronic evidence as the functional equivalent of documentary evidence will ensure a ‘media-neutral environment’ for anyone relying on electronic evidence. It will neither discriminate against those transacting electronically nor give them an unfair advantage.

printouts from an e-mail communication. It is important that one takes note of the following point with regard to the possible use of e-mail communication for purpose of provisional sentence summons. Texts of documents that have been scanned into a database can be altered. This underscores the increasing importance of audit procedures designed to ensure the continuing integrity of the records.

Electronic mail is the telecommunication of messages from one computer to another.<sup>24</sup> To be admitted as evidence, electronic message must first be authenticated or identified.<sup>25</sup> The question of whether the document is what it purports to be is a matter of conditional relevance. For purpose of provisional sentence summons, “provisional sentence is granted on a document which is truly liquid in the sense that it per se, and without the aid of extrinsic evidence, discloses an actual indebtedness.”<sup>26</sup> According to Julian Hofman (2006,p.6) , section 15(1) does not make all data messages admissible and therefore, other data messages may be inadmissible on grounds contained in other laws.

The South African law of evidence requires that anyone who wants to use a document as evidence has to satisfy the court that it is authentic; in other words, that the document is what it purports to be. Electronic evidence has a high degree of volatility, can be easily manipulated, altered or damaged after its creation and therefore authenticity must be proven.

E-mail is more susceptible to after-the fact alteration. It is fragile and may be intentionally or unintentionally modified by turning on a computer, which can overwrite existing files. E-mails are usually written without signature although if the ECT Act provides for electronic signature, most people choose not to affix their signature to it. However, as an alternative to signature, the definition provides “or is in law regarded as having acknowledged without his signature being actually affixed to the document”.

E-mail, when printed in hard copy or stored electronically, is usually recognised as equivalent to a paper document. Parties should take reasonable and good faith steps to meet their obligations to preserve information relevant to the issues in a civil action. Companies that produce a high volume of e-mails where acknowledgement of a debt is usually apparent must be ready to bear the high cost of preservation management.

Section 13 of the ECT Act stipulates that, when the signature of a person is required by “law” and that law does not specify the type of signature, “that requirement in relation to a data message is met only if an advanced electronic signature is used”. Section 1 of the same Act provides the following definition of such a signature:<sup>27</sup>

“an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37”.

## **5. Conclusion**

Although, the ECT Act instructs the courts not to deny data messages as evidence solely on the ground that it is constituted as data, e-mail evidence for the purpose of provisional sentence should be treated exactly the same as a paper document. The fact that it is an e-mail communication that involves telecommunication network gives rise to the possibilities of interception by third parties and questionable reliability of the information stored. E-mail is quite different from the formal written documents in that they are casually written and easily forged. E-

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<sup>24</sup> Benjamin Wright: *The law of Electronic Commerce EDI, Fax, and E-mail: Technology, Proof, and Liability* (Boston: Little, Brown and Company, 2<sup>nd</sup> ed, 1995) at 6.

<sup>25</sup> Ibid at 3 : “Authentication is the process by which the authenticity, or genuineness, of a document is established”.p6

<sup>26</sup> Herbstein and Van Winsen p 960.

<sup>27</sup> Section 37 of the ECT Act provides for an “Accreditation Authority”, defined as the Director General (of the Department of Communications), “although this official may also appoint other employees of the Department as “Deputy Accreditation Authorities”. The end goal of these accreditation process is an “authentication product or service,” which term one may safely assume to be sufficiently wide to include an electronic signature, See Professor Dana van Der Merwe in this regard, *Information Communications and Technology Law*, p.112

mail evidence may be a useful tool in many instances, but it is also a reliable source for provisional sentence summons in South Africa.

Acknowledgement of a debt that complies with the definition of a “liquid document” may be easily stored in a computer and be produced through a computer printout. In that instance, the electronic signature that is provided by the ECT Act may clearly confirm the liquidity of the document. It must be noted that it is possible for such acknowledgement to be effective without the signature provided the defendant is “legally deemed to have acknowledged such liability”. One could argue that if a signature can be dispensed with, then it is possible that the acknowledgement may be effective for purpose of provisional sentence summons even through the e-mail communication for as long as the defendant would be legally deemed to have acknowledged such liability”. Despite the challenges discussed above, South Africa is in a position to accept computer printout of an e-mail that complies with the requirements of liquidity as defined by Herbststein and van Winsen (2009). The fact that negotiable instruments, for example, cheques or promissory notes (liquid document) are excluded from the operation of the ECT Act does not imply that a liquid document or ‘acknowledgement of a debt’ cannot be created electronically and be admissible for a successful grant of provisional sentence.

## Reference

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