AN EVIDENTIAL ANALYSIS OF SECTION 15 (4) OF THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT ACT 25 OF 2002

BY

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DECLARATION

I hereby declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree Master of Law at the University of Pretoria. It has not been submitted for any degree or examination in any other University. I further declare that I have obtained the necessary consent and authorisation to carry out this research project.

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SUMMARY

One of the objects of the Electronic Communications and Transactions Act, Act 25 of 2002 (the ECT Act), is to enable and facilitate electronic communications and transactions for purposes of promoting legal certainty. It is submitted that Section 15 (4) of the ECT Act has in contrast, created more legal uncertainty. Section 15 (4) of the ECT Act, seeks to admit data messages into evidence on its mere production in any legal proceedings and attaches an evidential weight to such data messages, namely that it constitutes rebuttable proof of the facts contained therein. This study focuses on the interpretation of both the admissibility and evidential weight attached to data messages within the specific context of section 15 (4) of the ECT Act. A literature study will be undertaken and it is concluded that section 15 (4) of the ECT Act, as it stands, is a departure from the Model Law on which the ECT Act is based and has neither been effectively applied in our South African courts nor, in certain instances, correctly interpreted. Therefore, the Parliamentary legislator needs to re-consider whether section 15 (4) of the ECT Act serves a practical purpose.

TABLE OF CONTENTS

CHAPTER ONE

BACKGROUND

1. Introduction

Electronic and computer generated evidence in South Africa has evoked prominent legal discussion and a variety of interpretations in recent years. The law of evidence in South Africa has experienced ground-breaking reform pursuant to the need for clarity when determining the admissibility of electronic or computer generated evidence and the evidential weight to be attached thereto in legal proceedings.[1]

South African legislature has been involved in promulgating specifically purposed legislation to allow for and regulate the use of electronic or computer generated evidence in our courts and tribunals, none more so, than the promulgation of the ECT Act.

One of the objectives of the ECT Act, is to enable and facilitate electronic communications and transactions in the public interest, for purposes of promoting legal certainty and creating confidence in respect of such electronic communications and transactions.[2]

In contrast with the aforementioned objective, section 15 (4) of the ECT Act has, in fact, created more legal uncertainty and is considered problematic.[3] Section 15 (4) of the Act provides as follows:

…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 in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

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[1] Electronic Communications and Transactions Act 25 of 2002 (Hereinafter ECT Act).
[2] S 2(1) (e) of the ECT Act.
[3] Hofman J 2006 "Electronic evidence in criminal cases" 2006 *SACJ* 3 257. See also Hofman J "South Africa" in S Mason Electronic Evidence: Disclosure, Discovery & Admissibility 2007 *LexisNexis Butterworths: London* 483 "18.24" and "18.25". See also Schwikkard PJ *et al Principles of Evidence* 417.

Section 15 of the ECT Act as a whole, moves beyond the concept of "*computer printouts*" and focuses on the terms "*data*" and "*data messages*".[4] More particularly, section 15 (4) of the ECT Act seeks to:

(a) *Admit a data message made by a person in the ordinary course of business into evidence on its mere production; and*

(b) *Attaches a probative value or evidential weight to such electronically generated business records, namely, it being rebuttable proof of the facts contained therein.*

Our courts have not been able to consistently adjudicate on the aspects of admissibility and evidential weight when considering and interpreting section 15 (4) of the ECT Act. This contention is supported by academic commentary describing section 15 (4) of the ECT Act as problematic.[5]

2. Nature and scope of the research

Academic commentary and case law with regard to section 15 (4) of the ECT Act, suggest the following:

- The legislature has attempted to allow for the admission of as much electronically generated hearsay evidence, as possible.[6]
- It creates a general exception to the rule against hearsay for any data message made by a person in the ordinary course of business.[7]
- The provision is a departure from the United Nations Commission on International Trade Law on Electronic Commerce.[8]

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[4] Collier D "Evidently not so simple" Producing computer print-outs in court 2005 *Juta's Business Law*: 6-9.
[5] Pistorius T '"Nobody Knows You're a Dog": The Attribution of Data Messages 2002 *SA Mercantile Law Journal* 746 `dictates this – it will be wrong to adopt rules that create disparity between paper-based and electronic-based transactions'.
[6] Zeffertt DT and Paizes A.P and Skeen A St Q *Law of Evidence* 394 – `The thinking behind the new section 15 seems to be expansive and the purpose of the legislature was probably to free as much computer-generated evidence from the hearsay trap as could be justified without doing violence to the important values served by the exclusionary rule`.
[7] Hofman 2006 *SACJ* 3 267
[8] In 1996 the United Nations General Assembly on International Trade Law (UNCITRAL) passed a resolution that led to the adoption of the Model Law for electronic commerce (Hereinafter Model Law).

- It excludes the discretion of a court when determining the admissibility of electronic evidence falling within the ambit of section 15 (4) of the ECT Act.[9]
- Once electronic evidence is admitted in terms of the provision, it provides for its own evidential weight, namely constituting rebuttable proof of the facts contained in such data message or certified record, copy, printout or extract.[10]
- Compared to similar provisions, section 15 (4) of the ECT Act is considered a radical provision for the admissibility and evidential weight of business records.[11]

This study focuses on section 15 (4) of the ECT Act and the data messages made by persons in the ordinary course of business. It discusses the admissibility of electronic evidence in terms of section 15 (4) of the ECT Act and considers its impact on the statutory hearsay rule, presumptions of law and on the onus of proof in criminal proceedings.[12]

This study will specifically consider:

a. whether section 15 (4) of the ECT Act is South Africa's departure from the Model law.

b. whether section 15 (4) of the ECT Act should be reviewed to give a restrictive interpretation to the words " *in the ordinary course of business* ".[13]

c. whether data messages made by a person in the ordinary course of business and sought to be admitted in terms of section 15 (4) of the ECT Act could be classified as either documentary evidence or real evidence.

d. whether section 15 (4) of the ECT Act creates a general exception to the statutory hearsay rule.[14]

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[9] Schwikkard PJ *et al Principles of Evidence* 385.
[10] *Ndlovu v Minister of Correctional Services* [2006] 4 ALL SA 165 (W) 173.
[11] Collier *Juta's Business Law* 9.
[12] Section 3 of the Law of Evidence Amendment Act, 45 of 1988 (Hereinafter Act 45 of 1988).
[13] South African Law Reform Commission Issue Paper 27: Project 126: Review of the Law of Evidence, Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues (2010) at page 69 (Hereinafter SA Law Reform Commission Paper).
[14] Hofman 2006 *SACJ* 3 267.

e. the extent of the evidential weight to be attached to electronic evidence admitted in terms of section 15 (4) of the Act.

f. whether section 15 (4) of the Act affects the onus of proof in criminal proceedings.[15]

g. what South African legislature`s intended purpose was regarding section 15 (4) of the Act.

[15] Hofman 2006 *SACJ* 268 - `when applied in a criminal prosecution, for which 15(4) explicitly provides, the presumption of truth the section creates is open to a constitutional challenge as an unjustified shifting of the onus of proof on to the accused'.

CHAPTER TWO

OVERVIEW OF SECTION 15 (4) OF THE ECT ACT AND ITS DEPARTURE FROM THE MODEL LAW FOR ELECTRONIC COMMERCE.

1. Origin of the ECT Act

South Africa has been involved in regular legislative intervention to stay abreast with an ever changing business sphere. This is evidenced by the legislature enacting specific legislation aimed at facilitating the use of electronic or computer evidence in our modern day courts and tribunals. Since 1965, these legislative interventions have been promulgated, amended, substituted and repealed in order to adapt to modern business developments.

The first reported South African case involving the admissibility of electronic evidence, *Narlis v South African Bank of Athens*[16] (the *Narlis* case), was heard many years before Parliament passed the ECT Act. In the *Narlis* case, a printout originating from the computation, sorting, collating and synthesising of data by a computer, without the involvement of a natural person, was considered by the court. In considering the admissibility of the computer printout, the Appellate Division by way of Holmes JA held, that the computer printout could not be admitted in terms of the Civil Proceedings Evidence Act.[17] The rationale of Holmes JA was based on the fact that, the computer printout concerned, had not been made by a natural person, as contemplated by the Act, but rather by a computer.[18] Due to the difficulties encountered in the *Narlis* case, the legislature promulgated the Computer Evidence Act.[19]

Prior to the promulgation of the ECT Act, the Computer Evidence Act in conjunction with the Civil Proceedings Evidence Act and the Criminal Procedure Act[20], regulated the presentation of electronically generated evidence in legal proceedings.

In 1996, the United Nations General Assembly on International Trade Law (UNCITRAL) passed a resolution that led to the adoption of the Model Law.[21] As a natural consequence

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[16] *Narlis v South African Bank of Athens* 1976 (2) SA 573 (A).
[17] Civil Proceedings Evidence Act 25 of 1965.
[18] In the *Narlis case* 577h – Holmes AJ remarks: `This is perhaps a matter which might well engage the attention of legislature in South Africa`.
[19] Computer Evidence Act 57 of 1983 (Hereinafter Act 57 of 1983).
[20] Criminal Procedure Act 51 of 1977 (Hereinafter Act 51 of 1977).
[21] Gereda SL "Chapter 10 - The Electronic Communications and Transactions Act" 262–295.

of the Republic of South Africa forming part of the sixty member states of UNCITRAL, South African legislature has aimed to give effect to the Model Law, especially by modelling the ECT Act on the recommended Model Law.[22]

Section 11(1) of the ECT Act aims, as far as admissibility is concerned, to place a '*data message*' on the same legal footing as information generated conventionally on paper. The ECT Act defines a data message as:

"data" generated, sent, received and stored by electronic means and includes voice where the voice is used in an automated transaction and a stored record".

Section 15(4) of the ECT Act applies once the electronic evidence sought to be introduced:

- *concerns a data message as defined in terms of the ECT Act.*
- *was made by a person in the ordinary course of business and constitutes an original data message; or*
- *a copy or printout of or an extract from such original data message, certified to be correct by an officer in the service of such person;*

On a plain reading of section 15 (4) of the ECT Act, it appears that electronic evidence satisfying the criteria as provided for in section 15 (4) and sought to be introduced in legal proceedings, would be admissible in such legal proceedings on its mere production and be rebuttable proof of the facts contained therein.

2. Departure from the Model Law for Electronic Commerce.

While the ECT Act, and particularly section 15, is based on the Model Law, section 15 (4) of the ECT Act appears to constitute a departure from the Model Law. Article 9 of the Model Law deals with the admissibility and evidential weight of data messages as follows:

[22] UNCITRAL is a subsidiary of the General Assembly of the United Nations (http://www.uncitral.org). The Resolution in the first instance recommended that all states give favourable consideration to the Model Law in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communicating and storing information. Secondly, it encouraged efforts to popularise the Model Law and its Guide (General Assembly Resolution 85th Plenary Meeting 16/12/96).

'(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence: (a) on the sole ground that it is 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 shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.'

The purpose of article 9 of the Model Law is to provide for both the admissibility and evidential value of data messages as evidence in legal proceedings.

The subsections preceding section 15 (4) of the ECT Act deals with the admissibility and evidential weight of data messages in general and provide as follows:

(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 its originator was identified; and

(d) any other relevant factor.

It is evident that sections 15 (1), (2) and (3) of the ECT Act are identical to article 9 of the Model Law. The South African legislature chose to emulate and incorporate article 9 of the Model Law into section 15 of ECT Act.

Of critical importance for the current discussion is that, the Model Law does not make provision for "*a data message made by a person in the ordinary course of business*", neither that such a data message once admitted, be rebuttable proof of the facts contained therein. The Model Law rather seeks to establish reliability considerations in order to determine the admissibility and evidential weight of data messages. These reliability considerations of the Model Law have been incorporated into subsections 15 (2) and 15 (3) of the ECT Act, which sections, are glaringly distinguishable from section 15 (4) of the ECT Act.

It is submitted that, on the contrary, section 15 (4) of the ECT Act signifies an intentional departure by the South African legislature from the Model Law on which the ECT Act is based.

The reasoning by the legislature for such departure may have various origins. It is no secret that our South African Courts have had difficulties in admitting electronic evidence and then also considering its evidential value.

Whilst considering one of the objectives of the ECT Act, to promote legal certainty regarding electronic communications and transactions, it appears that the legislature had the intention of placing electronic evidence, made in the ordinary course of business, on a level footing with the most well-known form of commercial evidence, being paper. Particularly in an attempt to ensure more transparent and fair modern day civil and criminal proceedings.

It appears that, the legislature has specifically used the term "*in the ordinary course of business*" to distinguish section 15 (4) of the ECT Act and to justify its departure from the Model Law.

CHAPTER THREE

ADMISSIBILITY AND EVIDENTIAL WEIGHT OF EVIDENCE IN TERMS OF SECTION 15 (4) OF THE ACT

1. Scope and reliability of electronic evidence in terms of section 15 (4) of the ECT Act

The term "*in the ordinary course of business*" is not defined by the ECT Act. It is a term said to be industry specific, whereby an electronic communication or transaction may be in the ordinary course of business for a certain industry, however, not necessarily in the ordinary course of business for a different industry.

In general, for a transaction or communication to be within the ordinary course of business, it must adhere to the practices and customs that are considered normal for that specific industry. It would not be unusual for businesses in the same industry to engage in similar transactions or communications.

The test to determine whether an activity is considered in the ordinary course of business, was formulated and confirmed by our courts in Joosab v Ensor[23]: –

"..The test for determining whether a transaction was "in the ordinary course of business" is an objective one, namely whether, having regard to the terms of the transaction and the circumstances under which it was entered into, the transaction was one which would normally have been entered into.."[24]

It is no longer unusual for business transactions and communications to be conducted by way of sms, cellular applications, email, facebook and other electronic platforms in general. Section 15 (4) of the ECT Act would be inclusive of such wide ranging electronically generated data and would apply to any industry in so far as the relevant communication or transaction can be regarded as industry-specific or similar to such an industry.

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[23] Joosab v Ensor 1966 (1) SA 319 (A).
[24] Ibid 326.

When a party to legal proceedings seeks to introduce evidence in terms of section 15 (4) of the ECT Act, one of the first considerations to be taken into account by a presiding officer is to determine whether the data message that is sought to be introduced, can be said, within the context of the relevant industry, to be in the ordinary course of business.

The scope of electronic evidence provided for in section 15 (4) of the Act by using the term *"a data message made by a person in the ordinary course of business"*, materially increases the volume of electronically generated data eligible to be introduced into legal proceedings.[25]

On a plain reading of section 15 (4) of the ECT Act, it may include any data message in respect of any form of business enterprise in both the public and private sector.

The scope and volume of electronically generated data created by section 15 (4) of the ECT Act, not only relates to the admissibility of the data but also affects the probative value of such evidence since once admitted, it is on its mere production rebuttable proof of the facts contained therein.

To illustrate the increased scope and volume of eligible electronic evidence created by section 15 (4) of the ECT Act, it would be apposite to compare it with a historically similar provision, namely section 236 of the Criminal Procedure Act.[26]

Section 236 of the Criminal Procedure Act, contains a so-called evidential exception in respect of banking records which is similar to section 15 (4) of the ECT Act.[27]

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[25] Hofman 2006 *SACJ* 268.
[26] Act 51 of 1977.
[27] Ibid S 236 (1) - `The entries in the accounting records of a bank, and any document which is in the possession of any bank and which refers to the said entries or to any business transaction of the bank, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-
(a) that he is in the service of the bank in question;
(b) that such accounting records or document is or has been the ordinary records or document of such bank;
(c) that the said entries have been made in the usual and ordinary course of the business of such bank or the said document has been compiled, printed or obtained in the usual and ordinary course of the business of such bank; and
(d) that such accounting records or document is in the custody or under the control of such bank,
be prima facie proof at such proceedings of the matters, transactions and accounts recorded in such accounting records or document`.

Section 236 allows any records originating from a bank, within its ordinary course of business and supported by an affidavit attested to by a person in the bank's employ and who has knowledge of the records, to be admissible in evidence and regarded as *prima facie* proof of the matters, transactions and accounts recorded in such records or document.

Public policy dictates that banks must be heavily regulated due to banks being deposit taking institutions and especially in respect of the records banks keep. The business of a bank is regulated by both legislation and international conduct rules and therefore banks are more often than not, trusted institutions.

Hofman[28] has described a bank`s status as much like that of a public body. Banks run the risk of considerable negative consequences should they, as deposit taking institutions, fail to properly and accurately manage their records.

Section 15 (4) of the ECT Act is not only wider in scope than the business records exception in section 236, but it also ensures a probative value to be attached thereto. Attaching a probative value to bank records could be considered acceptable, because banks are regulated and supposedly responsible institutions whose records can be assumed to be reliable in much the same way as the records of a public body.

However, section 15 (4) of the ECT Act applies to the records of any business. The mere fact that someone is conducting a business is no guarantee that their records are either accurate or honest. Accuracy and honesty are factors directly correlated to the well-known evidential consideration, namely reliability. Reliability is an integral feature when considering the admissibility of electronically generated evidence.[29]

It is submitted, that the increased scope and volume of admissible electronic evidence created by section 15 (4) of the Act will directly impact and dilute reliability considerations relevant to the electronic evidence so tendered. There are no legislative provisions or regulatory bodies that supervise and regulate businesses in the private sector and in certain spheres of the public sector.

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[28] Hofman 2006 *SACJ* 267.
[29] Ss 15 (1), (2) and (3) of the ECT Act.

Electronically generated data can originate from a multitude of sources. Such generated data could easily be manipulated or corrupted by a person in the ordinary course of business, to suit any specific purpose or agenda of that person.

Section 15 (4) of the ECT Act, providing for the plethora of electronic evidence to be introduced and admitted on its mere production, raises concerns regarding the origin and reliability of such tendered evidence.

It can safely be assumed that any potential manipulation or corruption of electronically generated data would generally not infiltrate our banking institutions. However, the same assumption cannot be made for the dealings of private enterprises when such private enterprises facilitate the conclusion of agreements and transactions. Private business enterprises are not vetted, regulated and scrutinised to the same extent as banking institutions.

By way of example, should the local curious establishment down the street generate business related data, such data, would from an evidentiary perspective be on the exact same footing in any legal proceedings as any electronically generated banking records.

The increased scope and volume of admissible electronic evidence created by section 15 (4) of the ECT Act is only amplified by ensuring that it applies to any legal proceedings, unlike section 236, which only applies to criminal proceedings.[30]

In terms of the admissibility of data messages, the proverbial net has been cast wider. The legislature has gone one step further in allowing section 15 (4) of the ECT Act its own evidential weight, being rebuttable proof of its contents.

Section 15 (4) of the ECT Act had been considered for the first time in *Golden Fried Chicken v Yum Restaurants International*, in an Appeal to the full Court from a decision of the Registrar of Trademarks.[31]

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[30] It is submitted that section 236 if the Criminal Procedure Act is justified in criminal proceedings, in an attempt to place the prosecuting authority on even keel in terms of proving, especially, commercial fraud and other related crimes.

[31] *Golden Fried Chicken (Pty) Ltd v Yum Restaurants International* (Pty) Ltd 2005 BIP 269 (T).

The Registrar had decided to remove a trade mark from the register on the grounds that the trade mark had not been used continuously for five years since registration. Golden Fried Chicken submitted into evidence a print-out that it had used the mark during this time. Du Plessis J, assumed this print-out was a computer printout that qualified as a data message. He held, that even if this were the case, the print-out was not admissible in terms of section 15 (4) of the ECT Act because it had not, as the section requires, been certified by an officer of Golden Fried Chicken nor had it been shown to have been made in the ordinary course of business.[32]

The difficulties by our courts in interpreting the phrase in the ordinary course of business as showcased in the *Golden Fried Chicken v Yum Restaurants International*[33] judgment came to the attention of the South African Law Commission. The South African Law commission in one of its issue papers proceeded to question, whether section 15 (4) of the ECT Act should be reviewed to give a restrictive interpretation to the words, in the ordinary course of business.[34]

The concern in reviewing and amending legislation is that it invariably leads to even more litigation and judicial interpretation. The section 236[35] banking records exception was easily interpreted and narrowed because it only applied to certain institutions conducting the business of a bank and it being confined to criminal proceedings.

It is uncertain whether Legislature would be able to include certain more reliable business institutions and exclude others. Perhaps a future consideration for Legislature would entail focussing on, and facilitating the admissibility of, certain trusted and certified electronic software capable of creating data messages in the ordinary course of business.

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[32] Although Du Plessis J with whom Legodi J and Mavundla J concurred, did not apply section 15 (4) of the ECT Act, he did not express any doubts that he could have applied it had the print-out met the requirements in terms of section 15 (4) of the ECT Act. See also Hofman 2007 *LexisNexis Butterworths: London* 772.

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[34] SA Law Reform Commission Issue Paper 27: Project 126 at page 46.

[35] Act 51 of 1977.

It is submitted that any attempted restrictive interpretation would only compound further ambiguity and litigation. Our courts would in theory be better equipped to deal with the interpretation of data messages in the ordinary course of business. However, our courts will be burdened with more eligible evidence and a generally reduced reliability factor, in terms of section 15 (4) of the ECT Act.

Electronically generated data within the ambit of section 15 (4) of the ECT Act, being made admissible on its mere production in legal proceedings, appear to circumvent certain established considerations, especially the reliability aspect of the origin of data messages.

2. Classification of evidence tendered in terms of section 15 (4) of the ECT Act.

Generally, when parties to legal proceedings seek the admission of electronic evidence, the nature and classification of the electronic evidence becomes relevant. The nature and classification is of importance for purposes of ensuring that the parties to the legal proceedings and the presiding officer, apply the correct rules as prescribed by the law of evidence and which rules are specific to the prevailing nature and classification of the electronic evidence.

The admission of electronic evidence can either occur by way of the established classifications, such as documentary evidence or real evidence, alternatively, in terms of statutory exclusions providing for the admission of electronic evidence.[36]

When determining the admissibility and evidential weight of electronic evidence, tendered in terms of section 15 (4) of the ECT Act, one needs to consider whether section 15 (4) of the ECT Act allows for documentary evidence, real evidence or both. Alternatively, whether section 15 (4) of the ECT Act constitutes a separate statutory exclusion.

[36] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* Chapters 21 and 22. See also Schmidt CWH and Rademeyer H *Law of Evidence* Chapters 10 and 11.

Prior to the enactment of the ECT Act[37], our courts had considered the classification of electronic evidence in the form of computer printouts, as documentary evidence. In *S v Harper*[38] a narrow reading of the word "*document*" had been applied and the court interpreted it to be inclusive of only specific computer printouts that did not involve the computer and its software processing the data.

Similarly, in the case of *S v Mashiyi and Another* 2002 (2) SACR 387 (Tk), despite the court adopting the narrow reading applied in the *Harper* case[39], Miller J recognised at that point in time, that a *lacunae* existed in our law that needed to be filled and for new legislation, specifically relating to computer evidence in criminal cases, to be considered and promulgated.[40] Miller J, recognised mere months prior to the promulgation of the ECT Act, the need in South African law to introduce legislation which would facilitate the admission of electronic evidence and provision for attaching due evidential weight thereto. It is submitted that Miller J, at that particular point in time, was constrained by the legislature.

During 2012, Advocate Roux Krige of the Cape Society of Advocates, presented a paper on "*the admissibility of electronically generated evidence in a court of law*"[41] and distinguished three classifications, in terms of which computer printouts and by implication, electronic evidence[42], could be admitted in a court of law –

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[37] Act 25 of 2002 became effective in August 2002.
[38] *S v Harper* 1981 (1) SA 88 (D) 96-97.
[39] Ibid 392.
[40] The case had been decided a few months prior to the promulgation and operation of the ECT Act. The court read and interpreted section 221 of the Criminal Procedure Act to exclude computer printouts that contained information - `obtained after treatment by arrangement, sorting, synthesis and calculation by the computer`, in its conclusion the court further stated -
`Computers do record and store information but they do a great deal else; inter alia, they sort and calculate information and make adjustments...The extended definition of "document" is clearly not wide enough to cover a computer, at any rate where the operations carried out by it are more than the mere storage or recording of information`.
[41] The CyberCon Africa convention in 2012, held at Sandton, Advocate Roux Krige, presented on `The admissibility of electronic evidence in a court of law`– Advocate Krige distinguishes between three classifications under which computer printouts may be admitted into evidence in a court of law.
[42] It is submitted that by way of natural implication, the classifications presented on by Advocate Krige would apply to electronic evidence in general.

a) Where the information in the printout came about as a result of the computer having processed raw data, which data was entered onto the computer by a person.The computer with its software calculates, sorts, collates and synthesises the entered data. The computer then gives the data back in a different format as it was entered onto the computer. This is real evidence and the evidential weight of such a printout depends on the credibility of the computer, software and operating system.[43]

b) When the information in the printout was entered onto the computer by a person in circumstances where the computer did not process the information so entered. The person created the data on the computer. The computer then gives it back in the same format as it was entered onto the computer. This is documentary evidence.[44]

c) When the information was recorded by mechanical means without the personal involvement of a human being. The person only activates the electronic system, after which, the system then generates information based on its software and the system mainly records and stores. This is real evidence.[45]

Using the classifications of Advocate Krige as a barometer for section 15 (4) of the ECT Act, it is apparent that despite section 15 (4) of the ECT Act making specific provision for a data message made by a person, it will eventually depend on the extent of the person`s involvement in creating the data, when determining whether the electronic evidence so tendered, could be classified either as documentary evidence, real evidence of a documentary nature or real evidence.

[43] Advocate Krige`s power-point presentation at page 11.
[44] Ibid at page 13.
[45] Ibid at page 15.

When considering documentary evidence, it is trite law, that in order to prove the statements or facts contained in a document, compliance with certain fundamental evidentiary rules are required. Firstly, and subject to any other statutory exceptions, the contents of a document may in general be proved only by production of the original. Secondly, and subject to any other statutory exceptions, oral evidence would normally be required to satisfy a court of law of a document`s authenticity.[46]

In contrast, real evidence is at common law on its mere production, admissible in evidence during court proceedings. However, the evidence would not be of much evidential value without oral evidence by a person to place the real evidence in context and prove the relevant facts in order to make the required conclusions. Without corroborating oral evidence, the production of real evidence would merely be proof that the real evidence is what it purports to be, nothing more and nothing less than an object.[47]

Against this background, it can be determined whether the contents of section 15 (4) of the ECT Act promote and envisage the classification of the electronic evidence or whether it contains its own evidential rules for admissibility and its evidential weight.

When comparing the principles for purposes of admitting documentary evidence and proving its contents to section 15 (4) of the ECT Act, it is apparent that the contents of a data message made by a person in the ordinary course of business need firstly, not necessarily be in its original form to be proof thereof. Secondly, section 15 (4) of the ECT Act does not envisage or provide for the person involved in creating the data message, to give oral evidence regarding its authenticity or reliability.

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[46] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* 829. See also *Standard Bank Merchant Ltd v Creaser* 1982 (4) SA 671 (W) 674B.
[47] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* 849.

The fact that section 15 (4) of the ECT Act makes provision for the admission of electronic evidence on its mere production, could be argued to be more similar to real evidence.[48] Although, section 15 (4) of the ECT Act once again does not envisage any oral evidence to corroborate or place in context the electronic evidence tendered in terms of it. It rather ensures that upon its admission it constitutes rebuttable proof of the facts already contained therein.

It is submitted that the wording of section 15 (4) of the ECT Act is clearly in defiance of the ordinary evidential rules applied in determining the admissibility and evidential weight of either documentary evidence or real evidence. Despite electronic evidence tendered in terms of section 15 (4) of the ECT Act being able of a general classification to its nature, it is submitted that it constitutes a statutory exception to the ordinary rules of evidence.

It is surprising that section 15 (4) of the ECT Act deviates so considerably from the Model Law. Especially considering that the intention of the Model Law has always been to create a functional equivalence to exist between electronic evidence and documentary evidence. It is this disparity between section 15 (4) of the ECT Act and in particular documentary evidence, that legal writers have identified as the aspect which goes above and beyond the supposed functional equivalence as intended by the Model Law.[49]

It is submitted that section 15 (4) of the ECT Act is an alternative mechanism for parties to legal proceedings to admit electronic evidence. More particularly, data messages made by a person in the ordinary course of business, without being required to classify the presented electronic evidence as either documentary evidence or real evidence.

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[48] *S v Ndiki and Others* 2008 (2) SACR 252. At 258 (a) – What section 15 (4) does essentially is to treat a data message made in the ordinary course of business in the same way as real evidence at common law.

[49] Schwikkard PJ et al *Principles of Evidence* 385 at paragraph 21.4. This conclusion no doubt ties in with the idea of `functional equivalence` which Pistorius T '"Nobody Knows You're a Dog": The Attribution of Data Messages 2002 SA Mercantile Law Journal 746 says - `dictates this – it will be wrong to adopt rules that create disparity between paper-based and electronic-based transactions.` Schmidt CWH and Rademeyer H *Law of Evidence*, remarks that `[t]hese provisions make it clear that information given in electronic form is in principle to be treated, with only some adaptation, as the equivalent of other forms of evidence, particularly documentary evidence`.

Should the presented evidence be admitted in terms of section 15 (4) of the ECT Act, any classification of its nature will be merely academic due to section 15 (4) of the ECT Act providing for its own criteria regarding admissibility and evidential weight.

Section 15 (4) of the ECT Act creates a statutory exception to the ordinary rules regarding admissibility and evidential weight. However, our courts have not necessarily agreed and have attempted in certain instances to classify the nature of the electronic evidence tendered in terms of section 15 (4) of the ECT Act.[50]

The case of *La Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd*[51] (hereinafter *La Consortium*), concerned the accounting records of MTN who drew up certificates in terms of section 15(4) of the ECT Act. In the court *a quo*, extensive evidence had been led on the manner in which the data messages certified in terms of section 15(4) of the ECT Act had originated, its authenticity and reliability. Classen J, used s 15 (4) of the ECT Act to admit computer printouts made in the ordinary course of business and supported by the required certificate.[52]

However, the Appeal Court in *La Consortium* found that, the data messages relied on could be classified as real evidence and separately, the court found the data messages to include hearsay. The Appeal Court although accepting the admissibility of MTN`s records, disagreed with Classen J in using section 15 (4) of the ECT Act. The Appeal Court rather, in terms of its statutory discretion and considering reciprocal prejudice[53], admitted the records in terms in of section 3 of the law of Evidence Amendment Act.[54]

The Appeal Court stated that the probative value of the electronic evidence depended on the reliability and accuracy of the computer and its operating systems (MTN`s oracle computer software system).

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[50] *Golden Fried Chicken v Yum Restaurants International* (Pty) Ltd 2005 BIP 269 (T) 272. See also Hofman 2007 *LexisNexis Butterworths: London* 772.
[51] *MTN Service Provider (Pty) Ltd v La Consortium & Vending CC t/a La Enterprises and Others 2011* (4) SA 562 (W) 5 [6], 16 [12], 34.
[52] Hofman 2007 at page 772.
[53] The court`s statutory discretion is contained in section 3 of the Law of Evidence Amendment Act.
[54] Act 45 of 1988.

It is respectfully submitted that the Appeal Court erred in not, as done in the *court a quo*, applying the criteria set out in section 15 (4) of the ECT Act. It is further submitted that the presented electronic evidence in *La Consortium* was within the ambit of section 15 (4) of the Act and presented an ideal opportunity to have an Appeal Court give effect to its intention.

3. The impact of section 15 (4) of the ECT Act on the statutory hearsay rule

For present purposes, the protracted history culminating in the statutory hearsay rule, is irrelevant.[55] Suffice to state that, the hearsay rule has been developed through the our common law and is exclusionary in nature. The Legislature has codified the hearsay rule in section 3 of the Law of Evidence Amendment Act, which section, has consequently rendered the common law rule obsolete. What is relevant, is the contents of section 3 (1) of the Law of Evidence Amendment Act, its operation and its interpretation by our courts in the context of section 15 (4) of the ECT Act.

The statutory hearsay rule seeks to ensure that the best possible evidence is placed before a court of law. The rationale of the hearsay evidence rule is the absence of an opportunity to cross-examine the person on whom the probative value of the evidence depends, which makes hearsay potentially unreliable. This rationale is an important factor, when considering that section 15 (4) of the ECT Act operates as a rule of statutory exclusion and does not envisage any oral evidence from the person on whom the probative value, in creating a data message in the ordinary course of business, depends.

Section 3 (4) of the Law of Evidence Amendment Act[56], 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."

[55] S 3 of Act 45 of 1988.
[56] Act 45 of 1988.

Section 3 (1) of the Law of Evidence Amendment Act provides as follows:

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(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;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

Section 3 of the Law of Evidence Amendment Act, now clarifies what hearsay is and prescribes the majority of considerations for our courts when determining the admissibility of hearsay evidence. The general rule is that our courts still have a wide discretion to allow hearsay evidence if it is reliable and necessary.[57]

[57] S 3(1)(vii) of Act 45 of 1988.

The contentious issue is whether section 15 (4) of the ECT Act, providing for an exception to the ordinary rules regarding admissibility and evidential weight of electronic evidence, also creates an exception against the statutory hearsay rule. Thereby, admitting and attaching a probative value to electronic evidence which ordinarily would have to be considered subject to the considerations as prescribed by the statutory hearsay rule.

In the matter of *Ndlovu v Minister of Correctional Servies*[58] (hereinafter *Ndlovu*), the court had to consider amongst other things, whether a copy of a computer printout which complied with the best evidence rule, should be admitted into evidence, unless properly proven. The court determined that, due to the printout having been generated by a computer, it was governed by the ECT Act.

The data message constituting the printout in *Ndolvu*, had not been introduced by way of section 15 (4) of the ECT Act and Gautschi AJ, subsequently discounted section 15 (4) of the ECT Act for purposes of his judgment.[59] Therefore, the court only considered its interpretation of sections 15 (1), (2) and (3) of the ECT Act[60], wherein, Gautschi AJ stated[61]:

"where the probative value of the information in a data message depends on the credibility of a (natural) person other than the person giving the evidence, there is no reason to suppose that section 15 seeks to override the normal rules applying to hearsay evidence. On the other hand, where the probative value of the evidence depends on the "credibility" of the computer (because information was processed by the computer), section 3 of the law of evidence amendment act 45 of 1988 will not apply, and there is every reason to suppose that section 15 (1), read with sections 15 (2) & (3), intend for such "hearsay" to be admitted, and due evidential weight to be given thereto according to an assessment having regard to certain factors."

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[58] *Ndlovu v Minister of Correctional Servies* [2006] 4 ALL SA 165 (W).
[59] Ibid 173D.
[60] Ibid 173 - The court in conclusion found that the printout was admissible into evidence not in terms of section 15 of the ECT Act, but rather in terms of the court's statutory discretion to admit hearsay evidence in terms of the Law of Evidence Amendment Act 45 of 1988. This decision has been criticised for not providing clarity on the effect of section 15 of the ECT Act on the authenticity rule and the hearsay rule.
[61] Ibid 173F.

It is clear from the above extract that, in evaluating the preceding sections to section 15 (4) of the ECT Act, the court applied the classifications of documentary evidence and real evidence which automatically entails consideration of the statutory hearsay rule.

Similarly to the classifications as prescribed by Advocate Krige[62], the court found that subsections 15 (1), (2) and (3) do not seek to override the statutory hearsay rule as contained in section 3 of the Law of Evidence Amendment Act, when it constitutes documentary evidence produced by way of human intervention.[63]

With regard to section 15 (4) of the ECT Act, the court in *Ndlovu* made the following observations[64] :

"..provides an exception to the manner of proof and evidential weight ordinarily to be accorded to a data message. Held further, subsection 15 (4) provides for two situations in which a data message may on its mere production be admissible in evidence. The first is a 'data message made by a person in the ordinary course of business ', which, juxtaposed with the words that follow, clearly refers to an original data message, and is required to have been made in the ordinary course of business. The second is a copy or printout of or an extract from such data message which is certified to be correct by an officer in the service of such person (being a person who made the data message in the ordinary course of business)."

"..once either of these two situations are present, the data message is on its mere production admissible in evidence and rebuttable proof of the facts contained therein."

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[62] Advocate Krige`s presentation at CyberCon 2O12, Sandton, Johannesburg.
[63] *S v Ndiki and others* [2008] (2) SACR 252 (Ck) - Where the court in a similar fashion considered sections 15 (1), (2) and (3) of the Act. It extended the law relative to the admissibility of videos, audios and computer printouts from mechanically operated equipment to computer printouts where the computer processed the information and would be construed with some similarity as provided for as real evidence of a documentary nature, which constitutes proof of the truth of its contents, is not hearsay evidence and the original not in question. A preferable approach, according to *Ndiki*, is to extend the meaning of hearsay to include evidence that depends on the accuracy of the computer which would "*do away with the necessity to distinguish in each case between what would constitute hearsay evidence and what real evidence*".
[64] *Ndlovu v Minister of Correctional Servies* [2006] 4 ALL SA 165 (W) 173 A–C.

"..section 15 (4) appears to be self-contained, and does not admit of or require a qualitive enquire to be made in terms of subsections 15 (2) & (3) in regard to the weight to be attached thereto. Held, it provides for its own weight, namely the facts contained therein will be rebuttable proof. If not rebutted, then they will stand as evidence.

What is of importance from the *Ndlovu* judgment is that the court distinguished section 15 (4) of the ECT Act from the preceding subsections in section 15 of the Act. The court in *Ndlovu*, despite noting that electronic evidence created with the assistance of human intervention cannot escape the statutory hearsay rule, expressly stated that section 15 (4) of the ECT Act provides an exception to the manner of proof and evidential weight ordinarily to be accorded to data messages.

Of further importance is that the court in *Ndlovu* viewed section 15 (4) of the ECT Act as being self-contained and did not require a qualitive enquiry to be made in terms of its preceding subsections. This means that in Gautschi AJ`s interpretation, once the electronic evidence is admitted in terms of section 15 (4) of the ECT Act, it need not be considered whether the electronic evidence is authentic or reliable in an attempt to gauge its probative value, due to section 15 (4) of the ECT Act already providing for the probative value to be attached thereto, namely that it is rebuttable proof of the facts contained therein.

It is submitted that it could be inferred that Gautschi AJ acknowledged that section 15 (4) of the ECT Act would, despite involving human intervention, not be subject to any considerations in terms of the statutory hearsay rule.

In the matter *of La Consortium*, section 15 (4) of the ECT Act and its relation to the statutory hearsay rule had been directly considered and discussed. The Appeal Court in *La Consortium* concluded that, despite the very wide wording of section 15 (4) of the ECT Act, any hearsay contained in a data message, must pass the criteria set out in section 3 of the Law of Evidence Amendment Act. The court based this finding on the following:

"..hearsay is not merely admissible due to the principle of functional equivalence[65], which principle does not free data messages from the normal structures of the Law of Evidence but only those referred to in section 15(1) of the Act.[66] "

Academic commentaries have voiced their individual viewpoints on the impact of section 15 (4) of the ECT Act on the statutory hearsay rule as contained in section 3 of the Act. Hofman[67] regards section 15 (4) of the ECT Act as creating a general exception to the hearsay rule for any data message made in the ordinary course of business.

Schwikkard[68] in a similar fashion regards section 15 (4) of the ECT Act as controversial and explains[69]:

"...the section subjugates the hearsay rule in so far as the admissibility of computer printouts are concerned. The courts appear to have no discretion in respect of the admissibility of a data message but rather they are required to exercise their discretion when they assess the weight to be attached thereto."

In contrast to Hofman and Schwikkard, Zeffert, concludes[70]:

"..that a data message is clearly hearsay within the meaning of section 3 (4) whenever it is tendered in evidence in circumstances where the probative value of the evidence depends, in this sense, on the credibility of such a person.

"..that it is generally accepted that the ECT Act sets out to facilitate admissibility, however, the rules relating to hearsay evidence have not been excluded entirely by section 15, and to this extent I believe that Schwikkard and Van der Merwe have gone too far."

It is clear that there are differentiating views on whether section15 (4) of the Act can be said to be a general exception to the statutory hearsay rule.

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[65] The principle of functional equivalence relates to placing data messages on the same footing as documentary evidence, which principle is advocated in the Model Law. However, as discussed, section 15 (4) has been a distinct and intentional deviation from the Model Law by the South African legislature.
[66] At page 26.
[67] Hofman 2006 *SACJ* 267.
[68] Schwikkard PJ et al Principles of Evidence 385.
[69] Ibid.
[70] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* - `Subsection (1) (a) appears, on a quick reading, to render a data message admissible without further ado. However it would be anomalous if that were the case, since the ECT Act would then elevate a data message evidentially above an ordinary document. Rather, on a proper reading, section 15(1)(a) prohibits the exclusion from evidence of a data message on the mere grounds that it was generated by a computer and not by a natural person, and section 15(1)(b) on the mere grounds that it is not in its original form.

It is submitted that the views of Hofman and Schwikkard read with the judgment in *Ndlovu* should be accepted as being correct, in that section 15 (4) of the ECT Act seeks to admit electronic evidence made by a person (constituting human intervention) in the ordinary course of business in any legal proceedings, without further ado whether it be in its original form or not, accompanied by a certificate of the person involved.

Both options of proof in terms of section 15 (4) of the ECT Act, intend to circumvent the general requirement that a person involved in creating the data message would have to testify to the probative value of the tendered electronic evidence.

As previously stated, instead of attempting to make a classification of electronic evidence tendered in terms of section 15 (4) of the ECT Act, the mere provisions on its plain reading should be used to admit such electronic evidence and attach a probative value thereto.

This approach is justified, due to section 15 (4) of the ECT Act being self-contained and constituting a separate and distinct mechanism to admit data messages made by a person in the ordinary course of business. It would be superfluous and counter-productive for our courts to attempt to classify evidence tendered in terms of section 15 (4) of the ECT Act for purposes of determining its admissibility and evidential weight.

4. Section 15 (4) of the ECT Act as a rebuttable presumption

Presumptions are said to be a legal device whereby the existence of a fact is assumed.[71] Presumptions may arise by way of a general rule or as a consequence of the establishment of a particular factual basis.[72]

Our law recognises three classifications of presumptions, namely irrebuttable presumptions of law, rebuttable presumptions of law and presumptions of fact.[73]

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[71] Joubert V "Presumptions in the South African law of evidence" (2) 2002 *THRHR* 3 6.
[72] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* 181.
[73] Schmidt CWH and Rademeyer H *Law of Evidence* 5-3.

A presumption of fact is brought about by a natural process of reasoning, whereas, in the case of a presumption of law it may be artificially brought about by the operation of law.

An irrebuttable presumption of law is said to be an ordinary rule of substantive law formulated to look like a rule of evidence.[74] The words `irrebuttable` and `presumption` are said to be contradictory[75] and mutually destructive, however, its operation in law is by no means uncertain despite its ironic wording.[76]

In contrast, a rebuttable presumption of law, is a provisional presumption and may be described as a rule of law compelling the provisional presumption of a fact.[77] Naturally the provisional presumption ends as soon as evidence in rebuttal is adduced. The presumed or assumed fact need not be a logical inference from the evidence which gives rise to the presumption.[78]

It is submitted that the presumption created by section 15 (4) of the ECT Act can be classified as a presumption of law, due to its origin being a legislative provision and not the establishment of any particular facts. The rebuttable presumption of law as contained in our common law, namely *praesumptio iuris tantum*, is the true presumption as a rule of law.

Wigmore[79], appears to be the most accepted source regarding the principles applied to presumptions as a rule of law and its operation in relation to a burden of proof or evidential burden. He[80], distinguishes between a fixed burden of proof and one that shifted in the course of the trial. The reasoning is that a presumption imports the duty going forward in the argument, or in the giving of evidence.

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[74] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* 182.
[75] Schmidt CWH and Rademeyer H *Law of Evidence* 5-5.
[76] An example would be the presumption in our law that a child under seven is presumed to be incapable of discerning between good and evil, which presumption cannot be rebutted by evidence to the contrary. See also *R v Lourie* (1892) 9 SC 432 at 434.
[77] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* 184.
[78] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* 185. See also *R v Fourie* 1937 AD 31 at 44, "...the judge`s mind does not – and ought not to – advert to the reason for the presumption, and the presumption must be accepted as proof of the fact presumed until re-butted."
[79] JH Wigmore, *Wigmore on Evidence* 3 ed (1940).
[80] JH Wigmore, *Evidence* (1940) 2491.

The importing of such a duty is distinguishable from the burden of proof which rests on a particular party during the course of the legal proceedings and whether or not such burden of proof has been discharged, is considered on the totality of the evidence.

According to Wigmore, a rebuttable presumption of law is considered a genuine rule of law which requires a court to reach a conclusion in the absence of evidence to the contrary.[81] Further, a rebuttable presumption has only one legal consequence, namely that an evidential burden is placed on the party opposing the presumption.[82] That an evidential burden is all that shifts when a presumption comes into effect was accepted by Wigmore and pronounced on in his influential work.

Rebuttable presumptions of law have been said to have the following effect on the overall burden of proof[83]:

Firstly, a rebuttable presumption of law may create a permissible inference. In respect of this type of presumption, a court is not compelled to draw such an inference. However, if it chooses to do so, it places a tactical burden on the accused who may call for evidence in rebuttal, but is not obliged to do so.

Secondly, a rebuttable presumption of law may create a mandatory conclusion. Where a court draws a mandatory conclusion, it casts an evidentiary burden on the accused who is obliged to call for evidence in rebuttal.

Thirdly, the drawing of a mandatory conclusion may also have the effect of casting the primary burden of proof on the accused in the form of a reverse onus.

Whether a rebuttable presumption of law places an evidentiary burden or a legal burden in the form of a reverse onus on the person against whom the presumption operates, depends on the language contained in the presumption. For example, in a statutorily defined rebuttable presumption of law, the use of the words "evidence of a fact shall be prima facie proof of" or the words "in the absence of evidence to the contrary" creates an evidentiary burden.

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[81] Ibid at 2492.
[82] Ibid at 2491.
[83] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* 186 – 187. *S v Zuma and Others* 1995 (2) SA 642 (CC) at paragraph 24.

However, when a provision states that `X has happened unless the contrary has been proved`, then a primary burden of proof in the form of a reverse onus rests on the person who is faced with rebutting the presumption.[84]

The presumption created by section 15 (4) of the ECT Act can be classified as a rebuttable presumption of law. Section 15 (4) of the ECT Act attaches a very specific evidential weight to evidence admitted in terms of the section, namely that such admitted evidence constitutes rebuttable proof of the facts contained therein.

Considering the opinions of Wigmore and interpreting the wording in section 15 (4) of the ECT Act, it appears that despite it merely creating an evidential burden, its impact on the overall burden of proof, if any, may be categorised as a mandatory conclusion.

The Appeal Court *in La Consortium*[85] stated:

"..section 15 (4) is not said to be prima facie evidence of its contents, does not create a presumption and does not affect the onus of proof."

It is submitted that the court also erred in its interpretation of whether a presumption is created and the evidential weight thereof. On a plain reading of section 15 (4) of the ECT Act, it essentially creates, *prima facie* proof, in the sense that the contents will be considered proven until rebutted. This then creates an evidential burden against whom the evidence is tendered.

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[84] Bellengere A et al *Basic Principles of Evidence in South Africa* Chapter 4.
[85] *LA Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty)* Ltd 2011 (4) SA 577 (GSJ).

5. Section 15 (4) of the ECT Act and reverse onus provisions

It is the rebuttable presumption of law created by section 15 (4) of the ECT Act and the possibility of it constituting a reverse onus in criminal proceedings that has contributed to its controversial nature.[86]

The question of legislative provisions creating a reverse onus in criminal proceedings and the constitutionality thereof, has been considered by our Constitutional Court on more than one occasion.

In the matter of the *State v Zuma*[87] (hereinafter *Zuma*), section 25 of the Interim Constitution[88], which secures the burden of proof in criminal proceedings on the state, was evaluated against section 217(b)(ii) of the Criminal procedure Act[89], which section was found to have created a reverse onus.

The court in *Zuma* stated that[90]:

"..the Reverse onus provisions in our own statute law are also not uncommon. To go no further than the Criminal Procedure Act one finds, for example, the presumptions arising from entries in marriage registers on charges of bigamy (section 237), the presumption of knowledge of falsity arising from proof of a factually false representation (section 245) and the presumption of having failed to pay tax arising merely from an allegation in a charge sheet (section 249)."

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[86] Hofman 2006 *SACJ* 267–268 states: when applied in a criminal prosecution, for which 15(4) explicitly provides, the presumption of truth the section creates is open to a constitutional challenge as an unjustified shifting of the onus of proof on to the accused.
[87] *State v Zuma* 1995 (2) SA 642 (CC); 1995(4) BCLR 401 (CC).
[88] S 25 of the interim constitution provided as follows:
"25 (2) Every person arrested for the alleged commission of an offence shall ... have the right -
(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.
[89] Act 51 of 1977
[90] State v Zuma 1995 (2) SA 642 (CC); 1995(4) BCLR 401 (CC) 413B.

The court went on to state further[91]:

"Presumptions are of different types than reverse onus provisions. Some are no more than evidential presumptions, which give certain prosecution evidence the status of prima facie proof, requiring the accused to do no more than produce credible evidence which casts doubt on the prima facie proof. See e.g. the presumptions in section 212 of the Criminal Procedure Act. This judgment does not relate to such presumptions, nor does it seek to invalidate every legal presumption reversing the onus of proof. Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove.", and

"Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself."

Similarly in the matter of *State v Buhlawana*[92], the court stated that:

"The language of the text suggests that the presumption will stand unless proof to the contrary is produced. Presumptions phrased in such a way have consistently been held to give rise to a legal burden since the judgment of the Appellate Division in Ex parte Minister of Justice: in re R v Jacobson and Levy 1931 AD 466."

"On several occasions the Appellate Division has held that provisions in the legislation antecedent to this Act which gave rise to the presumption of facts 'unless the contrary is proved' imposed a legal burden upon accused persons.[93]

In the *Buhlawana* matter, counsel for the state argued that should the relevant legislative provision[94] be found to be unconstitutional, the court should 'read down' the section and rule that it should be interpreted as imposing not a legal burden but an evidential one.[95]

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[91] Ibid 422A.
[92] *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579.
[93] *S v Guess* 1976 (4) SA 715 (A) 719B-C.
[94] S 21(1)(a)(i) of Act 51 of 1977.
[95] *S v Bhuwana; S v Gwadiso* 1996 1 All SA 11 *15* (CC) at page 20 [28] - It is clear from sections 35(2) and 232(3) that the court must read down a provision which is 'reasonably capable' of a more restricted and constitutional interpretation. If the provision is 'reasonably capable' of being read down in a way which would be consistent with the Constitution, the Constitution requires that it shall be read in such a way. If the provision is not reasonably capable of such an interpretation, then section 98(5) requires the court to hold the provision invalid. Thereafter the court may exercise the discretion conferred upon it by the proviso to section 98(5) or the discretion conferred by section 98(6).

Section 15 (4) of the ECT Act may be open for constitutional challenge, however, it is submitted that it would pass constitutional muster. Neither would section 15 (4) of the ECT Act have to be read down, due to there not existing any ambiguity in its contents. Much in the same way as the *Zuma* case noted that the legislature could have a specific reason behind allowing for a certain presumption, it similarly can apply to section 15 (4) of the ECT Act.

It is no secret that cyber-crime has exponentially grown over the recent years. Crimes such as, child pornography originate and are continuously perpetrated through the utilisation of electronically generated data. It is submitted that one of many considerations of the legislature, could have been that section 15 (4) of the ECT Act could act as a mechanism, especially in criminal proceedings, to enable the admissibility of crucial evidence which in the past would have been deemed inadmissible and would lessen the onerous burden to prove such electronic evidence by way of the ordinary rules of evidence.

Taking into account the origins of a presumption of law, the distinguishing factors regarding an evidential burden and considering the overall burden of proof and its interpretation by our Constitutional Court, it is submitted that section 15 (4) of the ECT Act creates a mandatory conclusion by provisionally accepting proof of the facts contained in such original data message or record, copy, printout or extract, subject to it being challenged and rebutted by the accused.

Therefore section 15 (4) of the ECT Act only seeks to cast an evidentiary burden on the accused in criminal proceedings, alternatively the party against whom it is tendered in any other legal proceedings.

Section 15 (4) of the ECT Act does not provide for any conclusions to be drawn based on the facts therein contained nor constitutes an occurrence of fact or law purely based on the proof of its facts. It would still be up to the state to lead evidence and substantiate conclusions made from the facts contained in the original data message or record, copy, printout or extract of a data message, made by a person in the ordinary course of business.

From what has been canvassed regarding the differences between the burden of proof and an evidential burden, it is logical that presumptions of law and the consequential *prima facie* proof that arises, give rise to an evidential burden, but should not in principle, place a burden of proof on the party intending to oppose the presumption. A presumption is a means of proof, it is not a rule determining who must fail if no proof is forthcoming.

The overall onus in a criminal trial, for the state to prove guilt beyond a reasonable doubt, is correctly not affected by section 15 (4) of the ECT Act, due to section 15 (4) of the ECT Act constituting a provisional evidential burden, which burden, would be discharged upon refuting or rebutting the electronic evidence so tendered.

CHAPTER FOUR

Concluding remarks

The true nature of section 15 (4) of the ECT Act was aptly summarised in the case of, *Director of Public Prosecution v Modise*[96] (hereinafter *Modise*), and confirmed on Appeal:

"*..in their terms, they are designed to and do allow evidence in the form of the facts and opinions contained in a document which complies with the section in question to be admitted in evidence at a trial notwithstanding that the person who listed the facts and formed the opinions in the document is not called as a witness.*"[97]

On appeal to the High Court in *Modise*, Lamont J stated the following:[98]

"*This is the key which unlocks and solves the problem. The documents are not designed to be expert notices containing evidence to be led at the trial. These sections are specifically designed to enable the state to avoid the need to lead the evidence of a witness by way of producing him and the leading viva voce evidence.*"

The court found the evidence admissible if the provisions of the section are complied with, and did not require anything more. It is submitted that both courts in *Modise* correctly interpreted the nature of section 15 (4) of the ECT Act and the legislature`s intention behind it.

In essence section 15 (4) of the ECT Act is designed to and does allow for evidence in the form of the facts and opinions contained in a document, which complies with the section in question, to be admitted in evidence at a trial, notwithstanding, that the person who listed the facts and may have formed the opinions, is not called as a witness.

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[96] *Director of Public Prosecution v Modise* 2012 (1) SACR 553 (GSJ).
[97] Ibid 557D–E.
[98] Ibid.

Considering the legislature`s intention with section 15 (4) of the ECT Act, it is helpful to recognise that when the ECT Act had been considered and finalised, the legislature had the benefit of the Model Law, access to the extensive academic commentary on electronic evidence and case law both locally and internationally. It is submitted that the legislature would have been aware that electronic evidence created or originating without the assistance of human intervention and therefore the probative value of which depended on the computer and its software, was fully capable of being admitted in legal proceedings as real evidence at common law.

Therefore, the legislature intentionally created a mechanism, which specifically refers to data messages made by a person in the ordinary course of business, to admit such data messages into evidence, upon its mere production and without further ado. This against the general principle that such data messages would have been classified as documentary evidence and would have had to pass the general criteria for admission in legal proceedings and determining its evidential weight upon its admission.

The impact of section 15 (4) of the ECT Act on the law of evidence has predominantly been problematic. The first cause for concern occurred when the legislature took the intentional approach to deviate from Article 9 of the Model Law and incorporated an extremely broad provision, which, in contrast with South Africa`s general approach in law, is much more inclusionary in nature than exclusionary.

The deviation encapsulated in section 15 (4) of the ECT Act provides for a general exception to the hearsay rule and due to its application in any legal proceedings, flirts with the argument in favour of it constituting a reverse onus provision in criminal proceedings. It further creates a material disparity in comparison to the ordinary evidential rules applicable to documentary evidence, real evidence and even the supposed similar provisions regulating electronic evidence in general.[99]

[99] Ss 15 (1), (2) and (3) of the ECT Act.

The legislature`s approach and the evidential consequences flowing from section 15 (4) of the ECT Act, invariably led to academic commentators, correctly so, voicing their concerns and describing section 15 (4) of the ECT Act as radical and controversial.

Our courts have in considering the newly promulgated ECT Act, relied heavily on academic commentary when interpreting the ECT Act. One can easily attribute, as an exacerbating factor, our courts` reluctance to implement and utilise section 15 (4) of the ECT Act to the somewhat unflattering academic commentary on it. The inconsistencies of our courts in interpreting section 15 (4) of the ECT Act perhaps mirrors the differentiating views of our academic commentators.

It is submitted that section 15 (4) of the ECT Act is seen as a cavalier approach to admitting electronic evidence and a considerable amount of the criticism levelled at section 15 (4) of the ECT Act is borne out of legitimate concerns regarding the authenticity and reliability of the electronic evidence specified therein. There are no safeguards in section 15 (4) of the ECT Act to test the presented electronic evidence against. Unlike the preceding subsections to section 15 of the ECT Act and the statutory hearsay rule. It is submitted that these cumulative factors are a further explanation of the cautious approach taken by our courts when confronted with section 15 (4) of the ECT Act.

Theoretically parties to any legal proceedings would be able to use section 15 (4) of the ECT Act as an inclusionary measure to admit a particular form of electronic evidence, without having to prove its nature (either documentary or real evidence) and without having to procure the testimony in legal proceedings of the person who made the data message in the ordinary course of business. However, as indicated by canvassing our case law on section 15 (4) of the ECT Act, this theoretical mechanism has rarely been approved and applied by our courts.

The implication of section 15 (4) of the ECT Act, by excluding the statutory hearsay rule, would be that evidence introduced in terms of section and duly admitted in terms thereof, will in all likelihood contain hearsay evidence. However, it would not be subject to the statutory hearsay rule and would only have to meet the requirements set out in section 15 (4) of the ECT Act to be admitted into evidence and stand as rebuttable proof of the facts contained therein.

This study demonstrates that our courts are adopting a cautious approach in interpreting and applying section 15 (4) of the ECT Act. To date, there has only been a single reported case in which the criteria set out in terms of section 15 (4) of the ECT Act had been met and ensured the admission of the electronic evidence, as applied in *La Consortium*, although overturned on Appeal. The decisions in *Ndlovu*, *Ndiki* and *La Consortium* are encouraging.

It is submitted that more clear and concise judicial guidance on the admissibility and evidential weight of electronic evidence and specifically section 15 (4) of the ECT Act is needed in future cases.

The purpose of the SA Law Commission Paper was to identify evidential issues regarding electronic evidence and specifically considered section 15 (4) of the ECT Act. The SA Law Commission Paper suggested certain reform considerations.

Surely the ultimate goal is not to create a provision which evokes various academic commentary and theoretical discussion but rather a provision which promotes the intention of the ECT Act whilst simultaneously being implemented in our courts to the benefit of all parties concerned.

At this point in time there is an Appeal Court decision in the *La Consortium* case, which does not record the correct position and intended operation of section 15 (4) of the ECT Act. This judgment logically influences the willingness of legal representatives and our presiding officers to use section 15 (4) of the ECT Act when they could rather safely and securely fall back on the ordinary rules of evidence and specifically the statutory hearsay rule.

It is uncertain how the legislature would go about reforming section 15 (4) of the ECT Act to make it more accessible for implementation in our courts. It is submitted that any proposed reform of section 15 (4) of the ECT Act would not alter or dramatically correct what the existing section has failed to achieve.

Due to the controversial and radical nature of section 15 (4) of the ECT Act, it would be a fair consideration to repeal the provision in its entirety and reinstate the so called *status quo* by having a section 15 of the ECT Act which is in line with the Model Law and subject to the umbrella statutory hearsay rule.[100]

Zeffert states that the ECT Act has attempted, and time alone will show how effectively, to allow for the admissibility of data or information arising from an electronic communications transaction.[101] It is submitted that in the context of section 15 (4) of the ECT Act, time has spoken on its efficiency and clearly it has not borne the intended fruit.

[100] It is submitted that this would be a preferable approach to the suggested restrictive interpretation to be applied to section 15 (4) of the Act to place it in line with the Model Law. See Hofman 2007 *SACJ* 772.

[101] Zeffertt DT and Paizes A.P and Skeen A St Q *The South African Law of Evidence* 843.

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