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REFORMING CIVIL PROCEDURE: TRENDS IN CONTINENTAL EUROPE AND ENGLAND AND WALES

BY

ANLU RENETTE COETSEE

(STUDENT NR: 14095752)

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PROFESSOR DE VAN LOGGERENBERG & PROFESSOR T BEKKER

Department of Procedural Law

Faculty of Law

University of Pretoria

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ABSTRACT

This research involves the timeless question regarding the effective improvement of access to justice. The problems pertaining to access to justice, especially in respect of litigation, have been experienced and exposed in several jurisdictions across the world and has become known as the battle against costs, delays and complexities. The goal shared by most jurisdictions is to give all individuals the right to have his or her legal dispute resolved by a judicial entity at a proportionate cost and in a reasonable time. South African authors have made several suggestions in respect of reforming civil procedure in order to combat the problems identified above, to reduce the backlog in our courts and, ultimately, to enhance access to justice for all.

This research aims to find solutions by investigating different categories of civil procedural reform and by identifying which categories could serve as beneficial and prospective reforms for South African civil procedure. Accordingly, trends in civil procedural reform in Continental Europe and England will be investigated. Three countries have been identified for comparative analysis: England, the Netherlands and Belgium. Within each of these countries two trends have been identified, namely (1) case management, pre-trial protocols and the distribution of powers between parties and judges; and (2) digitalisation, modernisation and computerization of procedural rules. A chapter will be allocated to each trend, briefly describing the manner in which the procedure functions and its recent development, comparing and contrasting the situation with the South African position.

In conclusion, it will be considered in what way South African jurisprudence could benefit from the comparative analysis and identified reforms. The new developments in South African civil procedure relating to the specific categories of trends will further be investigated and discussed.

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Submission form for mini-dissertation/dissertation/thesis

1. Personal details

Title: Miss Student number: 14095752

Surname: Coetsee

First names: Anlu Renette

2. Home/postal address: 77 ROSE STREET

RIVIERA, PRETORIA Postal Code: 0084

Tel.: Cell no: 082 558 8807

3. Work address:

Postal Code:

4. Details of ~~mini-dissertation~~/dissertation/~~thesis~~

Degree: LLM Procedural Law (Coursework)

Department: Procedural Law

Supervisor: Professor DE van Loggerenberg

Co-supervisor: Professor T Bekker

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Supervisor

Date: 24/10/19

Co-supervisor (if applicable)

Date: 28/10/2019

PROF DE VAN LOGGERENBERG PROF T BEKKER

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CHAPTER 1: INTRODUCTION

1.1. SCOPE OF THE RESEARCH

This research involves the frequently debated topic concerned with the effective improvement of access to justice in civil jurisdictions. The problems experienced in terms of access to justice, especially in respect of the costs and delays involved with litigation, have been exposed in several jurisdictions across the world and has become known as the battle against costs, delays and complexities. Consequently, several jurisdictions across the world share the goal of securing the right to have a legal dispute resolved by a judicial entity at a proportionate cost and within a reasonable time. In reaching these goals, countries aim to make civil litigation as easy and as accessible as possible. The role of civil procedure in modern society has adapted to reflect the evolution of society's needs and has become society's substitute for injustice. The shortcomings in civil procedure have brought about the belief that litigation is a luxury instead of a right. If this statement is also true for South Africa, the law is fundamentally flawed in not effectively giving access to justice to everyone. The right to access to justice is enshrined in section 34 of the South African Constitution and is found in Article 6 of the European Convention on Human Rights. In guaranteeing this right, it should similarly be ensured that society's needs in respect of access to justice is met in a simple and cost-effective manner. South African authors have made several suggestions in respect of reforming civil procedure in order to combat the problems identified above, to reduce the backlog in the courts and, ultimately, to enhance access to justice for all.

The right of access to justice should be a top priority on the scale of Constitutional rights and should be developed accordingly as society's needs progress as contemplated and envisaged by section 34 of the Constitution. Overburdened courts and numerous delays in litigation is a known occurrence in South African procedure, often resulting in expensive and complex matters. In addition, alternative dispute resolution mechanisms are ineffective alternatives to the costly court procedure. In a country where poverty encumbers a great portion of the population, the legal system is currently only catering

for the wealthy minority due to the high costs involved in litigation. With outdated procedures and inadequate preventative measures South African civil procedure is plagued with issues frustrating the interests of justice. With the above in mind, it is submitted that South African civil procedure requires certain amendments in its goal to improve access to justice as contemplated in section 34 of the Constitution. In its efforts to pursue this goal, it is submitted that South Africa could benefit from the reform trends experienced internationally. Reforms exemplified in the international context will most likely provide insight into the changes that may benefit South African civil procedure the most and which amendments may complicate matters further.

In light of the above, it is pertinent to identify which solutions may lead to quicker and less expensive litigation in civil law, with due regard to specific problems identified in South African civil procedure. The research undertaken will follow a structured approach where categories of reform seen in the relevant countries and recent developments will first be identified. Accordingly, trends in civil procedural reform improving access to justice in Continental Europe and England will be investigated. Three countries have been identified for comparative analysis: England, the Netherlands and Belgium. Within each of these countries two trends have been identified, namely (1) case management, pre-trial protocols and the distribution of powers between parties and judges; and (2) digitisation, modernisation and computerization of procedural rules. A discussion on these reforms will be undertaken in respect of each of country, briefly setting out the manner in which the procedure functions and all recent developments. Further, a comparison between the trends and the similar South African provisions, or lack thereof, will take place. Finally, the reforms will be considered in the South African context and a conclusion will be reached on how South African jurisprudence could benefit from the comparative analysis and identified reforms and which solutions prove to have the highest prospect of success.

1.2. BACKGROUND

The research further aims to determine why court procedures and rules are currently

failing to provide adequate relief in respect of litigation and in what manner procedural reform could improve access to justice. It further needs to be determined how the civil procedural trends, as identified in England, the Netherlands and Belgium with specific reference to access to justice, may be utilised to determine where reform is necessary in South African law. In determination of the above, the research will be directed at providing an overview of the general principles of civil procedure and civil procedural reform.[1] The discussions will lead to an understanding of the current civil procedure status in South Africa and why reform in terms of access to justice is necessary.[2]

1.3. PROSPECTIVE AND POTENTIAL REFORMS: COMPARATIVE ANALYSIS

Following the above foundational matters, the research will continue to discuss the first trend identified relating to the control and early procedures of the legal process and explore civil procedural reforms in continental Europe and England by comparative review. In this regard, case management, pre-trial protocols and the distribution of power between the parties and the judge are the categories to be discussed in order to determine reforms that may assist in making South African litigation more accessible. Once identified, it should similarly be considered whether the solutions could be implemented in South African procedure through reform. The relevant European countries have dedicated ample time and resources to introduce and ensure the better management of cases. There are various managerial techniques, leading to several positive results, to be observed.

In England the "Woolf reforms", implemented on 26 April 1999, had a major impact on the English procedural system with the introduction of a complete new set of rules (the Civil Procedure Rules) and the introduction of the new concept of case management. In April 2013, a new regime of reforms ensued following *Lord Justice Jackson's* wide-ranging

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1 E Hurter 'Seeking truth or seeking justice: reflections on the changing face of the adversarial process in civil litigation' (2007) (2) *TSAR* 240.

2 C Theophilopoulos 'Constitutional transformation and fundamental reform of civil procedure' (2016) (1) *TSAR* 68.

review of the civil litigation costs system where he made recommendations on promoting access to justice at a proportionate cost.[3] The numerous case management reforms and pre-trial protocols introduced in the English procedural law, including their functionality, will be discussed.[4] Furthermore, the introduction of two new pilot schemes launched in 2015 aimed at creating shorter and earlier trials for business-related litigation, at a reasonable and proportionate cost will be discussed.[5]

The civil justice system in the Netherlands has been exposed to civil procedural reform throughout the last three decades, especially after the shortcomings experienced in the early 1990s.[6] The reforms have on multiple occasions concerned the distribution of powers between the judge and the parties and have been aimed at increasing efficiency in civil litigation. In 2002, the Civil Justice Reform Act (the Reform Act) affected both the judicial organisation of the courts and proceedings at first instance.[7] The Reform Act introduced several provisions into the Dutch Code of Civil Procedure, including elements in respect of: (1) first instance appearance; (2) personal appearance of the parties; (3) a duty on the judge to prevent delays;[8] (4) a broadening of rules in party-driven discovery of documents;[9] and (5) new pre-trial discovery provisions. A discussion will follow involving the transfer of case management powers from the parties to the judge.[10]

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3 See R Jackson *Review of Civil litigation Costs: Final Report* (2010) and N Andrews *Andrews on Civil Processes: Court Proceedings* (2013) 21.

4 Pre-trial protocols, standard directions online; increased docketing; streamlining rules for case management conferences; firmer enforcement of rules and court orders; and a menu of possible disclosure orders. See R Jackson 'Was it all Worth it?' (2018) *Professional Negligence* P.N. 61 and Andrews (n 3 above) 13 – 71.

5 *Civil Procedure Rules,* Practice Direction 57AB: Shorter and Flexible trials Schemes.

6 See CH van Rhee and RR Verker 'The Netherlands: A no-nonsense approach to civil procedure reform' in CH van Rhee and Y Fu (eds) *Civil litigation in China and Europe: Essays on the role of the judge and the parties* (2014) pp 259 – 280.

7 See van Rhee (n 6 above).

8 Article 20(1) of the Dutch Code of Civil Procedure.

9 Article 843a of the Dutch Code of Civil Procedure.

10 See van Rhee (n 6 above).

Belgium has undergone numerous and significant continuous amendments in civil procedure to improve access to justice. Reforms aimed at improving access to justice and pertaining to the time management of cases were introduced by the Act of 3 August 1992[11] and the Act of 26 April 2007.[12] The latter Act intended to create a more powerful, so-called active judge, having more control over the timetable and progress of the proceedings.[13] Furthermore the concept of "soft law", as experienced in Belgian civil procedural law, and its effects on reform will be discussed. The effect of Belgium's preliminary hearings and the procedural calendar that can be imposed by judges will be investigated. [14]

In conclusion, comparisons will be made to identify the benefits and prospects of certain reforms with reference to the South African system's needs. The recent reform experienced in South Africa with specific reference to case management will be discussed. The discussion will identify certain similarities and differences seen from the different reforms discussed and recommendations and criticisms will follow.

Secondly, in pursuit of the main goal of this research, the developments experienced in the identified countries pertaining to the use of technology in civil procedural reform to ensure quicker and cheaper dispute resolution will be discussed. Whilst assessing the above, to determine the best prospective reforms worthy of consideration in the South African context, due regard should be given to the provisions of the Constitution, society and the resources available. The identified countries have included several technological developments whilst amending, substituting and inserting new civil procedure rules or

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11 Promulgated on the 3rd of August 1992 (*Belgian Official Gazette,* 31 August 1992).

12 Promulgated on the 26th of April 2007 (*Belgian Official Gazette,* 12 June 2007). See further P Taelman and C van Severen *Civil Procedure in Belgium* (2018) Wolters Kluwer; B Allemeersch 'The Belgian Perspective on Case Management in Civil litigation' in CH van Rhee *Judicial Case Management and Efficiency in Civil Litigation* (2007) Ius Commune Europeaum, IntersentiaAntwerpen: Oxford.

13 Taelman & van Severen (n 12 above) 26.

14 Taelman & van Severen (n 12 above) 23.

regulations in attempts to reduce costs, delays and complexities and to advance digitisation, modernisation or computerisation. In this regard, it appears as if the South African civil procedural rules have failed to incorporate any ground-breaking developments in respect of technology in court procedures. This section has been included due to the numerous advantages promoted by the European jurisdictions, where a clear movement towards online courts and technological innovations to advance access to justice can be observed. It should, however, be noted that some developments have taken place in South African civil procedure with reference to digitisation. It is important to analyse this trend in the identified countries so that one may consider where and how the developments could be incorporated into South African procedure and whether enough resources will be available to support radical changes.

There is a new initiative in England concerning the introduction of an Online Court following the Civil Courts Structure Review report by *Lord Justice Briggs*.[15] The system is intended to create a user-friendly court where civilians may adjudicate their disputes without the assistance of lawyers, thereby departing from the traditional adversarial process.[16] In November 2015, the English government invested 700 million pounds for the digitisation of the civil system and to create a multi-tier dispute resolution procedure.[17] In respect of digitisation, England has made significant progress with the introduction of several Practice Directions and pilot schemes aimed at improving civil procedure and access to justice, the various pilot schemes and practice directions will be discussed.

In the Netherlands, reform aims to create a simplified standard model of civil litigation where judgment is guaranteed shortly after the submission of a claim, defence and after the oral hearing has taken place. The following reforms have been introduced in the Dutch

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[15] See Lord Justice Briggs *Civil Courts Structure Review: Interim Report* (2015), Lord Justice Briggs *Civil Courts Structure Review: Final Report* (2016).

[16] See Lord Justice Briggs *Civil Courts Structure Review: Interim Report* (2015), Lord Justice Briggs *Civil Courts Structure Review: Final Report* (2016). See also P Cortés 'The digitalisation of the judicial system: online tribunals and courts' (2016) *Computer and Telecommunications Law Review* C.T.L.R. 141.

[17] HM Treasury *Spending Review and Autumn Statement (2015)* 5, 69, 103 – 104.

system: (1) a duty to digital litigation; (2) a standard initiating document; (3) differences in communications; (4) an enlargement of the statutory time-limits in the Code of Civil Procedure; and (5) a digital environment called "My Case".[18] The digital highway has to be taken into account and compared to the South African situation in order to determine whether the South African population is prepared or in need of the advances made in the Dutch system. The Quality and Innovation of the Judiciary programme (QAI) introduced by the Dutch Ministry aimed at improving access to justice, reducing complexity of litigation and to facilitate the introduction of e-justice will be discussed.[19] Development in respect of online dispute resolution mechanisms are further of note in the Dutch system and will be discussed and analysed.[20]

Attempts towards digitisation has only recently been recognised thoroughly in Belgium. The current Minister of Justice has dedicated himself to facilitating reform in the Belgian civil law to increase access to justice.[21] In a policy statement delivered on 17 November 2014 pertaining to civil procedural reform, the Minister mentioned putting efforts towards the digitisation of the judiciary.[22] Limited progress has been made towards the Minister's optimistic goals. Concrete steps have, however, been made by the implementation of the Potpourri Acts.[23] The first step towards complete digitisation can be seen in the new ITC-tool: e-deposit.[24] There are other mechanisms that are worthy of consideration, for instance, the introduction of the VAJA-database (Vonnisen en Arresten, Jugements et

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[18] CH van Rhee 'E-justice: New developments and best practices in the Netherlands' available at http://www.iuscommune.eu/html/activities/2015/2015-11-26/workshop_7_Van_Rhee.pdf (accessed 31 May 2018) and X Kramer et al 'e-Justice in the Netherlands: the Rocky Road to Digitised Justice' in M Weller and M Wendland (eds) *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt* (2018) Tubingen: Mohr Siebeck 209 – 235.

[19] See note above.

[20] Kramer et al (n 18 above) 209 – 235.

[21] See Taelman & van Severen (n 12 above).

[22] See Taelman & van Severen (n 12 above).

[23] Taelman & van Severen (n 12 above).

[24] Article 32*ter* of the Belgium Judicial Code.

Arrêts – Judgements) by the Federal Public Service of Justice.[25] Electronic service of judicial documents is also recognised in the Belgian jurisdiction.[26]

1.4. CIVIL PROCEDURAL REFORM IN SOUTH AFRICA

The effective reform of any law, including civil procedural law, is usually an extremely difficult process, if not impossible, without strong instruments and political resolve to change the course of affairs. A legal system has to find a balance between the time and funds invested into a civil matter and the timely adjudication and outcome thereof. Furthermore, a balance must be sought in the distribution of powers between the parties and the judge. Moreover, within this balancing act, society's requirements and government's resources have to be taken into account. In the premises, in order to reach a conclusion on prospective reforms, which could prove to be most beneficial to South Africa, the previous comparative discussion of reform categories within this balancing act will be considered.

1.5. LIMITATIONS

The research will be limited to the field of civil procedure. Although there are other reform proposals aimed at access to justice in criminal procedure and in other fields of law, these will not be included in this research. The law of evidence will similarly not be considered in broad detail. The research will further only include a comparative analysis on the countries identified and not the entire European continent or other jurisdictions such as Canada or the United States of America. The research will not include the procedures followed in Unions such as the European Union, but will only consider the specific rules followed in the countries mentioned. The research is specifically aimed at the reform of civil procedure in the South African context. Alternative dispute resolution will not be considered as a specific category, however, will be discussed in the technological sense

[25] Taelman & van Severen (n 12 above) 286 -293.

[26] Taelman & van Severen (n 12 above).

in a section of the research. The research is further limited to the Uniform rules of Court applicable to South Africa and civil procedure in the High Court

1.6. APPROACH / METHODOLOGY

The research involves a desktop approach which entails reading, analysis, thinking, writing, re-reading, re-thinking and re-writing. Quantitative and qualitative research will not be included as it is not foreseen that it will be necessary within the ambit of the research. Predominantly, a comparative method will be employed in pursuit of the ultimate goal of the research, which is to evaluate the current trends in civil procedural reform with the goal of advancing access to justice and determining a solution that could be effective in the South African context. Secondarily, a black letter/doctrinal approach will be followed by criticising South African civil procedure and by pointing out that reform is necessary. A critical analysis of relevant law and literature will be made. The research will be subjected to constitutional scrutiny and some of the conclusions will be based on socio-legal research. This is required because the research topic requires inquiry into the social issues of access to justice, as well as whether the suggested reforms could represent South Africa's social ideals. Reliance will be placed on information from Civil Codes in the countries identified as well as South Africa civil procedural rules. Furthermore, reliance will be placed on articles, debates and criticism by scholars and academics on the topic. Some case law and limited statistics on the success of certain reforms will be considered.

CHAPTER 2: CASE MANAGEMENT, PRE-TRIAL PROTOCOLS AND THE DISTRIBUTION OF POWER BETWEEN THE PARTIES AND THE JUDGE

2.1. INTRODUCTION

Judges within adversarial civil procedural jurisdictions are known for their role as passive and neutral entities in litigation. A new trend has emerged where several civil jurisdictions are re-inventing and redistributing the power between judges and the parties in respect of their roles and duties applicable during the civil process.

In this regard, case management, pre-trial protocols and the distribution of power between the parties and the judge suggests a new understanding of a judge's role in civil matters where judges are given additional duties to actively engage in proceedings. In respect of case management, judges are not only required to adjudicate a matter on the evidence as presented to them, in addition to this duty, case management gives them the responsibility to manage the caseload confronting the court in a way that ensures that all procedures are dealt with efficiently and effectively. Several European jurisdictions have embraced and utilised case management and pre-trial protocols in an attempt to battle costs, delays and complexities. It is contended that these suggestions play an essential role in securing the right to trial within a reasonable time. For these reasons, case management, pre-trial protocols and redistributing the power between the judges and parties are recommended as a prospective reform in civil procedural law.

2.2. SOUTH AFRICA

In preparation for the discussions that will follow, it is important to understand the basic structure of South African civil procedure in regard to party control, especially with reference to the involvement of the judge in the pre-trial development of litigation.

2.2.1. Current issues in South African civil procedure

According to various authors, South African civil procedure is still extremely trial centred

and the civil rules are focused on preparing parties for trial rather than ideally focusing on the resolution of the dispute (by encouraging early determinations and advancing settlement).[1] This is problematic as it results in lengthy litigation, creating severe backlog in courts, where costs are driven up and litigants are expected to endure financial and emotional expense for many months (often years).[2]

2.2.2. Preparation for Trial

The South African civil procedure is traditionally characterised by a closed pre-trial stage where parties disclose as little as possible to each other concerning their respective cases and strategies.[3] Consequently, the surprise element still plays a major role in the presentation of evidence (specifically oral evidence) at the trial, giving meaning to the notorious concept of 'trial by ambush'.[4] *Paleker* compares this to a poker game where parties are known to keep their 'evidential cards' face down and will only expose the 'aces up their sleeves' when it is favourable to them.[5] With the exception of the application procedure, he points out that the truth is never fully revealed and only becomes apparent at a later stage in proceedings.[6]

It is submitted that in this regard South African rules still place undue emphasis on traditional adversarial principles. *Theophilopoulos* substantiates this view and contends that the adversarial system is designed to create a culture of conflict as opposed to a culture of co-operation or negotiation between parties.[7] This culture procedurally permits

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1 M Paleker 'Fact- and Truth-finding in South African Civil Procedure' in CH van Rhee and A Uzelac *Truth and efficiency in civil litigation: fundamental aspects of fact-finding and evidence-taking in a comparative context* (2012) 189 and 223-224; and C Theophilopolous 'Constitutional transformation and fundamental reform of civil procedure' (2016) (1) *TSAR* 68.

2 Paleker (n 1 above) 189.

3 Paleker describes this as "strategic suicide" (n 1 above) 190.

4 Paleker (n 1 above) 189 – 190; and DE van Loggerenberg 'Evolution of the powers of the judge and the powers of the parties regarding the taking of evidence in South Africa' 325.

5 Paleker (n 1 above) 190.

6 Paleker (n 1 above) 223 -224.

7 Theophilopoulos (n 1 above) 68 – 69.

relevant evidence to be withheld at the pre-trial stage of litigation.[8]

Even with an extensive set of discovery rules, there are no provisions aimed at prior witness depositions in South African procedure (unless a witness cannot attend trial or when expert testimony is applicable).[9] Parties in litigation are expected to prepare for trial, by way of exchanging pleadings and with procedures such as discovery, only to be confronted with mainly oral evidence of which they have no prior knowledge.[10] To the judge and the parties, everything is very much up in the air at the opening of the trial and things only become apparent as the trial progresses.[11] In addition, there are little to no sanctions in respect of non-compliance or, specifically, late compliance in respect of discovery rules, consequently resulting in several delays.[12]

(i) The role of the Judge

To make matters worse, judges are not given ample powers to interfere with proceedings. Contradictory to modern trends, the judge is expected to have a constrained approach and to adopt a passive and neutral attitude preventing the judge from descending *"into the arena and be liable to have his vision clouded by the dust of conflict".*[13] The court has

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8 Theophilopoulos (n 1 above) 68 – 69.

9 See Rule 38(3) of the Uniform Rules of Court. Note that this position has changed with the introduction of the new case management rules effective from July 2019 and Practice Directive of the Commercial Court effective from October 2018 and is discussed further in the conclusion of this chapter.

10 As a general rule evidence is given orally and each witness is subject to cross-examination by the legal representative of the other party, where after the judge gives a judgment based upon such material. See DE van Loggerenberg 'Civil Justice in South Africa' (2016) (Volume III issue 4) *BRICS Law Journal* 138.

11 Paleker (n 1 above) 223 – 224.

12 The only available remedy is to apply to court for an order compelling the opposing party to comply with discovery rules (see Rule 30A of the Uniform Rules of Court), however, with the current backlog in the court rolls parties will have to wait for months before any such order can be sought and before litigation can continue. In addition to the aforementioned, a party may also apply to court for punitive cost orders acting as a sanction against litigants who fail to comply with the rules. These sanctions, however, lack any immediate relief and are a great cause for delays in litigation.

13 Van Loggerenberg (n 4 above) 138, see *Yuill v Yuill* 1945 ALL ER 183 (CA) 189B. (See further e.g, *R v Roopsingh* 1956 4 SA 509 (A) at 514A; *S v Rall* 1982 1 SA 282 (A) at 832D).

no power to determine the outcome of a case on the basis of what it believes to be "truly relevant" and the judge plays no role in the determination of the truth.[14] The judge is obligated to rely on the facts alleged by the parties and patiently has to wait for the appropriate evidence to surface during trial.[15] The judge can, however, put questions to the parties regarding obscure points and has a duty to make sure that legal representatives behave during proceedings.[16]

2.2.3. Current procedures in South African civil procedure

(i) Pre-trial conferences

In terms of Uniform Court Rule 37 the pre-trial conference is compulsory for the legal representatives of both parties. The purpose of the conference is to curtail the length of proceedings by reaching agreement on certain issues and on time-consuming administrative details.[17] Rules prescribe that the pre-trial conference may not be held later than six weeks prior to the trial.[18] The parties are to provide each other with a list of certain admissions or issues, questions and any other matters pertinent to the preparation for trial.[19] After the pre-trial conference has taken place, the minutes or written record of the conference must be prepared and signed by or on behalf of every party.[20] In the event of discovery being made after the pre-trial conference has taken place, a further pre-trial

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14 Van Loggerenberg (n 4 above) 135.

15 Paleker (n 1 above) 190.

16 Van Loggerenberg (n 10 above). In addition, some authors are of the view that judges in South African trials have many inquisitorial powers, even if the trial system is predominantly accusatorial. Since the case of *R v Hepworth* 1928 AD 265 at 277 and 278, the position in our law has been that the "judge is an administrator of justice" who is not simply to sit back while the parties run the course of the trial. This, however, becomes more clear in criminal proceedings than civil proceedings where the sentencing phase has various important inquisitorial elements.

17 C Theophilopoulos et al *Fundamental Principles of Civil Procedure* (2015) 333.

18 In practice, deviations often occur and the pre-trial conference is seldom held six weeks before trial. See Theophilopoulos (n 17 above) 333 – 335.

19 Rule 37(4) of the Uniform Rules of Court.

20 Rule 37(6) of the Uniform Rules of Court.

conference must be held after such discovery. Previously, pre-trial conferences were of no to little use in most courts due to the limited evidence forthcoming from the respective parties.[21] The rules have, however, evolved over the years and, in some instances, it has become compulsory to have these conferences before the magistrate or judge, usually presiding over the matter.[22] Further it should be noted that these conferences previously specifically fell within the domain of advocates and attorneys and created no opportunity for an adjudicator to investigate the merits of a matter.[23] Therefore, parties were not given the opportunity to examine or discuss evidence in order to reach a mutual understanding and attempt settlement.[24] According to *Paleker*, the conclusion to be drawn from how pre-trail conferences are dealt with (at that point in time) and from anecdotal evidence in respect of what takes place at these conferences, it is indisputable that pre-trial conferences do not play a significant role in fact- and truth-finding.[25] As mentioned above, however, it should be noted that the rules pertaining to these conferences have been amended in certain courts to ensure that at least some matters are clarified and dealt with.[26]

(ii) Case Management in South Africa

a. Previous attempts towards case management

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[21] See Paleker (n 1 above) 221.

[22] In certain lower courts in South Africa this has become a common practice and it is compulsory for parties to hold pre-trial conferences in chambers before a magistrate. See section 54 of the Magistrates' Courts Act 32 of 1944 and Magistrates' Courts Rule 25. As mentioned above, however, this research will not include an in-depth consideration of the civil procedural rules in the lower courts of South Africa.

[23] In terms of Rule 37(8) of the Uniform Rules of Court a judge may at any time at the request of a party, or out of own accord, call upon the attorneys or advocates for the parties to hold or continue with a conference before a judge in chambers and may direct a party to be available personally at such conference.

[24] See Paleker (n 1 above) 221. Note further that case management is often aimed at ventilating the issues between the parties thoroughly in order to promote mutual understanding and the resolution of the dispute.

[25] Paleker (n 1 above) 221.

[26] See Rule 37 and 37A of the Uniform Rules of Court. See further (n 22 and 23 above). The practice directives in respect of pre-trial conferences in the different courts are, however, inconsistent and confusing and will therefore not be discussed here.

Case management has finally been incorporated on a working scale in South African civil procedure in July 2019.[27] Prior to the amendments, case management was a possibility only if the parties to a dispute mutually requested case management to apply to their matter and could not be enforced by the court.[28] Various Practice Directives have been adopted by different divisions of the High Court in respect of case-management and pre-trial conferences. These directives, however, lack provisions dealing with the procurement of evidence in terms of preparing for trial.[29] The various Practice Directives create confusion amongst practitioners as there is no uniform approach to these Rules and are not necessarily followed in all circumstances.[30]

Legal practitioners display a clear negative attitude towards any change or extension of judicial powers in terms of case management as seen from the contribution by *van Loggerenberg* where the prospect of case management, as deliberated in 2010, was discussed.[31] During this time, a Case Flow Management Committee was established (consisting out of senior judges of various higher courts) to oversee the drafting of a Practice Directive aimed at introducing an initial case management conference to be held before a judge where certain matters concerning the dispute would be discussed.[32] The Practice Directive was met with opposition from the Bar (i.e. the advocates profession) as well as the side Bar (the attorneys profession).[33] It should be noted that various important points were raised by the criticisms mentioned in respect of the practical implementation

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27 See *Government Gazette* No. 42497.

28 Theophilopoulos (n 17 above) 333 – 334.

29 Except for requiring that summaries of expert witnesses must be properly and sufficiently prepared by the parties. See van Loggerenberg (n 4 above) 319.

30 As this research applies to the civil procedural rules applicable to the entire South African legal system, Practice Directives limited to the different divisions will mostly be avoided, but for the new Commercial Court Practice Directive, as discussed below.

31 For the full discussion see van Loggerenberg (n 4 above) 317 – 325.

32 Under the Civil Justice Reform Project initiated by the Office of the Chief Justice see van Loggerenberg (n 4 above) 319 – 322. The draft practice directive extensively made provision for judicial oversight but the taking of evidence and the limitation of issues of fact were still to be in the hands of the parties (party control prevailing).

33 For a full discussion on the criticisms raised by the Bar see van Loggerenberg (n 4 above) 320-321.

of the Practice Directive, amongst other things, the negative effect of case management on the judicial independence and impartiality of judges and that the proposals will require a more active, administrative and managerial role from judges for which they are not suited by the nature of their office.[34] Trial judges will further be required to delve into the merits of the dispute at an early stage, thereby substantially increasing the possibilities that the parties and the issues may be pre-judged.[35] It is clear that legal practitioners frown upon the involvement of judges in the development of the litigation process.[36]

b. New developments

The Uniform Rules of Court have finally been amended by Government Gazette 42497 on the 31st of May 2019 to include provisions regulating Judicial Case Management. The rules have come into operation on the 1st of July 2019 and the judiciary has indicated that the rules indeed aim to advance access to justice goals by alleviating congested trial rolls and to address problems that cause delays in the finalisation of cases.[37] The new Rule 37A will be discussed following the determinations reached in respect of the identified countries. Further, the new Commercial Court Practice Directive recently adopted for both the Gauteng and Gauteng Local Divisions of the High Court of South Africa will be discussed. The Directive is aimed at regulating matters of a commercial nature and proposes to introduce case management in all commercial disputes[38] The Practice Directive has been in effect since October 2018.

2.2.4. Early Recommendations

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[34] See van Loggerenberg (n 4 above). See the discussion on case management and party autonomy in Belgium and Netherlands. The general conclusion from these examples are that procedural powers do not affect the principle of party autonomy.

[35] Van Loggerenberg (n 4 above).

[36] See van Loggerenberg (n 4 above).

[37] See Rule 37A(2)(a) of the Uniform Rules of Court and Office of the Chief Justice *Amendment of Uniform Rules of Court with the insertion of Case Management Rules* 28 June 2019.

[38] It is interesting to see how the Directive includes words such as 'statement of case', makes provision for witness statements and opts for disclosure orders as opposed to rules of discovery which are all terms and principles seen in the English civil procedure.

Paleker argues that South African civil procedure requires a new set of rules where more opportunities are available to parties to investigate the merits of a matter in the early pre-trial stages of litigation.[39] In this regard, *Paleker* further supports the view that case management could be a valuable tool in this regard.[40] In similar fashion, *Theophilopoulos* recommends that civil procedure should undergo a fundamental overhaul of certain key features in order to streamline the complexities and refers to the English "Woolf Reforms" as a starting point.[41] Other suggestions that may be mentioned at this juncture, include more sanctions in respect of late judgments, the discouragement of postponements and the utilisation of more technological developments in the court process.[42]

2.3. ENGLAND AND WALES

2.3.1. Introduction (the Woolf Reforms)

The adoption of the *Civil Procedure Rules (1998)* (CPR)[43] in England had a significant impact on the changing trends in respect of the judge's role in civil proceedings. Following the recommendations made by *Lord Justice Woolf*, the principle of party control was amended and the new system introduced a general framework for the active involvement

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[39] Paleker (n 1 above) 224 - "*Experience has shown that where facts and evidence are revealed earlier rather than later, parties have a greater chance of arriving at the truth sooner. This may provoke early settlement and prevent needless litigation."*

[40] Paleker (n 1 above) 224.

[41] Theophilopoulos (n 1 above) 91.

[42] GroundUp Editors 'Three ways to improve justice in South Africa' 13 November 2018 available at www.dailymaverick.co.za/article/2018-11-13-three-ways-to-improve-justice-in-south-africa/ (accessed 15 January 2019). The article emphasises that "*justice delayed is justice denied"* and that no party wins when a court case burdens litigants for months on end. According to the article, the solution can be found in simple, ruthless enforcement and that postponements should only be a possibility in extreme circumstances. From anecdotal evidence, and as most lawyers should know, postponement is a normal event in most civil matters.

[43] Came into force on 26 April 1999.

of judges in the pre-trial stage of litigation.[44] Accordingly, judges had a duty to ensure that litigation proceeds without undue delay and that the main issues pertaining to a matter are identified and prioritised (within certain limits).[45] This brought England one step closer to its continental counterparts. The "Woolf Reforms" served as an important foundational step in the reform of the English civil procedure.

2.3.2. Pre-trial Protocols

The 'pre-action protocols' were introduced by the *Civil Procedure Rules* (CPR) following the recommendations of the Woolf Report.[46] The set of protocols require parties to exchange substantial information prior to the filing of a claim in order to promote a mutual understanding and to advance settlement.[47] The purpose behind these protocols are to avoid the expense and inconvenience of litigation as far as possible and is rooted in the philosophy that trial should be the 'last resort' when resolving a dispute.[48] These protocols set out the steps necessary in the preparation for trial stage and have replaced the rules of discovery. The protocols are not subject to agreement and every dispute heading for trial should comply with the elaborate system of rules.[49] As the parties are obliged to meet all the requirements of the pre-trial stage, compliance tends to extend over months, especially in complicated matters.[50]

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[44] Lord Woolf was commissioned by the Department of the Lord Chancellor to extensively examine the English civil procedural system. See H Woolf *Access to Justice: Final Report* (1996).

[45] N Andrews *Andrews on Civil Processes: Court Proceedings* (2013). For a complete discussion of the judges powers see pages 13 – 21.

[46] The pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims. They are approved by the Master of the Rolls and are annexed to the Civil Procedure Rules. There are several pre-action protocols applicable in certain matters – accessible at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol.

[47] M Kay et al (eds) *Blackstone's Civil Practice: The Commentary* (2013).

[48] Andrews (n 45 above) 66.

[49] Andrews (n 45 above) 66 – 67.

[50] Andrews (n 45 above) 66 - 68.

The protocols are not without criticism and may contribute to complications in litigation. The protocols are advantageous in that they advance settlement or alternative dispute resolution and promote early disclosure of information by the parties.[51] On the other hand, in ensuring that these 'elaborate' requirements are met, costs of the case can be inflated quite rapidly.[52]

2.3.3. Commencement of proceedings, pleadings and case management

The second phase of proceedings concern the filing of a claim by the claimant who is required to notify the court thereof. All parties to the dispute must respectively provide a sworn 'statement of case' (previously known as pleadings).[53] This statement should set out the main aspects of the claim or defence, as well as the relief sought whilst details of legal arguments or evidence are unnecessary.[54]

Various managerial responsibilities are set out in the CPR and a court should, amongst other things, help identify the issues in dispute, the order in which these issues are to be resolved, which issues require a full trial and which can be dealt with summarily.[55]

Concerning the taking of evidence, party control prevails and is only subject to management direction and the court cannot order the taking of evidence or documents *mero motu*.[56] In keeping with adversarial principles, the impartial court will determine the winner of the case by listening to the presentation of the evidence and legal arguments of both parties.[57] The modern judge, however, has a more active duty to ensure that procedural rules are respected, that the case is not unduly delayed, unreasonably

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51 Andrews (n 45 above)66 - 68.

52 Andrews (n 45 above) 66 - 68.

53 Take note of the change in description.

54 Andrews (n 45 above) 66 – 67.

55 *Civil Procedure Rules,* Part 3: The Court's Case Management Powers. Also see Andrews (n 45 above) 68.

56 *Civil Procedure Rules,* Part 3: The Court's Case Management Powers. See also Andrews (n 45 above) 68.

57 *Civil Procedure Rules,* Part 3: The Court's Case Management Powers and see further Andrews (n 45 above) 68 – 69.

complicated or unfairly tilted in favour of a stronger party.[58] The court has a newly found power to limit the number of witnesses called and to place time limits on their examination, however, judges are cautioned to execute this power with restraint.[59]

A significant point of departure from the South African civil procedure is the notion of witness statements. Each party to a civil case in England must normally produce a witness statement in respect of each factual witness, including the party's own intended factual evidence.[60] These statements have to be exchanged between the parties ahead of trial or a witness cannot be heard.[61] The aim of the witness statements are to advance early disclosure and to reduce time lost in oral testimonies during the actual trial.[62] Prior to 1986, witnesses in civil trials gave all of their evidence orally and the opposing parties had no prior knowledge of the evidence that would be led.[63] The witness statements are, however, not without criticism and in a discussion document by the Bar Council of England and Wales several shortcomings associated with the statements are pointed out.[64]

2.3.4. The Jackson Reforms

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58 *Civil Procedure Rules,* Part 3: The Court's Case Management Powers.

59 *Civil Procedure Rules,* Part 3: The Court's Case Management Powers and see Andrews (n 45 above) 69 – 71.

60 *Civil Procedure Rules,* Practice Direction 32: Evidence, paragraph 32.4.

61 *Civil Procedure Rules,* Practice Direction 32: Evidence, paragraph 32.4.

62 Andrews (n 45 above) 69 – 71.

63 This is the current situation in South Africa, however, the new Commercial Court Practice Directive of 2018 has introduced prior witness statements and is discussed later in this contribution.

64 According to the council, the current regime of witness evidence in England and Wales does not improve the prospects of a fair and just outcome; nor does it save time or costs. These statements are often too long, address issues of which the particular witness has neither personal nor direct hearsay knowledge, rehears unnecessarily, are inaccurate, are slanted and spun so that they can give a misleading and inaccurate account of events, contain evidence that witnesses cannot actually remember and are little more than statements drafted to support a party's case. See The General Council of the Bar 'Reforming civil litigation: Discussion document' Recommendations by the Bar Council of England and Wales available at https://www.barcouncil.org.uk/media/203269/130325_reforming_civil_litigation.pdf (accessed 6 August 2018) page 16 – 22.

Following *Lord Justice Jackson's* report on the cost regime in England and Wales in 2009[65] various procedural changes (notably affecting costs) were introduced on 1 April 2013.[66]

For the purpose of this discussion the package of case management amendments is of importance:

(i) Standard directions online and Increased docketing

According to *Lord Justice Jackson,*[67] the standard directions for multi-track cases[68] published online by the Ministry of Justice, including when to use them and when not to, have all been effective and practitioners find the directions helpful.[69] The benefits of judicial docketing,[70] include the following: (1) reducing delay and litigation costs; (2) saving court resources and creating more efficient conduct of hearings; (3) enabling judges to tailor case management directions to the specific case; (4) increase the consistency of the management of cases; and (5) enabling the court to keep track of a claim's progress effectively.[71]

(ii) Relief from Sanctions/Firmer enforcement of Rules

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65 R Jackson *Review of Civil Litigation Costs: Final Report* (2010).

66 See Andrews (n 45 above) page 21 for a complete discussion on these reforms.

67 R Jackson 'Was it all Worth it?' (2018) *Professional Negligence* P.N. 61.

68 There are various "tracks" to which court cases in England are allocated. The "multi track" as referred to pertains to claims over 25 000 pound or for lesser money sums where the case involves complex litigation. The standard directions refer to the court's instructions to parties on how they are to prepare for a case and are intended to make sure that everything to do with the case is known to the court and to both parties before there is a full court hearing.

69 Jackson (n 67 above).

70 Judicial docketing is a phrase used to describe the allocation of specific cases to certain judges in order for them to preside over the matter throughout the proceedings from start to end. In this way judges are able to accelerate proceedings by keeping an eye on the progress and the conduct of the parties.

71 See Lord Neuberger 'Docketing: Completing case management's unfinished revolution' available at https://hsfnotes.com/litigation/2012/02/20/moves-toward-greater-use-of-judicial-docketing/ (accessed 28 November 2018).

Following *Lord Justice Jackson's* comments and complaints in respect of the high rate of tolerance for delays and non-compliance during litigation, Civil Procedure Rule 3.9 was reconsidered and redrafted.[72] According to *Lord Justice Jackson*, after a particularly bumpy start, where courts went 'over the top' in respect of the strict appliance of the rule, the courts have found the right balance after the case of *Denton v White.*[73]

(iii) Disclosure Orders

The Jackson reforms have further introduced a set of possible disclosure orders aimed at catering for the specific needs of different cases.[74] Instead of using a "standard

[72] Prior to the Jackson reforms the rule provided for various circumstances which the court must take into consideration in an application for relief from sanctions imposed for a failure to comply with a rule, practice direction or court order – including for instance whether the failure to comply was intentional or whether a good explanation can be forwarded for the failure. These factors were, however, removed when the new rule 3.9 came into effect specifying that a court should only consider two circumstances in each case, including the need (1) for litigation to be conducted efficiently and at a proportionate cost; and (2) to enforce compliance with rules, practice directions and orders. The change clearly demonstrates Jackson's frustrations in respect of unnecessary delays and his ambition for swift an inexpensive litigation. It also becomes quite obvious why the courts initially struggled to apply the new rule 3.9. See *Civil Procedure Rules,* Rule 3.9.

[73] Changes made to the Civil Procedure Rules (*Civil Procedure Rules,* Rule 3.9) pertaining to stronger sanctions applicable in the event of a breach of timetables or rules brought about much controversy in the English courts. In *Denton v White* [2014] EWCA Civ 906, the Court of Appeal dealt with three appeals, each of which concerned case management decisions and relief from sanctions dealt with under the so-called Mitchell approach (see *Mitchell v News Group Newspapers Ltd* 2013 EWCA 1537). The *Mitchell* approach held that the sanction against non-compliance will usually apply unless the breach is trivial or there is a good reason for it. The guidance delivered in *Mitchell* led to a substantial increase in satellite litigation, a reduction in cooperation between parties to litigation, and a significant increase in costs. Consequently, there was a need for intervention and the Court of Appeal in *Denton* set out a new three-stage approach with a broader application and with an umbrella clause stipulating that the courts must consider all of the circumstances of the case in order to deal with the application for relief "justly".

[74] See *Civil Procedure Rules,* Part 31 pertaining to disclosure orders.

disclosure"[75] in every case there were now more appropriate and proportionate choices.[76] Although these additions have not been particularly successful due to an overall disregard amongst legal practitioners, a working party chaired by *Lord Justice Gloster* have identified and taken on the issue.[77] Accordingly, a pilot has been drawn up with the goal of increasing co-operation and engagement and addressing the burden and costs associated with disclosures (particularly e-disclosures) which will ultimately lead to more focused and appropriate disclosure orders.[78]

(iv) Factual Witness Statements

The court has been granted more control over the expensive pre-trial exercise by issuing directions in respect of: (1) the identification and/or limitation of issues to which factual evidence may be directed; (2) the identification of possible witnesses and whose evidence may be read; and (3) the limitation of the length and/or format of witness statements.[79]

According to *Lord Justice Jackson* most of the case management reforms introduced in 2013 are effective and practitioners have forgotten that they form part of the Jackson reforms.[80]

2.3.5. Continued amendments

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[75] Standard disclosure requires parties to disclose the documents on which they rely and any documents that may adversely affect a party's case or support the other party's case (*Civil Procedure Rules,* Rule 31.6).

[76] In addition to the standard disclosure five other possibilities are now listed (*Civil Procedure Rules,* Rule 31.5).

[77] The Disclosure Working Group (DWG), chaired by Gloster LJ and composed of experts including High Court judges, solicitors, barristers and e-disclosure experts.

[78] The DWG's 'Disclosure Pilot Scheme' has been approved by the Civil Procedure Rule Committee. From 1 January 2019, the two-year pilot has introduced a new set of disclosure rules in the Business and Property Courts. See *Civil Procedure Rules,* Practice Direction 51U: Disclosure pilot for the Business and Property Courts.

[79] See *Civil Procedure Rules,* Rule 32.2 (3).

[80] See Jackson (n 67 above).

Two pilot schemes were launched in 2015 for cases regulated outside of the Rolls Building in London.[81] The schemes aim at creating shorter and earlier trials for business-related litigation, at a reasonable and proportionate cost.

(i) Flexible Trials Scheme

The Flexible Trials Scheme (FTS) enables parties to agree to adopt a more lenient case management procedure to suit the particular case at hand. The scheme is aimed at a faster and simpler procedure instead of the current full trial procedure under the CPR.[82] The scheme is designed to encourage parties to limit disclosure and oral evidence at trial to the minimum necessary in order to facilitate the fair resolution of their disputes and to reduce costs and time spent at trial.[83] The key elements of flexibility and choice will eventually result in courts respecting the agreements made between the parties, however, the courts will remain in control of the procedure to be adopted.[84] The elements of flexibility and choice will enable parties to make agreements in terms of evidence, whilst the court will respect these agreements but remain in control of the procedure to be adopted.[85]

(ii) Shorter Trials Scheme

The Shorter Trials Scheme (STS) is designed to offer dispute resolution for large volumes of cases in less time and will be suitable for matters where extensive disclosure, witness

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81 See *Civil Procedure Rules,* Practice Direction 57AB.

82 Which includes pre-trial disclosure, witness evidence, expert evidence and submissions at trial. See *Civil Procedure Rules*, Practice Direction 57AB part 3: The Flexible Trials Scheme. See also The Chancellor (the Judge in Charge of the Commercial Court and the Judge in Charge of Technology and Construction Court) 'Shorter and Flexible Trial Procedures: Pilot Schemes' available at https://www.judiciary.uk/wp-content/uploads/2015/09/Shorter-and-Flexible-Trial-Schemes-Announcement.pdf (accessed 25 September 2019).

83 See *Civil Procedure Rules*, Practice Direction 57AB part 3: The Flexible Trials Scheme.

84 See *Civil Procedure Rules*, Practice Direction 57AB part 3: The Flexible Trials Scheme.

85 See The Chancellor (n 82 above).

statements or expert evidence is not required.[86] The STS has very recently been set to be permanently implemented after a three-year trial.[87] Amendments are to be made to the CPR enabling the STS to operate from October 2018 in the Business and Property Courts.[88] In line with the strategies behind the Jackson reforms,[89] the scheme creates a streamlined procedure with a docketed judge leading to judgment within 12 months of the institution of a case.[90] The trial is limited to a maximum of four days and judgment should be rendered in six weeks.[91] The pilot has mostly been supported by practitioners since its introduction in 2015.[92] As mentioned above, the scheme is, however, limited to matters without certain evidentiary requirements (limited disclosure or witness evidence), but there is no monetary limit on the cases, with some worth several million pounds reportedly resolved through the process.[93]

2.4. THE NETHERLANDS

2.4.1. Introduction

The need for reform in the Netherlands was triggered by the shortcomings in the civil system experienced in the 1990's. At that time, most ordinary civil cases underwent a 'paper trial': an exchange of written documents between the claimant, the defendant, the judge and possibly an expert, without any public hearing.[94] The pace at which these exchanges took place was not controlled vigorously, and the parties would play their cards (statement of case) one by one, saving their best arguments and factual statements

86 J Hyde 'Shorter trials scheme goes permanent' (2018) *The Law Society Gazette.*

87 See Hyde (n 86 above).

88 *Civil Procedure Rules,* Practice Direction 57AB: Shorter and Flexible trials Schemes.

89 See Jackson (n 67 above).

90 *Civil Procedure Rules,* Practice Direction 57AB: Shorter and Flexible Trials Schemes.

91 See Hyde (n 86 above).

92 See Hyde (n 86 above).

93 See Hyde (n 86 above).

94 CH van Rhee and RR Verker 'The Netherlands: A no-nonsense approach to civil procedure reform' in CH van Rhee and Y Fu (eds) *Civil litigation in China and Europe. Essays on the role of the judge and the parties* (2014) 4.

until late in the procedure.[95]

Proposals to reorganise civil procedure (in an attempt to combat delays, costs and complexities) had a strong tendency to include a shift of powers concerning the control of proceedings from the parties to the judge.[96] In this regard, radical reform was experienced in 2002 with the introduction of the Dutch Civil Reform Act.

2.4.2. The Civil Justice Reform Act of 2002 (The Reform Act)

The Reform Act commenced on 1 January 2002[97] and altered the procedural rules governing proceedings before courts of first instance. First, one of the most significant reforms concerned the reduction of the number of written statements of case.[98] Where the law provided parties with a right to two written statements before, the Act limited these statements to only one and leave from court is necessary if a party desires to file additional statements.[99]

As stated above, public hearings seldom took place in the 1990s and were scheduled in limited circumstances.[100] The Reform Act emphasised the need for personal appearance of the parties and consequently contributed to the increase in the number of cases in which personal appearance was ordered.[101]

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95 The exchange of the statements of claim, defence, reply and rejoinder usually took half a year or more. Furthermore defended cases, including those that would settle at an early stage, would on average take 525 days (median) (mean 700 days). About 10 percent of cases would last longer than four years, whereas half a per cent would take more than 10 years. See van Rhee (n 94 above) 4.

96 R Verkijk 'Beyond winning: Judicial Case Management and the Role of Lawyers in the Principles of transnational Civil Procedure' in CH van Rhee (eds) *Judicial Case Management and Efficiency in Civil Litigation* (2007) 64.

97 van Rhee (n 94 above) 4.

98 A written statement of case is the party's explanation of his/her stance in the matter, in South Africa parties make this information is contained in pleadings.

99 van Rhee (n 94 above) 6.

100 van Rhee (n 94 above) 6.

101 van Rhee (n 94 above) 6.

The Act further introduced an explicit duty on the courts to prevent undue delay and to take the necessary steps to achieve this, either *mero motu* or on the request of a party.[102] Accordingly, the authority to determine procedural steps and at what time they have to be taken no longer fell in the exclusive domain of the parties. The Act further also broadened the rules of discovery.[103]

2.4.3. *Government Appointed Committee*

According to *Jongbloed*, the amendments made by the Reform Act were intended to be a mere repair job.[104] It was further necessary for the principles of civil procedure to be fundamentally re-considered. For this reason, in addition to the amendments introduced by the Act, the Dutch government appointed a committee (consisting of three leading scholars)[105] to present a report on the fundamentals of the civil justice system and to consider avenues for further reform.[106]

Various recommendations were made regarding the role of the court and the litigants in civil litigation. The Committee clearly favoured the court to have an active approach in litigation and embraced the idea of judicial case management.[107] The members of the Committee recommended that discovery rules be extended on the notion that parties have the duty to disclose all relevant information and to 'put their cards face up on the table'.[108] The transfer of powers from the parties to the court was justified by the need for more co-operation and efficiency in litigation and the widespread belief that civil litigation

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[102] Article 20(1) of the Dutch Code of Civil Procedure

[103] Article 843a of the Dutch Code of Civil Procedure

[104] AW Jongbloed 'Judicial Case Management and efficiency in the Netherlands' in CH van Rhee (eds) *Judicial Case Management and Efficiency in Civil Litigation* (2007) 110-111.

[105] Asser, Groen and Vranken.

[106] Jongbloed (n 104 above) 110 – 111.

[107] As van Rhee describes it *"The authors clearly refute a sporting theory of justice and argue that the autonomy of parties can no longer be the guiding principle of Dutch civil procedural law"* in CH van Rhee (n 94 above) 14 paragraph 2.

[108] Asser, Groen and Vranken 2006, p. 73 as discussed in van Rhee (n 94 above) 13.

is not merely a private enterprise of the litigants.[109] Most controversial of their suggestions were that judges should be allowed to assert certain facts on their own accord.[110] The proposals advanced by the Committee have led to the Minister launching a programme for legislative action, which could in time lead to revision of (parts of) the Code of Civil Procedure.[111] Several of their suggestions have, however, not led to the introduction of legislation.[112]

2.4.4. Case Management Powers (the current state of affairs)

The present litigation model may be qualified as moderately adversarial. The parties determine the facts of the case and play a leading role in launching and terminating litigation.[113] However, the parties may not withhold any information relevant to the case and have a duty to submit all relevant facts truthfully (even if this is to the detriment of their own case).[114]

In regards to the innovation of justice in order to maintain and strengthen the Dutch Judiciary, the legislator has mentioned two points in particular.[115] According to *Kramer et al*, there is a need for methods of communication between litigants and the courts in line with current standards (primary digital communication).[116] Secondly, the length of judicial

[109] See van Rhee (n 94 above) 10.

[110] This was met with resistance from the Minister of Justice and government. See CH van Rhee (n 94 above) 14.

[111] See van Rhee (n 94 above) 14.

[112] van Rhee (n 94 above) 9.

[113] See van Rhee (n 94 above) 9.

[114] Article 25 of the Dutch Code of Civil Procedure.

[115] X Kramer et al 'e-Justice in the Netherlands: the Rocky Road to Digitised Justice' in M Weller and M Wendland (eds.) *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt* (2018) Tubingen: Mohr Siebeck p 209 -235.

[116] This point will further be considered in Chapter 3 where technology and digital advancements in respect of civil procedure is discussed.

proceedings should be justified by the content and complexity of the dispute.[117] A standard procedural model with only one round of written arguments has been introduced in the majority of cases in an attempt to simplify proceedings.[118] The parties therefore have a greater interest in providing detailed factual statements and legal arguments in their first written statement of case, as the opportunity to file additional statements at a later point is not guaranteed.[119] At the personal appearance a judge is entitled to actively obtain information from the parties by asking questions.[120] Further, the judges are expected to promote settlement. In the event that this is not possible, judges have the power to render a (summary) judgement or to determine the further procedural steps that need to be taken.[121] The court's case management powers have in this regard been strengthened to ensure efficiency, especially in the earlier stages of a case.[122] More time limits for procedural acts and stages have also been introduced.[123] Only where a case of a complex nature is involved will an additional round of written arguments be permitted.[124] The intention behind these rules are to create a procedure which will be more user-friendly, custom-made and focused on the dispute at hand.[125] The aim of increasing the settlement of cases has formed a significant part of Dutch procedure for some time, the importance hereof is once again emphasised as a possible goal of the oral hearing.[126]

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[117] To this end Articles a-q have been inserted in the Dutch Code of Civil Procedure to lay down a new procedure for the digital conduct of proceedings. In addition, provision has been made relating to the security of the systems and the extension of deadlines for submissions of documents in the event of technical failures. See further Kramer et al (n 115 above) 11.

[118] See Kramer et al (n 115 above) 11. The basic structure is such that after the statement of claims and statement of defence, an oral hearing will take place (which can serve different purposes, see Article 30k of the Dutch Code of Civil Procedure), and the judgment will be given shortly after. Different ways to initiate proceedings, either by way of summons or by way of petition, are abandoned.

[119] van Rhee (n 94 above) 9.

[120] van Rhee (n 94 above) 9.

[121] van Rhee (n 94 above) 9.

[122] See van Rhee (n 94 above) 9 and Kramer et al (n 115 above) 11 and article 30o of the Dutch Code of Civil Procedure.

[123] See Kramer et al (n 115 above) 11.

[124] See Kramer et al (n 115 above) 11.

[125] *Kamerstukken II* (Parliamentary Documents) 2012/13, 29 279, 164 p. 8.

[126] Kramer et al (n 115 above) 11.

It is clear from the above that the Dutch courts have been granted extensive powers in respect of all procedural matters. The judge has been given a task to guard against unreasonable delay in litigation and may take the steps necessary to prevent such delay as envisaged by the Reform Act of 2002.[127]

2.4.5. Success of the Dutch Reforms

It should be noted that the reforms in respect of the Dutch civil procedure rules were accompanied by several significant other reforms, aimed at addressing the court structure and the organisation of the courts. It is therefore difficult to assess the exact contribution of the discussed amendments.

However, some inferences can be made:

The new procedure introduced by the 2002 Reform Act is aimed at creating a friendlier litigation model promoting the settlement of cases during the personal appearance of the parties. If settlement is found to be impossible or improbable, the aim was to efficiently proceed with a matter within a short time frame.[128]

Despite these ambitions, *van Rhee* states that research has shown that personal appearance does not necessarily cause the parties to settle more frequently.[129] It does, however, result in the parties settling the matter at an earlier point in time.[130]

An increase in extensive written statements of case, oral court hearings and the pre-action examination of evidence have emphasised the significance and importance of the

[127] Article 20(1) of the Dutch Code of Civil Procedure.

[128] According to van Rhee research has shown that indeed produced some of the expected results. See van Rhee (n 94 above) 11.

[129] van Rhee (n 94 above) 11.

[130] According to data based on cases concluded between 1994 and 1996. See van Rhee (n 94 above) 11 and Eshuis 2007 page 214-216 as seen in van Rhee (n 94 above) 11.

early stages in the litigation process.[131]

As regards to the debate surrounding the effects of case management on the impartiality of the judge it is to be noted that the Dutch system has not been confronted with any complications.[132] *Van Rhee* states that this is not surprising since the acquired case management powers have mainly been procedural in nature.[133] Judges have not been granted far-reaching powers in respect of the merits of cases. In this regard, only some powers have been extended, for example, the power to order the parties to supply additional information.[134]

2.5. BELGIUM

2.5.1. Introduction

The topic of case management has not gone unnoticed in Belgium and has been a subject of debate since the early 2000's. At that time, both parliament and government had already made proposals towards the introduction of a so-called 'active judge'.[135] Therefore, it is not unusual that Belgian law has embraced the principle of case management over the past decade. In relation to the time management of cases significant reforms were introduced by the Act of 3 August 1992[136] and the Act of 26 April 2007.[137]

2.5.2. The amendments to the preparatory phase

[131] van Rhee (n 94 above) 13.

[132] van Rhee (n 94 above) 13.

[133] van Rhee (n 94 above) 13.

[134] van Rhee (n 94 above) 13.

[135] B Allemeersch 'The Belgian Perspective on Case Management in Civil Litigation' in CH van Rhee (eds) *Judicial Case Management and Efficiency in Civil Litigation* (2007) 80.

[136] Promulgated on the 3rd of August 1992 (*Belgian Official Gazette,* 31 August 1992).

[137] *Wet tot wijziging van het Gerechtelijk Wetboek met het oog op het bestrijden van de gerechtelijke achterstand* promulgated on the 26th of April 2007 (*Belgian Official Gazette,* 12 June 2007).

Allermeesch writes that significant reform with regard to the preparatory phase of litigation was experienced in 1992 and 1995 in Belgium.[138] In 1992 the Belgian procedural rules were extensively amended in order to counter procedural manipulation and trivial attempts by lawyers to prolong proceedings in pursuit of their goal to drive up costs.[139] *Allermeersch* writes that the amendments introduced the notion of a so-called 'procedural calendar' imposing strict time limits for the exchange of memorandums, written motions and evidence, and to appoint a date for the final hearing of the case.[140] This was available to parties (on request) if undue delay was caused by the opposing party.[141] If parties failed to appear at the oral hearing or in the event of non-compliance with time limits, the judge could enforce an order *mero motu* by no longer accepting late statements of case or by disregarding the absence of the party in question.[142] No longer were 'last minute' manoeuvres accepted unless in exceptional circumstances where new information has surfaced which, in the opinion of the judge, necessitated additional rounds of briefs or motions.[143] Case law added significantly to the 1992 and 1995 rules and closed occasional loopholes.[144] Case law followed the basic principles of due process and fair play, and a ban on the abuse of rules of procedure.[145]

The principle of consensualism,[146] however, continued to dominate Belgian civil law and the pre-trial phase in particular. A problematic aspect remained, although a judge now had the power to impose sanctions at his own discretion, these powers could only be exercised at the request of one of the parties.[147]

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[138] See Allermeesch (n 135 above) 82.

[139] Allemeersch (n 135 above) 83.

[140] Article 747(2) of the Belgian Judicial Code; similar provisions in Articles 751 and 753 of the Belgian Judicial Code.

[141] Allemeersch (n 135 above) 83.

[142] Allemeersch (n 135 above) 83.

[143] Article 784 (2) of the Belgian Judicial Code.

[144] Allemeersch (n 135 above) 83.

[145] For a discussion on the developments concerning the case law see Allemeersch (n 135 above) 83.

[146] The theory behind party autonomy as discussed by Allermeesch (n 135 above) 83.

[147] Allemeersch (n 135 above) 83.

2.5.3. The In-Between (Soft Law)

According to *Allemeersch*, the courts were not willing to wait for changes to be introduced by legislature.[148] This resulted in Belgian judges embracing their role as active supervisors of proceedings and taking measures upon themselves.[149] The increased interest in case management was particularly visible in two areas: (1) Various courts, when formulating their internal regulations, developed systems to guarantee a smooth judicial procedure; and (2) Courts devoted themselves to an active procedural policy by drawing up special protocols with the bar.[150] These protocols were intended to create clear arrangements with lawyers concerning the procedural preparation of cases. An example of these protocols were the rules laid down requiring parties to immediately agree on the time limits regarding procedural steps and submitting statements of claim at the introductory hearing.[151] This emphasises the stance of many in the procedural debate that reform is not necessarily only about changing the rules of civil procedure, but also changing procedural attitudes and processes.[152]

2.5.4. The Act of 26 April 2007

The solution to the problematic aspects that remained after the amendments of 1992, as mentioned above, came with the Act of 26 April 2007 and its provisions.

The Act now provides for the mandatory fixation of binding time limits within a period of six weeks after the action has been brought before the court, unless the parties mutually agree that these time limits should not be imposed.[153] The length of the limits are similarly determined by agreement between the parties. However, if the parties are unable to

[148] Allemeersch (n 135 above) 83 – 86.

[149] Allemeersch (n 135 above) 85- 86.

[150] See Allermeersch (n 135 above) 85 – 86.

[151] Allemeersch (n 135 above) 85- 86.

[152] See CH van Rhee (eds) *Judicial Case Management and Efficiency in Civil Litigation* (2007) 5.

[153] P Taelman and C van Severen *Civil Procedure in Belgium* (2018) Wolters Kluwer 256 – 259.

agree, the judge has to decide on the time limits (thereby enjoying full discretion).[154]

2.5.5. Practical value

As the law stands today, the preliminary hearing can be considered as a first 'case management conference' where the judge will decide on the further course of the case.[155] In the event of a complex case (one that cannot be resolved immediately or on a nearby date) a procedural calendar will generally be agreed upon by the parties, in the absence of agreement, the calendar will be imposed by the court (this is the practical value of the amendment of 2007).[156] The procedural calendar sets out the deadlines concerning the filing and exchange of written pleadings and supporting documents.[157]

2.5.6. More recent changes

As will be discussed later, the Minister of Justice of the Michel Government, Koen Geens, has committed himself to do everything in his power to ensure that judgment is rendered within one year of initiation in ordinary (civil) cases.[158] In his plan for more access to justice, some elements of case management have been incorporated. The Potpourri Acts have significantly changed opposing default judgments and the role of the judge in these circumstances.[159] The Potpourri Acts further changed the rules on appeal, now providing that a judgment is provisionally enforceable from 1 November 2015.[160] The law reform has further required written pleadings to be drafted in accordance with a predetermined structure, failing which the court will have no obligation to respond to them.[161] One of the

[154] Taelman & van Severen (n 153 above) 256 – 259.

[155] Taelman & van Severen (n 153 above) 256 – 259.

[156] Articles 747-748 of the Belgian Judicial Code.

[157] Taelman & van Severen (n 153 above) 256 – 259.

[158] Taelman & van Severen (n 153 above) 26.

[159] Taelman & van Severen (n 153 above) 311 – 314.

[160] L&E Global 'Belgium's Reform Act on Judicial Law ('Potpourri Act')' available at https://knowledge.leglobal.org/belgiums-reform-act-on-judicial-law-potpourri-act/ (accessed on 15 January 2019).

[161] L&E Global (n 160 above).

purposes of the fourth Potpourri law is to introduce a system where the summons period is significantly extended, in order to allow the defendant to file pleadings prior to the introductory session so that the case can be dealt with immediately at this session (depending on the circumstances).[162]

2.6. CONCLUSION

2.6.1. Reforms identified in continental Europe and England

(i) Pre-trial protocols and early determination

Pre-trial protocols in England are clearly valuable and advantageous in facilitating settlement and a mutual understanding between parties. It is submitted that South African civil procedure would benefit from protocols which may shift the focus from the preparation of trial to the resolution thereof and the notion of trial being the absolute last resort. It should, however, be noted that the costs associated with these protocols are problematic and if parties do not have ample resources to meet the requirements it may lead to a negative result on their access to justice. It is further notable from the discussion relating to the Dutch reforms that intervention by the courts in the preliminary stage of a civil case may have a positive effect on its determination. The disclosure of facts and evidentiary material by the parties have been deemed as an important aspect in the acceleration of the process. Therefore, it seems that the elevation of a judge's case management powers is beneficial to civil procedure in that it enables courts to encourage parties to co-operate and to enforce the procedural rules, further also facilitating settlement prospects.

(ii) Limitations concerning evidence

Limitations on evidentiary material in attempts to shorten trials are prominent in the reform experienced in England and the Netherlands. They are especially valuable in specific

[162] Potpourri IV promulgated on 25 December 2016 (*Belgian Official* Gazette, 30 December 2016).

proceedings where certain forms of evidence are not necessary, as seen from the two new pilot projects launched in England. Further the specific rules pertaining to disclosure orders in England and to adapt these orders to the requirements of a matter show significant promise in avoiding unnecessary delay in civil proceedings. In the Netherlands, the shift of procedural powers to an increasingly active judge has created possibilities for judges to exclude certain types of evidence on their own accord as part of their duty to ensure that matters may be dealt with swiftly. Limitations on evidence may, however, lead to problems concerning the principles of truth finding in the civil process and can therefore be undesirable.

(iii) Docketing

The idea behind docketing includes that a case be allocated (but not reserved) to one judge who is then primarily responsible for hearing all applications in relation to the case. This, as mentioned before, was deemed undesirable by legal practitioners in South Africa as seen in the discussion pertaining to the Draft Practice Bill in 2010.[163] A further problematic aspect pertaining to docketing in the South African context is the resource constraints of the judiciary (and the inefficient management structure of its state appointed administration).[164] However, the introduction of the new Rule 37A has specified that cases will be allocated to certain case management judges to preside over all pre-trial and case management conferences.[165]

(iv) Witness Statements

As stated above, the South African civil procedure extensively relies on oral evidence. Witness statements were introduced in England to enable parties to prepare for trial and to save time during the actual trial. In line with the discussion on 'trial by ambush' witness

[163] The Bar was of the opinion that this will result in an adjudicator pre-judging a matter thereby affecting the judge's impartiality and infringing the principle of audi alteram partem and would therefore be undesirable. See van Loggerenberg (n 4 above) 320 – 321.

[164] See Theophilopoulos (n 1 above) 93.

[165] See discussion below.

statements can serve an important function in South African litigation. These statements can be supplemented by oral examination at trial and do not limit the purpose of cross-examination in relation to truth finding. The Commercial Court Practice Directive[166] has made provision for witness statements prior to trial, these statements will include all witnesses' examination in chief. In the Netherlands, reforms have been aimed at making sure that all facts are available to the court during parties' first appearance. Contrary to the abovementioned concerns in respect of oral evidence, the Dutch reforms have emphasised the importance of personal appearance and the duty of judges to put questions to the parties in attempts to accelerate the matter. However, as stated, detailed statements of cases are already provided by the parties.

(v) Personal appearance

The discussion above has further highlighted the importance of personal appearance of the parties at their first appearance. It has shown to be of great importance in resolving cases in a quick and satisfactory matter. In respect of the pre-trial meeting procedure in South Africa, the previous notion of personal appearance may be beneficial if incorporated into our civil procedure. Because parties have a personal interest in a matter, this may result in less postponements due to an increased disclosure of facts and evidence early on in front of the adjudicator and will ultimately cause the matter to be resolved in less time.

(vi) Consistent and ongoing reforms

The English reforms demonstrate that a once-off, complete overhaul of civil procedural rules can have a dramatic effect on litigation. This dramatic event may further ignite a consistent effort to advance access to justice amongst all legal participants. The English example shows that subsequent reforms are of significant importance and that active efforts should consistently be put towards civil procedural reform.[167] However, according

[166] Commercial Court Practice Directive 2018 – providing for extensive case management.

[167] As seen in England and Wales, the initial Woolf Reforms of 1998 were not adequate and subsequent reforms had to be implemented to ensure that access to justice rights are advanced and protected.

to *van Rhee,* the Netherlands demonstrates that reforming a civil justice system is not merely a matter of adjusting the rules of civil procedure.[168] Changes in the rules went hand in hand with other significant changes in the attempt to reduce the backlog of cases.[169] Chapter 3 will further make it clear that jurisdictions require enormous monetary investments from the government to succeed with certain reforms.[170] The importance of support from all legal parties (judges, advocates and lawyers) is further demonstrated by the Belgian experience. The importance of protocols and soft law is additionally emphasised. In this regard, the Commercial Court Practice Directive[171] may be a step in the right direction in the South African context. However, a question that remains is whether South Africa will have the support needed to be successful in reform.[172]

(vii) The debate on party autonomy

As mentioned above, the impartiality of the judge has not, as of yet, been questioned by the Dutch legal profession. As opposed to previous centuries, the precise distribution of powers between the court, the parties and their attorneys is no longer a matter of fierce ideological debate.[173] Imitating the Dutch policy, the primary focus should be on enhancing access to justice, litigant satisfaction, swift procedures and low costs.[174] Further, it needs to be pointed out that there is an increasing belief that all participants to a legal dispute (the judge, the parties and the lawyers) are jointly responsible for achieving these goals.[175] As far as the orderly conduct and progress of proceedings are concerned,

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Furthermore, it should be noted that England has several pilots active in the different courts of England and Wales to introduce new reform strategies on a step-by-step basis and to test these strategies before full scale implementation. See chapter 2 part 2.3.

[168] van Rhee (n 94 above) 13.

[169] Adjustments to the number of court staff, the introduction of 'flying brigades' and changes to the financing system. See van Rhee (n 94 above) 13.

[170] See chapter 3 part 3.3.1. and 3.4.2. (ii) of the Commercial Court Practice Directive 2018.

[171] The Commercial Court Practice Directive 2018.

[172] See discussion on legal practitioners' attitude towards previous reform suggestions on page 5 and 6.

[173] van Rhee (n 94 above) 10.

[174] van Rhee (n 94 above) 10.

[175] van Rhee (n 94 above) 10.

Belgium has undergone a clear shift (like most European Union countries) from the court being a 'mere passive observer' to the 'master of proceedings'.[176] The courts have a case management responsibility to ensure that proceedings run smoothly and that judgment is given in an appropriate amount of time.[177] This implies that a judge has the power to direct and instruct parties in civil proceedings to ensure that the progress of the trial is maintained, or even accelerated.[178] The Belgian experience demonstrates that judges should have more power in determining the procedural elements of a case. Respecting the principles of party autonomy, the parties still have the power to direct proceedings. However, in the event of parties failing to properly realise this right, the judge has the power to intervene in order to ensure that proceedings follow an orderly course. In this regard, Belgium has found a successful 'balance' between the powers of the parties and the powers of the court. This advances the opinion held by many authors that party autonomy does not have to be sacrificed in the process of increasing the power of the courts.

2.6.2. New developments in South Africa

The legislature has very recently amended the Uniform Rules of Court to provide for extensive case management in civil proceedings in South Africa. In respect of case management, however, it is important to note that these rules were preceded by the case management provisions introduced by the Commercial Court Practice Directive adopted in 2018, further discussed below. The provisions of the new amendments will now be discussed in comparison to the case management developments observed from the identified countries above.

(i) New Case Management Rule 37A

With the insertion of the new rule 37A, case management shall apply to specific

[176] Taelman & van Severen (n 153 above) 35 – 40 and 452 – 455.

[177] Taelman & van Severen (n 153 above) 35 – 40 and 452 – 455.

[178] Taelman & van Severen (n 153 above) 35 – 40.

categories of matters[179] at any stage after a notice of intention to defend is filed and to any other proceeding in which case management is deemed appropriate by the Judge President or upon the request of a party.[180] It should be noted that the courts reserve a discretionary power in terms of subrule (1)(b), enabling any litigant to approach the court for an order subjecting a matter to judicial case management where it can be demonstrated that proceedings have been delayed for too long or when it is a matter with voluminous evidence, or anything that may be deemed appropriate.[181] The legislature has further provided that, where it is necessary, the nature and extent of case management will be completed by the relevant directives or practices of the Division in which the proceedings are pending.[182] These developments are, to a certain extent, similar to how the English rules have been amended following the "Woolf Reforms" and the introduction of reform through Practice Directions. Practice Directives will play a valuable role in terms of the functioning of case management as indicated by subparagraph (4)(b).[183] Matching Belgium's views and developments in terms of "soft law", the rules emphasise the importance of a step-by-step approach to ensure that problematic areas can be countered and indicates that the legal actors in a certain area should be able to adapt civil procedural rules to cater for the specific needs of the different divisions.

a. Early determination

In terms of the new rule 37A case management may apply in all proceedings, including applications.[184] All matters identified for case management must, as an absolute rule, be certified as trial-ready before any trial date is allocated, therefore these cases will usually be subjected to several pre-trial conferences.[185] Pre-trials have the purpose of limiting the

[179] As the Judge President of any Division may determine in a Practice Note or Directive.

[180] See Office of the Chief Justice (n 37 above) and Rule 37A(1)(a) – (b) of the Uniform Rules of Court.

[181] Rule 37A(1)(b) of the Uniform Rules of Court.

[182] Rule 37A(2)(b) of the Uniform Rules of Court

[183] Rule 37A of the Uniform Rules of Court.

[184] See Office of the Chief Justice (n 37 above).

[185] See Office of the Chief Justice (n 37 above).

issues in dispute and ensuring that a matter is ready for trial, thereby eliminating delays. The legislature has inserted Rule 37A to prescribe the minimum requirements for a pre-trial conference to be convened by the parties or before the judicial officer prior to the commencement of trial to make sure that all actors involved abide by these rules.[186] The rule further specifies the requirements in terms of trial-readiness to encompass the following: (1) that all issues possible of being resolved without trial, have been resolved; (2) the remaining issues have been adequately defined; (3) that the requirements of rules 35 and 36 (9) have been complied with, if applicable; and (4) that all foreseeable potential causes of delay have been identified to the extent practically possible.[187]

An interesting addition relates to the fact that judges now have the power to direct discovery processes if they are of the opinion that it would advance the matter faster.[188] The new rules further incorporate technological advancements (further discussed in chapter 3) by providing that the registrar shall issue a notice *electronically* to parties where a party applies for the allocation of a trial date following the close of pleadings (*litis contestatio).*[189] The content of this notice shall include, amongst the criteria: (1) the date, time and place of a case management conference; (2) the name of the case management judge; (3) the requirement of a pre-trial meeting before the case management conference; (4) that the plaintiff is required to ensure that the court files is suitably ordered, secured, paginated and indexed (two days prior to the conference); and (5) to deliver the agreed minute of the pre-trial conference (signed by both parties) or alternatively a minute signed by the party filing the document accompanied by an explanation why agreement on its content had not been obtained.[190]

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[186] See Office of the Chief Justice (n 37 above).

[187] *Government Gazette* No. 42497 and Rule 37A(5)(b) of the Uniform Rules of Court.

[188] See Rule 37A(5)(c) of the Uniform Rules of Court and *Government Gazette* No.42497. The direction of discovery procedures is similar to the disclosure orders as discussed above in England and Wales. It is submitted that when discovery is directed to cater for the specific needs of a case, unnecessary delays can be avoided.

[189] At the address furnished in terms of rules 17(3)(b) or 19(3)(a) – see Rule 37A(6) of the Uniform Rules of Court.

[190] See Rule 37A(7) of the Uniform Rules of Court. In terms of Rule 37A(8) of the Uniform Rules of Court the minute will contain the agreement or different positions held by the parties in terms of the issues identified

Pre-trial conferences have been substituted by the amendments in terms of Government Gazette No. 42497. A plaintiff is now required to appoint a date, time a and place for a pre-trial conference, however, only where cases are not subject to judicial case management as contemplated in rule 37A.[191] Rule 37(8)(a) further provides that a judge may of own accord direct attorneys or advocates appearing on behalf of the parties to hold or to continue with a conference before a judge and may direct a party to be available personally at such conference.[192] It should be noted that judges have ample power in respect of the pre-trial conference and that Rule 37 grants them the power to, amongst other things, order condonation etc, however, only with the consent of the parties.[193]

In addition to the pre-trial minute mentioned above, the parties are required to deliver a detailed statement of issue setting out the common cause facts and the issues that are in dispute, further explaining the nature of the dispute and setting forth the parties' respective contentions in respect of such issues.[194] It is clear from the provisions of rule 37A that the pre-trial stage has been expanded to include the earlier determination of several aspects of a matter before it may proceed to trial. Subrule 10 sets out the numerous matters which parties have to address at the pre-trial meeting held in terms of subrule 7.[195]

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in subparagraph (10) and will further identify any additional steps necessary to have the matter certified as trial ready, including setting out a timetable agreed between the parties according to which such further steps will be taken,

[191] See Rule 37A(3) of the Uniform Rules of Court – *The provisions of Rule 37 shall not apply, save to the extent expressly provided in this rule, in matters which are referred for judicial case management.*

[192] See Rule 37A(8)(a) of the Uniform Rules of Court.

[193] See Office of the Chief Justice (n 37 above).

[194] Rule 37A(9)(a) of the Uniform Rules of Court.

[195] See Rule 37A(10) of the Uniform Rules of Court – subparagraph 1 indicates that parties still deal with all matters required in a pre-trial conference in terms of rule 37, however, further only adds several further matters in need of determination. This further clearly substantiates the earlier view that the early determination of several new aspects to a matter are now required. It is submitted, as pointed out above, that this serves the interests of access to justice.

b. Powers between the parties and the judge

The power of judges have been increased by subrule 9 of Rule 37A, stipulating that judges may, upon the consideration of such a statement of issue as described above, direct that the appearance by one party or all parties be dispensed with.[196] It is submitted that the rule is somewhat vague as it does not indicate whether a judge has an absolute power in this regard or whether parties have a choice or opportunity to object. It should be noted that the principle of *audi alteram partem* is embedded in South African civil procedure and grants each party the right to be heard, it should therefore be cautioned that this rule not be applied beyond the scope of established legal principles.

Although it should be noted that the new provisions specifically provide that the scope of judicial engagement is not limited, it further specifies certain duties that a judge must complete at the case management conference.[197] These duties include that the judge must explore settlement, on some or all issues, including (if appropriate) enquiring whether the parties have considered voluntary mediation, the judge must endeavor to promote agreement between the parties pertaining to the number of witnesses and to eliminate pointless repetition of evidence and/or facts and to identify and record the actual issues in dispute to be tried at trial.[198] From the aforementioned it should be noted that the legislature has clearly given due regard to the prospect of settlement early on in the matter which has previously been pointed out as a detrimental aspect in South African civil procedure. As discussed above, settlement has become an important goal in civil procedure in England and the Netherlands and it is important to note that South Africa has followed this trend. Further an important aspect of any pre-trial protocol as identified in the respective countries is to define the issues between the parties adequately and to dispense with time-wasting matters which South Africa has embraced through the introduction of its case management rules. The powers of a case management judge have been amplified in respect of the control of the proceedings. Judges now have the opportunity to intervene very early on in the trial stage to ensure that the parties produce

[196] See Rule 37A(9) of the Uniform Rules of Court.

[197] Rule 37A(11) of the Uniform Rules of Court.

[198] Rule 37A(11)(a) – (c) of the Uniform Rules of Court.

and do everything necessary to ensure that litigation runs at a smooth pace and for the shortest time possible, thereby saving parties' costs and by unencumbering the South African courts. However, on the other hand the various case management conferences ordered by the judge in a matter may inflate legal costs quite rapidly by forcing legal representatives to travel to court more often. In this regard it is important to note that if representatives fail to ensure that the issues are adequately ventilated between the parties early on in the process the case management judge has the power to make any cost order as he/she deems fit (see below).[199]

The case management judge may at a case management conference certify or refuse to certify a case as trial-ready and to put the parties on such terms as appropriate to achieve trial-readiness, and direct them to report to the case management judge at a further case management conference on a fixed date.[200] The judge further has the power to strike a matter from the case management roll and direct that it be re-enrolled only after non-compliance with the rules or management directions have been rectified, serving as sanction against parties who unnecessarily delay the process.[201] An interesting development in respect of the insertion of rule 37A is that a judge may give directions for the hearing of opposed interlocutory applications by a motion court on an expedited basis.[202] The fact that the rule provides for an expedited basis may raise questions as to whether it may be prejudicial to parties whose matters are not subject to case management, however, the provision may be extremely beneficial in finalising a matter faster, thereby ultimately creating more court time for other matters. Contrary to adversarial principles, a case management judge has been granted the power to order separation of the issues in appropriate cases *mero motu*.[203] The judge may further at the conclusion of a case management conference record the decisions made and direct the plaintiff to file a minute thereof (if deemed convenient) and to make any order as to costs, including an order *de bonis propriis* against the parties' legal representatives or any other

[199] Rule 37A(12)(g) – (h) of the Uniform Rules of Court.

[200] Rule 37A(12) (a) – (c) of the Uniform Rules of Court.

[201] Rule 37A(12)(d) of the Uniform Rules of Court.

[202] Rule 37A(12)(e) of the Uniform Rules of Court.

[203] Rule 37A(12)(f) of the Uniform Rules of Court.

person who has unreasonably frustrated the objectives of the judicial case management process.[204] It is submitted that the legislature expressly intended to include the order *de bonis propriis* to discourage and sanction representatives against delays that may have been avoided which are against the very purpose of the judicial case management initiative as legal representatives are often responsible for a substantial portion of time wasted. How often and how severely these costs orders are to be implemented against legal representatives remain to be seen. It may serve as deterrence and may encourage co-operation between all actors involved in the matter, however, it is further submitted that judges should use their discretion wisely and only where absolutely necessary as they may further discourage legal representatives to call upon case management in matters, thereby frustrating the very object for which judicial case management has been implemented. It is easy to see from the above that the legislature has given due regard to higher sanctions as a deterrence method in respect of civil proceedings, which as discussed in the respective countries above, shows great promise in accelerating litigation.[205]

The court file to be placed before the trial judge must include: (1) the record of the case management conference, including the minutes submitted by the parties; (2) any directions issued by the judge; and (3) a record of the issues in dispute.[206] The record will, however, exclude any settlement discussions and offers as per the usual civil procedure rules.[207] The trial judge is entitled to consider the documents in the court file pertaining to the conduct of the trial, including the determination of any applications for postponement and issues of costs.[208] The legislature has decided that the normal penalty of an adverse costs order in respect of non-compliance and failures of parties to adhere to the principles and requirements of the rule is adequate.[209]

[204] Rule 37A(12)(g) – (h) of the Uniform Rules of Court.

[205] See Chapter 2 part 2.3.4 pages 21 – 24 on the discussion involving sanctions in England and Wales.

[206] Rule 37A(13) of the Uniform Rules of Court.

[207] Rule 37A(13) of the Uniform Rules of Court.

[208] Rule 37A(14) of the Uniform Rules of Court.

[209] Rule 37A(15) of the Uniform Rules of Court.

As mentioned above, the legal profession with reference to the 2010 discussions in terms of case management, raised several concerns in respect of its detrimental effect on judicial impartiality and neutrality in matters.[210] Keeping to adversarial principles, the rules specifically state that case management by judicial intervention shall be construed and applied in accordance with the principle of party control, notwithstanding the provisions contained in the rule.[211] A further interesting development in respect of the rule is that the legislature has opted to protect the impartiality of judges by the insertion of subrule (15), providing that the case management judge and the trial judge shall not be the same person, unless agreed upon between the parties.[212] The debate surrounding the detrimental effect close contact between the judge and the parties may have on the impartiality of judges, as mentioned above, has therefore quite easily been disposed of. However, it should also be noted that this may cause further delay in proceedings as trial judges will have to familiarise themselves with matters *de novo*, however, it is preferred over the prospect of a matter being prejudged or a party suffering prejudice as a result.

It is submitted that a problematic aspect in respect of the provisions of Rule 37A relates to appeals and reviews. It is questionable whether parties will be able to appeal against the directions or decisions made in a case management conference. On the one hand, by excluding the right to appeal in this instance would result in significant prejudice to parties in certain circumstances, on the other hand, allowing parties to appeal case management conferences will completely defeat the purpose of Rule 37A. It is submitted that the judiciary should give adequate attention to this aspect before severe challenges emerge.

(ii) The Commercial Court Practice Directive

The Commercial Court Practice Directive further promises significant development in civil

[210] See chapter 2 part 2.2.3 (ii) pages 13 – 17 relating to previous attempts towards case management.

[211] Rule 37A(2)(c) of the Uniform Rules of Court.

[212] Rule 37A(15) of the Uniform Rules of Court.

litigation in South Africa on the front of case management.[213] The Directive attempts to promote efficient conduct of litigation in the High Court and to resolve disputes quickly, cheaply, fairly and with legal acuity. The Directive provides for the allocation of a judge(s) as case manager to any matter and ordinarily the judge(s) will determine the interlocutory matters and hear the trial or application.[214] The Directive further stipulates that all proceedings in the Commercial Court will be subject to management by the court, signifying the adoption of a positive attitude towards case management.[215]

Subsequent to the matter being allocated to a judge, the plaintiff will apply for a date and time for the first conference.[216] According to the provisions of the Directive the following matters need to be discussed at this point: (1) a general sense of what the matter is about; (2) what needs to be done to bring the matter to trial; (3) timetable for getting the matter expeditiously to trial; (4) a potential trial date; (5) the number of witnesses likely to be called, including expert witnesses; (6) probable length of the trial; and (7) creating an appropriate electronic means for communications and the exchange and filing of documents.[217] The above clearly demonstrates that the new Directive aims to deliver an earlier determination of all the facts pertaining to the dispute, which has been identified as a significant element in accelerating litigation. Similar to the powers granted to judges in Belgium, with reference to the procedural calendar, the Directive grants a judge the power to determine the timetable in respect of the development of the matter and proceeding to trial, absent agreement between the parties.[218]

The presiding officer has a discretionary power to determine the steps of the matter depending on the specific requirements of the case.[219] Chapter 4 further provides that the

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[213] Commercial Court Practice Directive for both the Gauteng and Gauteng Local Divisions of the High Court effective from 3 October 2018.

[214] See Commercial Court Practice Directive 2018 Chapter 2: paragraph 7.

[215] See Commercial Court Practice Directive 2018 Chapter 2: paragraph 8.

[216] If the plaintiff fails to make an application as required, any other party may apply for the set down of the first case management conference.

[217] See Commercial Court Practice Directive 2018 Chapter 3.

[218] See Commercial Court Practice Directive 2018 Chapter 3. See further Chapter 2 part 2.5.4. pages 33 - 34.

[219] See Commercial Court Practice Directive 2018 Chapter 4.

plaintiff[220] must file a 'statement of case' containing the following: (1) the plaintiff's cause of action and relief claimed; (2) the essential documents the plaintiff intends to rely on; and (3) a summary of evidence the plaintiff intends to rely on.[221] It is to be noted that the concept of 'statement of case' is not known to South African civil procedure, but for its limited use in the labour courts.[222] The concept is, however, seen in most European jurisdictions, which may indicate that international procedure has been considered in the drafting process. Further, the concept of statement of case incorporates several steps in the traditional South African pleadings process, thereby creating a shorter process and increasing the early determination of facts. The defendant must, within a specific period, file a responsive statement of case (defence). It is further provided that no request for further particulars may be sought in the Commercial Court, thereby creating stricter time constraints and resulting in more detailed pleadings, finally causing earlier determination.

At the second case management conference, the parties will either present an agreed list of triable issues or, absent agreement, each party's identification of the triable issues. All interlocutory issues will be dealt with at this conference or at any postponed date, including the determination of the triable issues.[223] The Directive has further made provision for the filing of full witness statements by the parties, it being understood that the witness statements will constitute, save with leave from the judge, the evidence in chief of a particular witness.[224] Although this might be a step in the right direction, as this can be beneficial in saving significant court time, it is submitted that the introduction of such a fundamental change in procedure in a mere Practice Directive can result in more delays in proceedings as all actors involved in the matter are unfamiliar with this practice, however, on the other hand this may serve as an important initial introduction and assessment of witness statements.

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[220] In a period specified by the judge as decided in the first conference.

[221] See Commercial Court Practice Directive 2018 Chapter 4.

[222] The civil procedural rules do not provide for a 'statement of case' and pleadings follow the traditional methods and principles, however, in the labour court of South Africa make provision for a statement of case in a standard form available online.

[223] See Commercial Court Practice Directive 2018 Chapter 5.

[224] See Commercial Court Practice Directive 2018 Chapter 5.

No general discovery is required in the Commercial Court and instead of discovery rules, the judge(s) may allow for the targeted disclosure of documents that are relevant to the dispute as defined in the 'statement of case' or 'responsive statement of case'.[225] Any enforcement applications relating to disclosure will be determined by the judge(s) in good time to permit for the orderly preparation for trial.[226] Should further conferences be required, the parties may approach the allocated judge to convene a conference upon good cause. According to the provisions of the Directive, in accordance with the timetable the case will proceed to trial. If parties wish to lead additional evidence at trial outside of their witness statements, a written application must be made in advance of the trial.[227] The Directive prevents certain forms of ambush from surfacing at trial. A bundle of essential documents which will be used at trial must be compiled and agreed upon by the parties.[228] From the provisions of the Directive it becomes clear that co-operation from all actors involved is required in litigating, this is in line with the international developments. As a standard, documents will be admitted without the necessity of formal proof.[229]

2.6.3. *Concluding Remarks*

Case management has been recognised as essential in securing the right to a trial within a reasonable time in the identified European jurisdictions. The Commercial Court Directive clearly aims to create strict rules in terms of a procedural calendar and includes many new provisions that have been suggested previously in this chapter. However, some problematic aspects remain and provisions regulating the enforcement of the provisions are questionable. The Directive does not provide for sanctions on parties who fail to adhere to the rules, as seen above, this has been pointed out as a problematic area

[225] The new process in terms of the Directive holds many similarities to the procedure followed in England, as well as the other identified countries.

[226] Commercial Court Practice Directive 2018 Chapter 5. The chapter further deals with expert evidence, providing that the issues need to be narrowed as much as possible.

[227] See Commercial Court Practice Directive 2018 Chapter 6.

[228] See Commercial Court Practice Directive 2018 Chapter 6.

[229] See Commercial Court Practice Directive 2018 Chapter 6.

in terms of rendering judgments. It should, however, be noted that the new case management provisions include several sanctions on parties as well as their legal representatives where rules are not complied with. Despite the criticisms, the Directive's provisions are promising and should be closely monitored to determine its rate of success and whether these rules should be rolled-out and implemented in other courts.

The case management rules incorporated into the South African civil procedure show many similarities to the amendments experienced above in the respective countries. The rules are aimed at subjecting certain categories of cases to case management due to the volume of evidence and facts inherent to such matters. Similar to the different tracks for cases in England, including the vast pre-trial requirements, case management rules provide that several requirements have to be met before the matter can be deemed trial-ready. It is submitted that specialised rules catering for identified categories of cases, like pre-trial protocols and targeted disclosure orders, is of importance to consider in South African law. It is submitted that it is likely that the earlier determination of the facts as intended by the case management provisions will most likely lead to the quicker settlement of matters, especially where there is a duty on the judge to explore this avenue. It is clear that the new rules intend to increase a judge's power in the pre-trial phase in an attempt to accelerate proceedings, this shift in powers (especially in a procedural nature) has been identified and implemented in each identified country and serves to be a promising development.

CHAPTER 3: TECHNOLOGY IN CIVIL JUSTICE SYSTEMS (MODERNISATION / DIGITISATION / E-JUSTICE)

3.1. INTRODUCTION

The advantages of digitisation in modern civil justice systems have proven to be an extremely valuable instrument in civil procedural reform. This chapter aims to identify where development in South African civil procedure has taken place in respect of technology and where the civil procedural rules still lack same. It further aims to emphasise the potential of technological reform in civil justice by evaluating the changes in the identified countries and further comparing them to the current South African procedures. *Uzelac & van Rhee* point out that modernisation and technology may have a fundamental impact on access to justice, that it does not merely assist the administrators and judges in their duties but also serves as a tool creating the possibility to do so with the additional benefit of higher efficiency and lower costs.[1] They further state that 'e-justice' should not create a justice system in which the 'electronic' element is an end in itself and a functional equivalent of the older, paper-based procedure but that it has the capacity to fundamentally change the procedure, just as paper-based litigation fundamentally transformed oral procedures in the past.[2] The authors further point out that electronic litigation has the potential of revolutionising all dimensions of communication among the main participants of any matter by resulting in an accelerated flow of information which is also complete and productive.[3] In addition to the above, electronic litigation serves as an immense tool in neutralising the disadvantages of both adversarial

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1 See A Uzelac and CH van Rhee *Transformation of Civil Justice: Unity and Diversity* (2018) 10.

2 See Uzelac & van Rhee (n 1 above) 10.

3 See Uzelac & van Rhee (n 1 above) 10 and 11. Immediate communication can take place between parties (or their representatives), between the parties and the court (including the court administration and other legal services and professions) and between different courts or their departments. Any decision made in a pending lawsuit can be announced and delivered instantly. This particular improvement has been experienced by several South African legal practitioners where judges have agreed to deliver judgment by email, thereby conveniently eliminating the need for all participants to travel to court.

and inquisitorial proceedings thereby contributing to a cooperative model that adjusts the procedure to its substance and optimizes the use of the necessary resources while reducing unnecessary litigation.[4]

3.2. SOUTH AFRICA

Numerous jurisdictions have embraced modern technology in civil justice systems and courts. This is a trend that many European countries have followed in attempts to increase access to justice. In this regard, South African court procedures and rules have remained undeveloped and to an extent, inadequate. South Africa has, however, at least acknowledged the importance of e-technology and certain noteworthy developments have recently been observed. It should further be mentioned that South African court rules and legislation is plagued by poor drafting creating inconsistencies and peculiarities preventing the current provisions relating to e-technology to reach its full potential.

3.2.1. Introduction

According to *Knoetze,*[5] information and communications technology plays a key role in: (1) managing case load; (2) publishing information for court users; (3) managing knowledge within the court; (4) supporting the preparation and conduct of litigation and presenting evidence; (5) providing transcripts; and (6) preparing and publishing judgments.[6] *Knoetze* further proposes that legislation should be enacted to address the issue of virtual courts and the use of technology in assisting remote witness testimony.[7] Numerous authors and judges are of the opinion that technological changes will improve

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4 See Uzelac & van Rhee (n 1 above) 11.

5 Dr Izette Knoetze LLD (UFS) is a legal researcher at the Legal Aid South Africa National Office in Johannesburg,

6 I Knoetze 'Virtual evidence in courts – a concept to be considered in South Africa?' (2016) *De Rebus* DR 30 available at http://www.derebus.org.za/virtual-evidence-courts-concept-considered-south-africa/ (accessed on 2 March 2019).

7 The notion of video conferencing will be discussed later in this chapter. See also Knoetze (n 6 above).

both access to and the efficiency of the justice system and that these changes should be embraced by all.[8]

Historically, the South African judiciary has acknowledged the importance of digitising and modernising the court and civil justice system, however, often failing to implement adequate amendments and new rules. For example, the creation of an electronic filing system has been on the agenda for years, however, to date no full-scale implementation has taken place.[9] A recent article identifies the lack of digitisation as one of the key ways in which South African Civil Justice can be improved.[10] The article mentions that the *Chief Justice Mogoeng* is committed to getting courts working electronically which will include the serving, filing and lodging of documents.[11]

The problem not only surrounds unimplemented strategies to modernise South African civil procedure. It should be noted that the rules of court fail to effectively accommodate and embrace technology and have not been amended accordingly. This will become clear during the following discussions.

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8 See Knoetze (n 6 above). See further Mbatha J in *MK v Transnet LTD t/a Portnet* 2018 JOL 40248 (KZD) at paragraph 16, 25, 27, 29, 36. See also Satchwell J in *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 1 SA 236 (GJ) at paragraph 2, 28, 29 and 32.

9 As far back as 2011, an article titled "*South Africa's justice system goes hi-tech"* (E van Rijswijk 'South Africa's justice system goes hi-tech' 9 November 2011 available at www.brandsouthafrica.com/governance/developmentnews/justice-091111 (accessed 20 January 2019)) reads that plans are afoot to bring South Africa's judiciary in line with world standards by introducing a new electronic court and case management system. The recommendations formed part of the Department of Justice and Constitutional Development's *Access to Justice Conference* in July 2011 (See R Vahed 'Access to justice: Conference hosted by Chief Justice' 8 to 10 July 2011 (24) *The SA Bar Journal* 2) where Chief Justice Ngcobo formally endorsed the introduction of the electronic filing system His view was supported by current Chief Justice Mogoeng Mogoeng. See van Rijswijk (n 9 above).

10 GroundUp Editors 'Three ways to improve justice in South Africa' 13 November 2018 available at www.groundup.org.za/article/three-ways-improve-justice-south-africa/ (accessed 15 January 2019).

11 GroundUp Editors (n 10 above).

3.2.2. Problematic Areas (Overview of legislation, rules and codes affecting the use of ICT in legal services)

(i) The "lacuna" in the Uniform Rules of Court

Section 44(1)(a) of the Superior Courts Act[12] provides for two instances in civil proceedings where service may take place via transmission by fax or any other electronic medium 'as provided by the rules': (1) in the case of any summons, writ, warrant, rule, order, notice, document or other process of a superior court; and (2) in the case of any other communication which by law, rule or agreement of parties is required or directed to be served or executed on any person, or left at the house or place of abode or business of any person, in order that such person may be affected thereby.[13] However, *van Loggerenberg* points out that there are no court rules providing for service by means of fax or any other electronic medium as contemplated in s 44(1)(a).[14] Consequently, a "*lacuna*" exists in the Uniform Rules of Court: Rule 4A is irrelevant (as it only concerns subsequent service) and Rule 4(1)[15] does not provide for the *process* of service by means of fax or any other electronic medium.[16] Accordingly, amendments are needed to give effect to the provisions of s 44(1)(a).

The Uniform Rules of Court were amended in 2012[17] in an attempt to incorporate the provisions of the Electronic Communications and Transactions Act.[18] *Van Loggerenberg* further identifies some of the fundamental failures of these amendments in terms of

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12 Superior Courts Act 10 of 2013 came into operation on 23 August 2013.

13 Van Loggerenberg 'Service in the Superior courts' (2013) *De Rebus* DR 48 available at http://www.saflii.org/za/journals/DEREBUS/2013/254.pdf (accessed on 15 January 2019).

14 Van Loggerenberg (n 13 above).

15 Rule 4A(1) of the Uniform Rules of Court see *Governent Gazette* No. 35450 See Rule 4(1) of the Uniform Rules of Court dealing with the service of documents.

16 Van Loggerenberg (n 13 above).

17 *Government Gazette* No.35450

18 Electronic Communications and Transactions Act 25 of 2002.

service of delivery.[19] The new Rule 4A deals with the subsequent service of documents and notices after service of process (which is provided for in r 4(1)(a)).[20] Rule 4A makes provision for the service of documents by way of facsimile or electronic mail to the respective addresses provided by parties, applicable under rr 6(5)(b), 6(5)(d)(i), 17(3), 19(3) and 34(8).[21] *Van Loggerenberg* points out that none of these rules, nor the relevant forms in the first schedule of the Uniform Rules of Court, require a party to provide a facsimile and electronic mail address.[22] They simply stipulate that such an address should be provided 'where available'.[23]

Regardless, the rules[24] in terms of these addresses, and any possible amendment to the rules in order to bring them in line with Rule 4A(1), would be futile due to the requirement in each of the rules that an address within 15 kilometres of the office of the registrar must be appointed at which a party will accept notice and service of all documents.[25] Clearly, as *van Loggerenberg* points out the requirement of a physical address invalidates and contradicts the provisions of Rule 4A(1)(c) (as well as Rule 4A(1)(b)).[26] He calls for the framers of the uniform rules of court to deal with the issue of service of processes and subsequent documents or notices in a clear, uniform and harmonised manner and submits that the necessary amendments should be introduced without delay.[27]

(ii) Further problematic areas

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19 See van Loggerenberg (n 13 above). See also *Government Gazette* No.35450.

20 See Rule 4A of the Uniform Rules of Court.

21 All these rules are discussed in *Government Gazette* No. 35450.

22 van Loggerenberg (n 13 above).

23 Except for Rule 34(8) of the Uniform Rules of Court, where there is no provision concerning facsimile and electronic mail addresses. Therefore, no party can be obliged to provide such an address.

24 Rules 6(5), 17(3), 19(3) and 34(8) of the Uniform Rules of Court.

25 van Loggerenberg (n 13 above).

26 See *Government Gazette* No.35450 for Rules 6(5)(b), (6(5)(d)(i), 17(3), 19(3) and 34(8) of the Uniform Rules of Court.

27 van Loggerenberg (n 13 above).

Another author, *Mabeka,* writes that the Rules of Court further consistently fail to incorporate and cater for the use of e-technology.[28] *Mabeka* points out that several of the Uniform Rules of Court fail to make any reference to e-technology: (1) Rule 8 in respect of the Registrar of the court issuing summons;[29] (2) Rule 20 concerning the delivery of a declaration;[30] (3) Rule 21 concerning requests for further particulars;[31] (4) Rule 22 in respect of the delivery of a plea;[32] and (5) Rule 23 dealing with delivery of notice to except or strike out.[33]

Mabeka contends that the rules require an in-depth consultation to ensure the further development of e-technology law.[34] *Mabeka* further points out that the processes in the Magistrates' court rules mirror those contained in the Uniform Rules of Court, therefore, the rules similarly require amendment insofar as e-technology is concerned.[35]

3.2.3. Progress made

With due regard to the discussion above in respect of the lack of development of technology and the limited and problematic application thereof, it should be noted that the amendments have made at least some progress. Rule 19 of the Uniform Rules of Court (amended in 2012), allow parties to use electronic mail when a notice of intention to defend is served.[36] The defendant can give his/her facsimile or e-mail address, which

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[28] Unpublished: NQ Mabeka 'The Impact of e-technology on Law of Civil Procedure in South Africa' unpublished Doctor of Laws thesis, University of South Africa 2019. See Mabeka's research for a thorough discussion on all the court rules, the Acts applicable and how e-technology has influenced South African civil procedure. Mabeka further also discusses the systems in designated foreign jurisdictions.

[29] Rule 8 of the Uniform Rules of Court.

[30] Rule 20 of the Uniform Rules of Court.

[31] Rule 21 of the Uniform Rules of Court.

[32] Rule 22 of the Uniform Rules of Court.

[33] Rule 23 of the Uniform Rules of Court.

[34] See Mabeka (n 28 above) Chapter 3 and Chapter 5 where proposals for possible amendments are made.

[35] See Mabeka (n 28 above) Chapter 3 and Chapter 5 where proposals for possible amendments are made.

[36] Rule 19 of the Uniform Rules of Court: Notice of Intention to Defend.

should mean that correspondence between the defendant and other party can take place by use of electronic means.[37] It is further popular amongst parties to agree to the electronic service of documents after the institution of a claim, especially where there is a geographical distance between the parties.[38] Contrary to the above, certain law firms insist on physical service, resulting in a need for correspondents where parties are located in different areas, further amplifying the costs of litigation. It is submitted that provisions enabling parties to utilise the benefits of e-technology in this regard should be developed accordingly.

(i) Substituted Service - Service of court process by social media

In light of the above, it has become clear that the electronic service of court documents is underdeveloped and unclear in South Africa due to the absence of provisions and obscure drafting in respect of the court rules. However, some far-reaching developments have been experienced and will be discussed below.

The internet and online social networking has revolutionised the way people communicate and share information.[39] The principle of *audi alteram partem* is at the cornerstone of due process and signifies the importance of personal service and notifying any party with an interest in the matter of the initiation of the legal process.[40] In this regard, history has been made in the case of *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*[41] where the High Court of Kwa-Zulu Natal (Local Division, Durban) approved the service of court documents via Facebook.

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37 Rule 19 of the Uniform Rules of Court.

38 Rule 19(3) of the Uniform Rules of Court provides that parties may consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.

39 See LB Grové and SM Papadopoulos 'You have been served . . . ON FACEBOOK!' (2013) (76) THRHR 424 – 436.

40 See Grové & Papadopoulos (n 39 above) 427. For a complete discussion on court process see pages 427 – 431.

41 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD).

In the aforementioned case, the plaintiff made application to the High Court for an order granting substituted service by serving a notice on the defendant via a Facebook message (in addition to the notice being published in a local newspaper).[42] The Uniform Rules of Court permit parties to apply for substituted service in circumstances where it is not possible to effect service in the traditional method through the sheriff of the court.[43] The accessibility of social media, given the common use of smart phones, means that it is becoming more likely for individuals to access Facebook (or a comparable media service) on a daily basis as oppose to accessing a newspaper.[44]

In reaching her conclusion, Steyn J pointed out that the changes in communication technology has vastly increased over the years and it is therefore reasonable for the law to recognise such changes and to accommodate these changes where possible.[45] It was, however, further pointed out that courts have been hesitant to acknowledge and adapt to the changes brought about by modern technology due to a court's inherent duty to adhere to established procedures in order to promote legal certainty and justice.[46] According to the court's findings, the 2012 amendments to the Uniform Rules of Court played a crucial part in granting the application. It specifically referred to the insertion of Rule 4A into the Uniform Rules of Court providing for the service of subsequent documents and notices

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[42] *CMC Woodworking* (n 41 above). Grové & Papadopoulos (n 39 above) question whether publication in a newspaper is in any way effective and argues that it further presents a problem for poorer litigants, who sometimes cannot afford publication in a newspaper see page 433.

[43] A Bellengère and L Swales 'Can Facebook ever be a substitute for the real thing? A review of *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD)' (2016) 20 *Stellenbosch Law Review* 454 - 475.

[44] See Bellengère & Swales (n 43 above) 457 – 458. This article further discusses the statistics in regard to the social media landscape in South Africa.

[45] *CMC Woodorking* (n 41 above) para 2.

[46] *CMC Woodorking* (n 41 above) para 2.

by facsimile or electronic mail to the respective addresses provided.[47] In addition to the 2012 amendments to the Uniform Rules of Court, the court referred to the ECTA and the Companies Act 71 of 2008, stating that it had paved the way for different avenues in effecting notice.[48] *Grové & Papadopoulos* support and welcome the court's application of the applicable law and the recognition of the role technology plays in our lives, including the fact that communication methods have changed, however, point out that the judgment is not as far-reaching as it seems at first glance.[49]

The court's interpretation of the Uniform Rules of Court suggests that a litigant may only use electronic means to serve "subsequent" documents and notices and a plaintiff cannot commence proceedings by serving documents electronically.[50] *Bellengere & Swales* note certain problems in this regard by stating that there are no current provisions obliging parties to receive service electronically (litigants can claim that an email address is not available, or simply refuse to provide an address for service), save for the provisions of

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47 2012 amendment to the Uniform Rules of Court. See *Government Gazette* No. 35450. See Bellengère & Swales (n 43 above) 458. Although the rule makes no reference to social network sites such as Facebook, the court, in justifying its decision to allow substituted service in this unique manner, referred to the Canadian case of *Boivin and Associates v Scott*, which "held that the same reasoning for the use of email as a method of service should also apply for service by Facebook".

48 The court made specific reference to section 6(10) of the Companies Act 71 of 2008, which allows for electronic transmission of a notice. *CMC Woodworking* (n 41 above) para 2. In terms of the onus of granting substituted service in the manner requested, the court pointed out that the applicant bore the onus of proving that: (1) service via Facebook was warranted; and (2) there was a real likelihood that the notice would be brought to the attention of the respondent.

49 Grové & Papadopoulos (n 39 above) 433. The authors emphasise the distinction of substituted service where proceedings are instituted, and substituted service where proceedings have already been instituted.

50 Although not the specific subject of this judgment, the court's comments on this topic draws attention to the lacuna in the Court Rules as mentioned previously and discussed by van Loggerenberg. See van Loggerenberg (n 13 above) and see further Bellengère & Swales (n 43 above).

substituted service (following an application to the court).[51] The authors further point out that the amended Uniform Rules of Court do not specifically allow or make provision for the service of a document via social media, initiating action or subsequent thereto, however, that they do not preclude this either and that one can interpret the amendment to broadly permit electronic service of "subsequent" legal documents "where available".[52]

According to *Bellengère & Swales,* the court erred on the side of caution in finding that the present application would not have been possible if not for the recent amendment to the Uniform Rules of Court.[53] The authors are of the opinion that the application would have been perfectly possible under the un-amended rules (Rule 4).[54] This rule already provided for an application to court for leave to serve by substituted service without any restrictions on the suggested method.[55] The amendment to the rules merely provide for an indication that electronic service is becoming more acceptable.[56] This again demonstrates how the courts may and are using their inherent powers to advance the utilisation of technology in litigation, without necessarily creating or amending court rules. This may hold many advantages in terms of creating simpler, faster and less costly court procedures and ultimately advancing the goals of access to justice.

Despite the court's openness to technological developments, the judge emphasised that the background in relation to the application was extremely important in respect of the

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51 See Bellengère & Swales (n 43 above) 459, the authors regard this position as unsatisfactory and submit that the Rules Board ought to immediately amend the Uniform Rules of Court to give effect to the Superior Courts Act, and provide litigants with a clear manner to effect service electronically in all circumstances, see further van Loggerenberg (n 13 above).

52 See Bellengère & Swales (n 43 above) 460.

53 See Bellengère & Swales (n 43 above) 460. This viewpoint is further supported by Grové & Papadopoulos (n 39 above).

54 Again this view is supported by Grové & Papadopoulos (n 39 above).

55 The rule required the applicant to suggest a method of service to the court. See Bellengère & Swales (n 43 above) 460.

56 See Bellengère & Swales (n 43 above) 460.

discretion exercised in favour of the applicant and the order being granted.[57] The court further emphasised that each case should be decided on its own merits and that the type of documents requiring service should be taken into account.[58] The judge noted that 'cogent reasons' had been presented in support of the present application and that it should be understood within the context of its launching.[59]

Although, the court in *CMC Woodworking* created the possibility of serving documents by way of social media, as pointed out above, the judgment only applies to subsequent pleadings following summons or a notice of motion or any other pleading initialising litigation and in no way expands Rule 4A as it pertains to these documents.[60] It is submitted that, in terms of the digitisation of civil procedure and the progress made abroad, development in this regard is required. *Grové & Papadopoulos* criticise the court in *Woodworking* for having a restrictive view on electronic service and for limiting it to an electronic mail account.[61] As social networks are increasingly becoming the norm, the developments discussed may have numerous advantages in terms of access to justice, amongst other things, gaining the attention of litigants faster and more cost effectively. This is emphasised by *Grové & Papadopoulos* where these authors argue that substituted service by way of a newspaper publication may be fatal to the ability of poor litigants to have their dispute adjudicated in a fair public hearing before a court (section 34 of the Constitution) due to the costs involved.[62] *Grové & Papadopoulos* state that the traditional

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57 *CMC Woodworking* (n 41 above) para 3.

58 *CMC Woodworking* (n 41 above) para 14.

59 *Belengere & Swales* point out the potential problems that may arise from the judgment. They specifically refer to: (1) the invasion of privacy; (2) proof of receipt by the defendant; (3) certainty with regard to the defendant's identity; (4) legal certainty; and (5) the impact and applicability of the ECTA. For a detailed discussion see Bellengère & Swales (n 43 above) 461 – 466.

60 Grové & Papadopoulos (n 39 above) 433,

61 See Grové & Papadopoulos (n 39 above) 434. The authors point out that the restrictive view of the court is contrary to previous decisions where a data message was interpreted widely, see further *Jafta v Ezemvelo KZN Wildlife* 2008 10 BLLR 954 (LC) and *Mafika v SA Broadcasting Corporation Ltd* 2010 5 BLLR 542 (LC).

62 Grové & Papadopoulos (n 39 above) 433.

manner of substituted service via newspapers is, especially in light of the costs and small chance of service being anything but symbolic, inappropriate in many cases.[63] They argue that service via electronic means should be embraced further as it is more likely to reach the intended recipient, and should from the outset be preferred to the traditional newspaper print approach.[64] The overriding criterion should at all times be that the chosen manner of service is most likely to reach the intended recipient.[65] *Bellengere & Swales* state that the greatest benefit of the approach taken in *CMC Woodworking* is that notification by way of social networks will usually result in the defendant or respondent actually having the matter brought to his/her attention.[66]

(ii) Video Conferencing

In terms of digitisation, video conferencing can play a significant role in procuring oral evidence in court from a witness unable to attend trial. Video conferencing is defined as a live transmission of a communication between two or more persons, from various locations.[67] The conference takes place before a court of law and witnesses can be observed, requested to clarify answers and examined at the same time, similar to as if they were physically present. *Knoetze* explains a virtual court to be the use of technologies that provide for trials with participants in different distant areas, in which the physical location of the courtroom does not have an effect on the process or conduct of the proceedings.[68] She points out that there are various reasons for witnesses to give their evidence from a location outside the courtroom, such as cost or convenience.[69]

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63 Grové & Papadopoulos (n 39 above) 435.

64 Grové & Papadopoulos (n 39 above) 436.

65 Grové & Papadopoulos (n 39 above) 436.

66 See Bellengère & Swales (n 43 above) 473. The authors made certain submissions in regard to effectively utilising social networks as a means for substituted service and which issues need to be considered carefully and properly pleaded in the founding papers See page 473 – 474.

67 See Knoetze (n 6 above).

68 See Knoetze (n 6 above).

69 See Knoetze (n 6 above).

The High Court of Kwa-Zulu Natal (Local Division, Durban) recently granted an applicant permission to testify from Yugoslavia by way of video conference link.[70] The application was based on the fact that the applicant would be unable to attend trial in South Africa due to old age, ill health and impecunious state.[71] The respondent opposed the application on a number of grounds, including that the Uniform Rules of Court do not provide for video conferencing and that the applicant failed to make out a case for the relief sought.[72] The provisions of Rule 38(2) of the Uniform Rules of Court was emphasised by the Respondent's counsel as it requires all witnesses to be examined *viva voce* and that there are only limited circumstances where a court may authorise evidence to be taken by way of commissioner.[73]

According to *Mbatha J*, presenting evidence through video link and other social media mechanisms is a novelty in South Africa, save for a very limited extent in the criminal courts.[74] The judge points out that technology has advanced to a level where direct evidence can be taken from a witness in another country while the possibility of cross-examination is present due to the visibility of the witness to all participants.[75] The ECTA regulates the use of electronic communication, however, there are no provisions including the use of video link communications.[76] *Mbatha J* emphasises that our law does not cater

[70] *MK v Transnet LTD t/a Portnet* 2018 JOL 40248 (KZD).

[71] See *MK v Transnet* (n 70 above) paragraph 6.

[72] See *MK v Transnet* (n 70 above) paragraph 9.

[73] See *MK v Transnet* (n 70 above) paragraph 9.

[74] See *MK v Transnet* (n 70 above) paragraph 16. Section 158 of the Criminal Procedure Act 51 of 1977 provides for exceptions that evidence must be given in the presence of the accused, where vulnerable witnesses can do so by way of video links.

[75] See *MK v Transnet* (n 70 above) paragraph 16.

[76] The Electronic Communications and Transactions Act 25 of 2002.

for all the instances where the applicant cannot give oral evidence in court.[77] The court reserves a discretion to grant orders as regulated in Rule 38, which discretion is exercised judicially.[78] When a witness is unable to appear, it has to be shown that it is in the interests of justice that the ordinary way of taking evidence should be departed from.[79]

Due to the lack of rules regulating applications for evidence through video conferences, the High Court relied on its inherent power to regulate its own process in the interests of justice as enshrined in section 173 of the Constitution to determine the application.[80] The judge found that the absence of such rules should not prevent this court from considering the application.[81] The court further pointed out that video link conferencing can ensure access to justice in terms of section 34 of the Constitution, as well as that the courts have a duty to ensure that people who have a physical, financial, health or age barrier are given proper access to the courts.[82] According to *Mbatha J*, the legal barriers created by the lack of rules, cannot override the right to access to justice and video link conferencing extends and expands access to justice as a cost effective measure, which is also

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77 Rule 38(3) of the Uniform Rules of Court provides for the taking of evidence by a witness prior to or during the trial before a commissioner of the court. Rule 38(5) of the Uniform Rules of Court provides that unless the court directs such examination to be by interrogations and cross interrogations, the evidence of any witness to be examined before the commissioner in terms of an order granted under subsection (3) shall be adduced upon oral examination in the presence of the parties, their advocates and attorneys, and the witness concerned shall be subject to cross-examination and re-examination.

78 See *MK v Transnet* (n 70 above) paragraph 18. See further DT Zeffert and A Paizes *The South African Law of Evidence* (2017) 3rd Edition LexisNexis 21 according to *Zeffert and Paizes* the test is essentially a practical one, where the court has a duty to consider all material that may assist it in reaching a conclusion. However, the value of some evidence is outweighed by the problems created. It is a matter of discretion and a court should find an answer by balancing the competing considerations within the limits of legal principles. *Mbatha J* (n 70 above) is of the opinion that this test should apply to applications of a similar nature to the one in the *MK v Transnet* case.

79 See *MK v Transnet* (n 70 above) paragraph 18.

80 See *MK v Transnet* (n 70 above) paragraphs 21 – 23.

81 See *MK v Transnet* (n 70 above) paragraph 24.

82 See *MK v Transnet* (n 70 above) paragraph 25.

convenient to all and can be used in civil proceedings.[83] Video link conferencing further does not require any compromise in respect of the fundamental principles underlining civil procedure in South Africa and a party testifying via this route can be cross examined by all legal representatives and the judge without limiting the quality of the evidence given.

The court in *Uramin Incorporated in British Columbia t/a Areva Resources Southern Africa v Perie*[84]*,* similar to the court in *MK v Transnet*, authorised video link conferencing to procure evidence of witnesses who were physically removed from South Africa and unable to attend court in Gauteng.[85] In her determination, Satchwell J pointed out that the lack of rules might not be the barrier but rather the budgetary constraints.[86] Judges have found the use of video linkage to be appropriate in certain circumstances and recognised that South African courts should use modern technology where it is in the interest of justice to do so.[87] Satchwell J mentioned that the South African Rules of Court have developed to include, beyond mere pen and paper, the concept of the typewriter, the computer, telefax and email, therefore, it makes no sense to exclude video conferencing.[88] Similarly, the court in *MK v Transnet* emphasised the need for a legal framework in respect of video link conferences and discussed examples from foreign jurisdictions within the Commonwealth.[89]

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83 See *MK v Transnet* (n 70 above) paragraph 24 – 26.

84 *Uramin Incorporated in British Columbia t/a Areva Resources Southern Africa v Perie* 2017 1 SA 236 (GJ).

85 See *Uramin v Perie* (n 84 above). Similarly, in *Folley v Pick 'n Pay Retailers (Pty) Ltd and others* 2017 ZAWCHC 86, Boqwana J found that there were compelling reasons to allow the procurement of the principal witnesses' evidence through the use of video link conference in this case. See in particular paragraph 20 of Boqwana's judgment setting out the compelling reasons. Firstly, Boqwana seemed to consider the necessity of the evidence whereafter he considered the quality and facilitation of the recording.

86 See *Uramin v Perie* (n 84 above) paragraph 16.

87 See *MK v Transnet* (n 70 above) paragraph 27 and 28. The right to have a person give *viva voce* evidence is not absolute. In *Uramin v Perie* (n 84 above) paragraphs 30 and 32 it was further emphasised that video conferencing is an efficient and effective way of producing oral evidence both in chief and in cross examination and that it can serve as a tool for securing access to justice.

88 See *Uramin v Perie* (n 84 above) paragraph 32.

89 See *MK v Transnet* (n 70 above) paragraphs 32 – 36.

Following the criticisms and developments observed in case law, a legal framework has finally been proposed by the legislature in the new Judicial Matters Amendment Bill of 2018, aiming to introduce provisions regulating witness evidence by remote audiovisual link in proceedings other than criminal proceedings.[90] The insertion of Section 37C will provide for the presentation of any evidence by witnesses, irrespective of whether the witness is in or outside the Republic, by means of audiovisual link.[91] The court may make any order in terms of evidence via audiovisual link where it appears to the court that it would (1) prevent unreasonably delay; (2) save costs; (3) be convenient; (4) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings; and (5) if the interests of justice so require.[92] The section further provides for certain aspects regarding the audiovisual facilities required.[93] Giving evidence in terms of subsection 1 may be subjected to certain conditions if deemed in the interests of justice.[94] The court is further required to provide reasons for allowing or refusing an application in respect of evidence via audiovisual link.[95] The section specifies that evidence given by a witness via audiovisual link will be regarded as a witness who has been subpoenaed to give evidence in the relevant court.[96] It is submitted that the introduction of section 37C may indicate that the legislature is giving ample attention to developing civil procedural rules through technological means. It is further to be noted that the inclusion of evidence through audiovisual link in civil matters will serve to advance access to justice, as demonstrated by the discussions above and below. The introduction of the new case management Rule 37A has further made provision for video conferencing

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90 The Judicial Matters Amendment Bill 2018 proposes to introduce section 37C in the Superior Courts Act 10 of 2013 regulating the use of audiovisual link in civil matters in the superior courts and introducing a similar section in the rules affecting the magistrates' courts.

91 See Judicial Matters Amendment Bill 2018 section 37C(1).

92 See Judicial Matters Amendment Bill 2018 section 37C(2).

93 See Judicial Matters Amendment Bill 2018 section 37C(2)(b), 37C(2)(c) and 37C(6).

94 See Judicial Matters Amendment Bill 2018 section 37C(3).

95 See Judicial Matters Amendment Bill 2018 section 37C(4).

96 See Judicial Matters Amendment Bill 2018 section 37C(5).

in subrule (10)(h) specifically indicating that parties have to discuss the taking of evidence by video conference.[97]

3.3. ENGLAND AND WALES

3.3.1. Introduction

There have been numerous initiatives to digitise the justice system in England over the last decade. One such initiative is the introduction of an online court following the landmark report published in January 2016 (*Civil Courts Structure Review)* by *Lord Justice Briggs.*[98] This report follows the proposals made by the Civil Justice Council (a public advisory body)[99] and by JUSTICE (a human rights NGO).[100] Both reports emphasise the need to invest in technology and modern court-annexed ADR schemes, specifically in civil and commercial disputes of a low or medium value.[101] Efforts towards the modernisation of the civil justice system became inevitable following Her Majesty's Treasury's autumn statement in November 2015, the Report stated that £700 million is to be invested to modernise and fully digitise the courts and tribunals system and to create a multi-tier dispute resolution procedure.[102] The government and judiciary are working together to radically reform the English and Welsh justice system by 2020.[103] The English

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97 See Rule 37A(10)(h) of the Uniform Rules of Court.

98 Lord Justice Briggs *Civil Courts Structure Review: Interim Report* (2015) (Briggs Interim Report).

99 Civil Justice Council *Online Dispute Resolution Advisory Group* 'Online Dispute Resolution for Low Value Civil Claims' February 2015 available at <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> (accessed 20 January 2019).

100 *JUSTICE* 'Delivering Justice in an Age of Austerity' April 2015 available at <https://justice.org.uk/justice-age-austerity-2/> (accessed 20 January 2019).

101 P Cortés 'The digitalisation of the judicial system: online tribunals and courts' (2016) *Computer and Telecommunications Law Review* C.T.L.R. 141.

102 HM Treasury *Spending Review and Autumn Statement* 2015 (5; 69; 103 – 104).

103 See Cortés (n 101 above) 141.

government has recognised that there are several benefits that may be gained from an increase in the use of technology in the justice system.[104]

3.3.2. Recent reforms and the progress so far

The government's strategy to digitise the English courts has led to multiple pilot schemes introducing modern proceedings in the civil procedural system. Some of these schemes will now be discussed:

(i) Online Courts and the New Online Civil Money Claims pilot

The implementation of an online court has been one of the main reform initiatives in the English civil system.[105] High litigation costs hinder access to justice for individuals and small businesses in cases where only small or moderate-value civil claims are at stake.[106] Additionally, the complexities of the procedural rules make litigating without lawyers

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[104] See HM Courts & Tribunals Service 'Annual Report and Accounts' 2014-15 available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/433948/hmcts-annual-report-accounts-2014-15.pdf> (accessed 15 January 2019). Her Majesty's Courts and Tribunals Service identified several issues relating to the inefficiency of the courts and tribunals, following their annual report published in 2015. See also L Frazer MP 'HM Courts & Tribunals Service New Online Civil Claims Pilot Rolled Out' April 2018 (letter from the Parliamentary Under-Secretary of State for Justice) available at <https://www.parliament.uk/documents/commons-committees/Justice/correspondence/Lucy-Frazer-HMCTS-online-civil-claims-pilot.pdf> (accessed 20 January 2019) pages 3 and 4 where the government's intentions to maximise the use of technology is clearly set out. *Frazer* writes that the government intends to establish a new online procedure rule committee to support some civil, family and tribunal online proceedings. The new rule committee will have expertise in the law and the provision of lay advice and other relevant experience which will enable it to produce simple court rules, which support online procedures and which are, as far as possible, embedded in the online software.

[105] An Online Court firmly supportive of the essential concept of a new, more investigative, court designed for navigation without lawyers. See Lord Justice Briggs *Civil Courts Structure Review: Final Report* (2016). The Online Court is to provide an opportunity to utilise.

[106] See Cortés (n 101 above) 2.

impractical.[107] Reform has been aimed at delivering an improved, user-friendly small claims court that is accessible online.[108] To this end, a new online service has been launched by the Ministry of Justice to enable members of the public and businesses to claim money owed, resolve disputes out of court and access mediation.[109] This service is the first step towards a complete new online procedure for civil claims delivered under the framework of the existing *Civil Procedure Rules* (CPR)[110] under Practice Direction 51R.[111]

The online service is accessible to anyone across England and Wales and provides for a faster, user-friendly alternative to an action in the County Court small claims track for a money claim under £10,000.[112] The introduction of the new online service follows a closed pilot of the service, which operated from August 2017.[113] Early evidence suggests that access to justice has been improved and that the online system is leading to higher engagement from defendants as opposed to the traditional civil money claims service.[114] Due to the length and complexity of the civil justice system, members of the public have been deferred from using the civil courts to initiate small claims. The new system encourages people to settle disputes online and directs them to free mediation services, saving parties time and money whilst having the additional benefit of freeing up expensive court and judicial time for more complex matters.[115] Departing from the traditional

[107] See Cortés (n 101 above) 2.

[108] Cortés (n 101 above) 2. The introduction of online courts was one of the main recommendations made by LJ Briggs in order to overcome the disproportionate costs of paying legal representation when litigating low and medium value civil disputes. See LJ Briggs Interim Report (n 98 above).

[109] L Frazer MP 'HM Courts & Tribunals Service New Online Civil Claims Pilot Rolled Out' April 2018 (letter from the Parliamentary Under-Secretary of State for Justice) available at <https://www.parliament.uk/documents/commons-committees/Justice/correspondence/Lucy-Frazer-HMCTS-online-civil-claims-pilot.pdf> (accessed 20 January 2019).

[110] *The Civil Procedure Rules* 1998.

[111] *Civil Procedure Rules* Practice Direction 51R (Online Civil Money Claims Pilot).

[112] See Frazer (n 109 above) 1.

[113] *Civil Procedure Rules* Practice Direction 51R (Online Civil Money Claims Pilot).

[114] See Frazer (n 109 above) 1.

[115] See Frazer (n 109 above).

adversarial process, the service creates the possibility of a single-user-to-single-user (non-legally represented) claim to be initiated and responded to.[116] Additionally, settlement is promoted by signposting mediation services[117] and allowing a defendant to propose settlement options that the claimant can accept or reject.[118] Should the defendant fail to submit a response to a claim, the service supports the claimant to request a judgment in default.[119]

According to *Frazer*, paper claims take around 15 days on average from receipt to issue.[120] In contrast, digital claims are issued instantaneously.[121] If the claimant has been able to provide an email address for the defendant, which they have in 90% of the cases, notice of the claim is sent immediately via email further increasing the possibility of early resolution.[122] The potential success of the system can duly be noted, in one particular case, a claim was settled within two hours of being issued.[123] The defendant is, to a certain extent, given a choice to respond to the claim online or on paper,[124] however, within the controlled pilot 65% of defendants responded digitally.[125]

Accordingly, the government has taken initiative to further improve the system by considering possible issues that may arise. Assisted digital arrangements are in place to

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[116] See *Civil Procedure Rules* Practice Direction 51R (Online Civil Money Claims Pilot).

[117] See for instance *Civil Procedure Rules* Practice Direction 51R: section 6.1(5) and (7);

[118] See for instance *Civil Procedure Rules* Practice Direction 51R: section 7.5.

[119] *Civil Procedure Rules* Practice Direction 51R section 5.1(9).

[120] *Civil Procedure Rules* Practice Direction 51R and Frazer (n 109 above).

[121] Frazer (n 109 above).

[122] See Frazer (n 109 above) 2.

[123] Frazer (n 109 above).

[124] *Civil Procedure Rules* Practice Direction 51R: section 5 (Defendant's response online) and section 10 (Defendant's response on paper). Section 10.1(1) reads: "*If the defendant wants to respond to the claim but is unable, for any reason, to do so online, the defendant must contact the court within 19 days after the date of issue of the claim form and confirm that they want to respond. For example, if the court issued the online claim on the 3rd of March, the defendant would have to contact the court on or before 22nd March."*

[125] Frazer (n 109 above).

ensure that those who may have difficulty accessing digital channels are supported.[126] Currently, this includes 'light touch' assistance over the telephone, and more intensive face to face support for users who are digitally excluded.[127] With regards to legal representation, Her Majesty's Courts and Tribunals Service (HMCTS) will in the near future extend the scope of the service to support more users and claim types.[128] In this regard a service is being piloted allowing legal representatives to issue unspecified money claims within the County Court.[129]

As mentioned above, the introduction of an online court was a pivotal part in respect of the recommendations made by *Lord Justice Briggs*.[130] The adoption of the new service is an important step in the ongoing modernisation of the English courts and tribunals system. The service has been launched after a year of development with members of the judiciary, representatives from the advice and legal community as well as users.[131]

(ii) Electronic Working Pilot Scheme (CE-File)

[126] Frazer (n 109 above).

[127] The government is piloting the face to face provision in 6 locations across England and Wales with a view of extending the service if successful. The government also intends to introduce a web-chat functionality to support users online. See further Frazer (n 109 above).

[128] Frazer (n 109 above).

[129] See *Civil Procedure Rules* Practice Direction 51S 'The County Court Online Pilot'. The purpose of this practice direction is to establish a pilot to test a procedure that will enable legal representatives to file claims online at the CCMCC, using the County Court Online website, and for the claims to be issued to those legal representatives online, for the claimant then to serve (the pilot will run on an invitation-only basis). See further Frazer (n 109 above) *"As we learn more from the success of this pilot we will make these features publicly available."*

[130] See note above.

[131] Frazer (n 109 above).

An electronic filing (e-filing) system[132] was among the recommendations made by *Lord Justice Jackson* in his Report *'Civil Litigation Costs Review'.*[133] The Electronic Working pilot scheme (EW) was introduced in the Rolls Building Jurisdictions on 15 November 2015 under Practice Direction 51O.[134] The pilot scheme has, after a few amendments, ultimately been extended until 6 April 2020.[135]

The CE-File system allows parties to issue proceedings and file documents online 24 hours a day, every day all year round, including out of normal Court office opening hours and on weekends and bank holidays, except for certain circumstances (down time periods).[136] The EW system applies to and may be used to start and/or continue certain claims in terms of the CPR,[137] pre-action applications,[138] insolvency proceedings, arbitration claims in the Rolls Building Jurisdictions and in the Central Office of the

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[132] Including statements of case and other documents and the storage of documents in electronically that are accessible to the parties, the court and the judiciary.

[133] R Jackson *Review of Civil Litigation Costs: Final Report* (2010).

[134] *Civil Procedure Rules* Practice Direction 51O under *Civil Procedure Rules* rule 5.5 stipulating that a practice direction may make provision for the way in which documents can be filed or sent to court, rule 7.12 relating to the electronic issuing of claims and Part 51 concerning Transitional Arrangements and Pilot schemes.

[135] Since 25 April 2017 the use of EW has been compulsory in the Rolls Building courts. Accordingly, in these specific courts, it is no longer possible to issue or file claims or applications by email (outside of the CE-File system in accordance with PD 5B), or in hard copy (by hand or by post). Practical Law Dispute Resolution 'Electronic working and the Courts Electronic Filing System: tracker' 14 August 2017 available at https://uk.practicallaw.thomsonreuters.com/Document/Ieee5ef3d44a011e498db8b09b4f043e0/View/Full Text.html?contextData=(sc.Default)&transitionType=Default> (accessed 20 January 2019).

[136] See *Civil Procedure Rules* Practice Direction 51O section 2.1.

[137] *Civil Procedure Rules* Part 7 in respect of the initiation of proceedings and claim form, part 8 of the CPR surrounding alternative procedure for claims and part 20 claims pertaining to counterclaims and other additional claims. See *Civil Procedure Rules* Practice Direction 51O section 2.2.

[138] Including applications under CPR rule 31.16 in respect of disclosure before proceedings have started. See *Civil Procedure Rules* Practice Direction 51O section 2.2.

Queen's Bench Division.[139] In order to file a document using EW, a party shall access the EW website address specified by HMCTS (the website), register for an account or log on to an existing account, enter details of a new case or use the details of an existing case, upload the necessary documents and pay the appropriate fee.[140] Proceedings issued in the applicable courts will be stored in the specific court as an electronic file.[141] The website sets out further details, updated from time to time, on how to complete a filing.[142] The documents are made secure by electronic sealing.[143] After the document is sealed and issued, the court will electronically return the claim/application to the party's (EW) online account and notify the party that it is ready for service, thereby keeping parties updated on the progression of the case.[144] Unless the court orders otherwise, any document filed by any party or issued by the Court using EW, which is required to be served, shall be served by the parties and not the Court.[145]

According to an article by *Moriarty*, the Electronic Working Pilot scheme has been embraced, it has been found to save time and costs as well as a large amount of

[139] In the Rolls Building from 1 October 2017 and in the Central Office of the Queen's Bench Division from 1 January 2019. As mentioned, EW is now compulsory for parties who are legally represented in these courts. If a party is unrepresented, he/she may elect to make use of the EW system. See *Civil Procedure Rules* Practice Direction 51O paragraph 2.2.

[140] See *Civil Procedure Rules* Practice Direction 51O paragraph 2.3.

[141] *Civil Procedure Rules* Practice Direction 51O section 2.4.

[142] *Civil Procedure Rules* Practice Direction 51O section 2.5.

[143] See section 7 of *Civil Procedure Rules* Practice Direction 51O. Where a claim form (or other originating application) has been issued through the EW system and accepted by the Court, the claim will be sealed electronically with the date on which the relevant Court fee was paid and this shall be the issue date, as per the provisions of paragraph 5.4. of the Direction. The electronic seal may differ in appearance to the seal used on paper.

[144] *Civil Procedure Rules* Practice Direction 51O section 8.1.

[145] *Civil Procedure Rules* Practice Direction 51O paragraph 8.2. In terms of paragraph 8.3. the CPR and IR 2016 as to filing evidence of service will apply.

photocopying.[146] The author further points out that feedback received from users of the system have been positive so far.[147]

(iii) Video Hearing Pilot Scheme

The Pilot is established by Practice Direction 51V under rule 51.2 of the Civil Procedure Rules.[148] The pilot envisages a procedure where an internet-enabled video link may be utilised at a court hearing for applications seeking to set aside default judgments.[149] All parties to the dispute, including their legal representatives, will attend the hearing using the video-link (from suitable IT equipment).[150] All persons involved will be able to see and hear, and be seen and heard by, each other and the respective judge overseeing and determining the application.[151] Hearings will be held in public and citizens can access a hearing by attending court in person where the judge, the parties and their legal representation will be seen from a screen in the court room.[152]

Preceding the pilot in the County Courts under Practice Direction 51V, a small-scale pilot of video hearings for the First-tier Tribunal (Tax Chamber) took place as part of the larger effort to transform and modernise the justice system.[153] The pilot was available to

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[146] M Moriarty 'Compulsory electronic working in the Rolls Building: time to reflect' 17 May 2017 available at http://www.blplaw.com/expert-legal-insights/articles/compulsory-electronic-working-in-the-rolls-building-time-to-reflect (accessed 20 January 2019).

[147] Moriatry (n 146 above).

[148] *Civil Procedure Rules* Part 51 concerns Transitional Arrangements and Pilot schemes.

[149] Entered into under *Civil Procedure Rules* Part 12, regulating default judgments. See also *Civil Procedure Rules* Practice Direction 51V paragraph 1.2.

[150] *Civil Procedure Rules* Practice Direction 51V paragraph 1.3.

[151] *Civil Procedure Rules* Practice Direction 51V paragraph 1.3.

[152] *Civil Procedure Rules* Practice Direction 51V paragraph 1.4.

[153] See M Rossner and M McCurdy 'Implementing Video hearings (Party-to-State): A Process Evaluation' (2018) *London School of Economics and Political Science MOJ*, see also Lord Chancellor, the Lord Chief Justice of England and Wales, and the Senior President of Tribunals 'Transforming Our Justice System' (2016).

appellants who filed a request for a basic appeal over a specified period of time.[154] The small-scale pilot (Party-to-State) consisted of an appellant, appearing via their own computer from home or work, a representative from HMRC appearing from their office, and a Judge sitting in an open courtroom.[155] Using technology to hold video hearings for technical parts of cases, mainly involving the legal professionals and judges, could save significant court time and help cases progress faster.[156] According to the London School of Economics and Political Science, the results of the pilot reveal that hearings were successful among appellants, welcoming an alternative to travelling to court.[157] Participants further reported that they found hearings to be clear, easy to navigate and user-friendly.[158]

(iv) Online Divorce Pilot

[154] See Rossner & McCurdy (n 153 above) 4 and 5. It is of note to mention that past research has focused on video-enabled hearings in the criminal context. In 2010, the Ministry of Justice published an evaluation of video-enabled hearings for defendants in police custody in London and Kent, focusing on the outcomes such as cost efficiency, judicial decision-making, fairness and procedural justice. For more on this see M Terry et al 'Virtual Hearing Pilot Evaluation' (2010) *MOJ Research Series* 21/10 for a full discussion on the pilot in the criminal courts.

[155] See Rossner & McCurdy (n 153 above) 5.

[156] Press Release 'Video hearing pilot launched' 15 Febriuary 2018 from HM Courts & Tribunals Service and the Ministry of Justice available at <https://www.gov.uk/government/news/video-hearing-pilot-launched> (accessed 20 January 2019).

[157] London School of Economics and Political Science 'Video hearings for tribunal users are clear, easy to navigate and user-friendly first UK pilot reveals' 13 September 2018 available at <http://www.lse.ac.uk/News/Latest-news-from-LSE/2018/09-September-2018/Video-hearings-for-tribunal-users-are-clear-easy-to-navigate-and-user-friendly-first-UK-pilot-reveals> (accessed 20 January 2019).

[158] London School of Economics and Political Science (n 157 above).

This Pilot scheme is set up under Practice Direction 36D and 36E (Procedure for online filing of applications in certain proceedings for a matrimonial order).[159] The Pilot intends to assess new practices and procedures to facilitate the filing of certain matrimonial applications via an online system and has been launched nationwide.[160] The pilot removes the need to fill in paper forms and to file them manually at court, thereby saving time and costs for all participants.[161] The system will be in accordance with modern day life by increasing the option of using online systems as opposed to paper-based procedures, thereby cutting wasted time and speeding up services which can safely be expedited.[162] From the 2018 litigants in person have been able to issue divorce petitions online.[163] According to *McFarlane* some 35 000 have done so, representing 55% of divorce petitions issued by litigants during the past 10 months.[164] The advantages have also been made clear by the astonishingly decrease in the error rate of 40% detected in paper divorce petitions to the rate of almost nothing at 0.4%.[165] 84% of litigants using the online process have been satisfied with the new development.[166]

(v) Substituted Service

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[159] *Family Procedure Rules* Practice Direction 36E. Although this rule does not fall under the civil procedure rules, for the purpose of this research it is included as the civil procedural rules in South Africa includes family law.

[160] *Family Procedure Rules* Practice Direction 36D and 36E paragraph 2.1. Subsequent to Practice Direction 36D coming into operation during 2017, Practice Direction 36E has been in force since 16 January 2018 and will therefore be further discussed.

[161] Justice Minister, *Lucy Frazer*, has further indicated that divorce applications online will assist in providing support for people who are often going through a difficult and painful time. See Press Release 'Fully digital divorce application launched to the public' 6 May 2018 from HM Courts Courts & Tribunals Service Ministry of Justice available at <https://www.gov.uk/government/news/fully-digital-divorce-application-launched-to-the-public> (accessed 20 January 2019).

[162] Press Release (n 161 above).

[163] Sir A McFarlane 'Living in Interesting Times' (2019) *Resolution Conference* Judiciary of England and Wales 6.

[164] McFarlane (n 163 above) 6.

[165] McFarlane (n 163 above) 6.

[166] McFarlane (n 163 above) 6.

The United Kingdom has further embraced social network communication in respect of the service of documents. In an unreported decision in October 2009, a United Kingdom High Court allowed an injunction to be served on an unknown respondent over the social media platform Twitter.[167] As a response to the applicant's petition, the English High Court sent a direct message the imposter user ordering him to read and comply with a court order. The message led to a link specifying that the blogger is prohibited from intentionally misleading the public by his "tweets" on Twitter.[168]

In another unreported decision in *AKO Capital LLP v TFS Derivatives,*[169] the English High Court via *Teare J* accepted substituted service via Facebook indicating that it should be acceptable if the account is proven to be active.[170] This is authorised in terms of the Civil Procedure Rules, specifically rule 6.15 stating that *"..where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make any order permitting service by an alternative method or at an alternative place."*[171]

Accordingly, the United Kingdom will permit substituted service and other electronic means under its civil procedure laws if, simply, good reason exists to authorise service via a social network.[172] It should be noted, as pointed out by *Bellengere & Swales,* that

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[167] See Bellengère & Swales (n 43 above) 472. See also P Tabibi 'Facebook Notification – You have been served: Why social media service of process may soon be virtual reality' (2013) (7) *Phoenix Law Review* 37. The issue first arose after an unknown Twitter user intercepted a conservative blogger, Donal Blaney's account. Blaney, an attorney, decided to ask for court intervention as opposed to asking Twitter for help. See further Tabibi 40.

[168] See Bellengère & Swales (n 43 above) 472.

[169] *AKO Capital LLP & Another v TFS Derivatives & Others* 2012 12 (2) *E-Commerce Law Reports* 4, 5. See also MJ Beazley 'Social Media and the Courts: Service of Process' May 2013 *Fourth Judicial Seminar on Commercial Litigation.*

[170] See Beazly (n 170 above) paragraph 34.

[171] *Civil Procedure Rules* Rule 6.15.

[172] See Bellengère & Swales (n 43 above) 472.

the South African rules similarly provided for substituted service to take place by alternative methods, without any restrictions.[173]

3.4. THE NETHERLANDS

In the Netherlands, the modernisation of civil justice has been a priority for several years. With a high international rating of internet penetration and e-commerce, the Dutch government has recognised the economic and social importance of investing in technology in all sectors.[174] The importance hereof has been recognised despite the fact that access to justice is relatively easy in the Netherlands, that high administration of justice exists and that judgments are rendered in a reasonable amount of time (this confirming that consistent reform is necessary in any civil justice system).[175]

3.4.1. The digital highway in the Netherlands

European statistics show that in 2016, 97% of the Dutch population (between the ages of 12 and 65), 74% of the population between 65 and 75, and 34% of the population over

[173] See Bellengère & Swales (n 43 above) Chapter 3: footnote 54 above.

[174] X Kramer et al 'e-Justice in the Netherlands: the Rocky Road to Digitised Justice' in M Weller and M Wendland (eds) *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt* (2018) Tubingen: Mohr Siebeck p 209 – 235. See further the Ministry of Economic Affairs (Regulatory Reform and ICT Policy Department) 'The Digital Agenda for the Netherlands: Innovation, Trust, Acceleration' 4 October 2016 available at https://www.government.nl/documents/reports/2017/04/11/digital-agenda-for-the-netherlands-innovation-trust-acceleration (accessed 15 January 2019).

[175] CH van Rhee 'E-Justice: New developments and best practices in the Netherlands' 2015 available at http://www.iuscommune.eu/html/activities/2015/2015-11-26/workshop_7_Van_Rhee.pdf (accessed 20 January 2019).

75 years of age use the internet.[176] Digital communication has become the norm and the Dutch government has recognised that it is uncomplicated, quick and cheap.[177]

3.4.2. The Quality and Innovation of the Judiciary programme (QAI)

In 2012, the programme *Quality and Innovation of the Judiciary ("QAI")*[178] was introduced by the Dutch Ministry for the purpose of reforming the justice system.[179] The programme's reform proposals (to be introduced in stages from 2015 onwards) in both civil and public law litigation are aimed at improving access to justice, reducing complexity of litigation and to facilitate the introduction of e-justice.[180] The programme has been at the heart of justice reform and includes four bills[181] introducing a series of amendments to the Dutch Code of Civil Procedure and to other acts.[182] These proposals were adopted in July 2016.[183]

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[176] Van Rhee (n 175 above) 3-4, see also Kramer et al (n 174 above) 1 and Eurostat 'Internet Access and Use Statistics – Households and Individuals' 30 January 2017 available at https://ec.europa.eu/eurostat/statis1ticsexplained/indes.php/Digital_economy_and_society_statistics_households_and_individuals (accessed 15 January 2019).

[177] It should also be noted that the Netherlands has one of the most advanced digital economies in the EU – See European Commission 'Europe's Digital Progress Report 2017 – Use of Internet and ePrivacy' May 2017 available at https://ec.europa.eu?digitl-single-martke/en/download-scoreboard-reports (accessed 15 January 2019).

[178] In Dutch *Kwaliteit en Innovatie rechtspraak, KEI.*

[179] Van Rhee (n 175 above) 1, see also Kramer et al (n 174 above) 1.

[180] Digitisation is pivotal to simplifying access to justice, to speeding up procedures and to lowering costs, especially to consumers and small businesses. See van Rhee (n 175 above) 1, see also Kramer et al (n 174 above) 1.

[181] For a summary on the proposals see: KEI-I (34.059), KEI-II (34.138), KEI-III (34.212) and KEI-IV (34.237(R2054)) *Eerste Kamer* website discussed under 'Simplification and digitalization of procedural law' available at https://www.eerstekamer.nl/wetsvoorstel/34059_vereenvoudiging_en#p1 (accessed 15 January 2019).

[182] Kramer et al (n 174 above) 10-11.

[183] Kramer et al (n 174 above) 10-11.

(i) Preliminary steps towards Digitisation in the Netherlands

Online access to legal information and the introduction of different ICT (Information and Communication Technologies) features in the court process were gradually implemented in the Netherlands, starting from the late 1990s.[184] In 2008, the first steps were taken to provide a legal framework for digital communication with the courts through the enactment of Article 33 of the Dutch Code of Civil Procedure (DCCP).[185] In 2012, further progress was made through the enactment of Article 125(3) of the DCCP creating a possibility to digitally submit claims in a limited number of cases.[186]

In 2014, during the preliminary stages of the QAI, a digital procedure was introduced through a pilot at the lowest level of the District Court, the *eKantonrechter.*[187] Claimants could lodge claims using a secured web-portal[188] with the rest of the procedure taking place online, apart from a possible oral hearing.[189] The procedure is, however, limited to claims up to € 25 000 in domestic, two-party cases where no extensive review of facts are needed and where the other party agrees to the procedure.[190] According to *Kramer*

[184] Kramer et al (n 174 above) 10.

[185] Van Rhee (n 175 above) 4, see also Kramer et al (n 174 above) 10. In 2008, Article 33 of the Dutch Code of Civil Procedure (DCCP) was introduced, making it possible to lodge requests and to make announcements in the course of proceedings electronically (by using e-mail), provided that the court enables it and that the other party or parties involved have indicated their electronic availability.

[186] Van Rhee (n 175 above) 4, see also Kramer et al (n 174 above) 10 (footnote 58): In 2012, Article 125(3) of the DCCP was introduced, providing that in certain cases the document instituting proceedings can be lodged electronically (this provision has meanwhile been revoked due to new procedural rules for the electronic submission of documents enacted in 2016).

[187] Kramer et al (n 174 above) 10. It is based on Article 96 of the DCCP, which enables parties to jointly submit a claim to the *kantonrechter,* applying special rules. The procedural rules for the digital version of this procedure are available on the Dutch website, De Rechtspraak available at www.rechtspraak.nl.

[188] De Rechtspraak available at www.rechtspraak.nl.

[189] Kramer et al (n 174 above) 10.

[190] Kramer et al (n 174 above) 10.

et al, it has been deemed unsuccessful due to its rare use and, in particular, its voluntary nature.[191]

As mentioned previously, it is necessary to use innovations to maintain and strengthen the Dutch Judiciary. The legislator has mentioned two points in particular.[192] First, there is a need for methods of communication between litigants and the courts in line with current standards (primarily digital communication).[193] Secondly, the length of judicial proceedings should be justified by the content and complexity of the dispute, to this end simplified and accelerated procedures are necessary.[194]

To meet the first requirement, in terms of digitisation, the new provisions of QAI regulate digital communication between the court and the parties or their lawyers.[195] A digital environment has been created called 'My Case' (*Mijn Zaak*).[196] Parties can log into the website of the judiciary and create a digital case file accessible through this secured interface.[197] 'My Case' replaces the traditional cause list hearing (*rôle*) in which procedural steps can be taken and time limits may be fixed.[198] Lawyers are able to log in using a lawyer's pass, while private persons can do so by using their national identification number (DigiD)[199] and organisations through eRecognition (eHerkenning).[200] A claim can

[191] The fact that it is only available in simple cases and that it does not provide for appeals contributed to its scarce use. See Kramer et al (n 174 above) 10.

[192] Kramer et al (n 174 above) 11.

[193] Kramer et al (n 174 above) 11 – 12.

[194] Kramer et al (n 174 above) 11-12 and van Rhee (n 175 above) 2.

[195] See Kramer et al (n 174 above) 11.

[196] See Kramer et al (n 174 above) 11 and van Rhee (n 175 above) 2.

[197] Kramer et al (n 174 above) 11-12 and van Rhee (n 175 above) 2.

[198] Van Rhee (n 175 above) 2.

[199] This number is also used for e.g. filing tax papers and communications with the government. See Kramer et al (n 174 above) 11.

[200] These identification means suffice as an electronic signature within the meaning of Article 3:15a(4) of the DCCP. See Kramer et al (n 174 above) 11.

be submitted through a standard claim form to be filled out online.[201] The initiating document can be served by ordinary mail or e-mail, either before the case is filed or within two weeks.[202] The defendant can access the digital case to file his statement of defence, eliminating the need to use a bailiff.[203] The file contains all information on the relevant case, including: (1) the parties; (2) the judges; (3) the agenda; and (4) all documents and communications by the parties and the court.[204] Parties are updated and notified via e-mail when a new message is posted.[205] If required, oral hearings can take place in person, however, this may also be done through, for example, a videoconference if a cross-border case is concerned.[206] The ultimate goal of the interface is to fully digitise the workflow within the courts, eventually resulting in a paperless system.[207] To provide secured access to digital work files for court staff and judges, another interface has been created within the courts: 'My Workspace'.[208] The Council of the Judiciary worked in cooperation with the courts, organisation management experts and a team of IT specialists to develop the systems.[209]

According to *van Rhee,* starting litigation and submitting documents digitally will become compulsory for most litigants.[210] The question arises whether the compulsory use of the digital procedure could be construed as a limitation to a person's right of access to justice and therefore be rendered unconstitutional. *Kramer et al* states that claims will be

[201] See Article 30c of the DCCP and see further Kramer et al (n 174 above) 11 – 12 and footnote 72.

[202] Kramer et al (n 174 above) 12 – The rules on the service of documents, which used to be exclusively in the hands of the bailiff, have also been amended. If the defendant enters an appearance, serving through a bailiff is no longer required.

[203] See note above.

[204] See Kramer et al (n 174 above) 12 and van Rhee (n 175 above) 2.

[205] See Kramer et al (n 174 above) 12.

[206] See Kramer et al (n 174 above) 12.

[207] Kramer et al (n 174 above) 12.

[208] Kramer et al (n 174 above) 12.

[209] Kramer et al (n 174 above) 12.

[210] In accordance with Article 30c of the DCCP. See Van Rhee (n 175 above) 5 and Kramer et al (n 174 above) 13.

declared inadmissible if not lodged electronically.[211] However, an exception is made in Article 30c paragraph 4 of the DCCP for certain self-represented litigants.[212] Natural persons are not required to litigate digitally if they are not represented by a lawyer or other professional third party.[213] Despite the high rate of internet connectivity in the Netherlands, the legislator regarded making digital litigation compulsory for all categories (at this stage) would be going too far.[214]

(ii) The state of affairs in digital communication

In 2017, the digitisation of proceedings was still incomplete.[215] According to *Kramer et al*, not all 'user' features are fully functional, and some of the procedural amendments are not operational.[216] As mentioned, the changes and digital elements are introduced in stages and initially tested in specific courts before continuing to the next phase.[217] According to *Kramer et al* the website of the judiciary contains updated information and short videos explaining digital proceedings and how to file claims.[218]

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[211] Kramer et al (n 174 above) 13.

[212] Kramer et al (n 174 above) 13.

[213] This also apples to informal associations whose statues are not included in a notarial deed and exceptions are also made for foreign parties. See *Kamerstukken II* (Parliamentary Documents) 2014/15, 34 059, no.3 (Explanatory Memorandum), 1.4.5 and Kramer et al (n 174 above) 13. It is interesting to note that, contrary to the Dutch approach, digital reforms in England, especially pertaining to the notion of the "online courts", tend to exclude legal representation within the new digitised rules and in the pilot programmes as reform is aimed at reducing costs by eliminating the need for lawyers.

[214] See *Kamerstukken II* (Parliamentary Documents) 2014/15, 34 059, no. 3 (Explanatory Memorandum), 1.4.5 and 12.1.3. It is, however, clear from paragraph 1.4.5 that digital litigation is preferred and repeated that all other parties, apart from the exceptions, are to litigate digitally. It is further provided that where the exception applies to a litigant, he/she still reserves the option of litigating digitally or on paper.

[215] See Kramer et al (n 174 above) 12 paragraph 3.2.3.

[216] See Kramer et al (n 174 above) 12 paragraph 3.2.3.

[217] See Kramer et al (n 174 above) 12.

[218] Kramer et al (n 174 above) 12. See further De Rechtspraak available at https://www.rechtspraak.nl/English/Pages/accessibility.aspx (accessed 15 January 2019).

By 2018, communication with the court, in particular the filing of documents and the delivery of judgments, has largely been digitised.[219] The initial aim was to finalize the roll-out of QAI in 2019, however, in April 2018 the Dutch Minister of Legal Protection decided to freeze the project after an external study had identified serious concerns regarding its implementation and the costs involved.[220] The further roll-out of the QAI programme is therefore on hold, however, what has already been implemented will continue to be used.[221]

3.4.3. Digitisation of out-of-court dispute resolution in the Netherlands

In addition to the abovementioned initiatives, a trend in digitisation can be seen within out-of-court dispute resolution.

(i) Private Initiatives Supporting Digitisation

In the field of alternative dispute resolution, a range of online methods for out-of-court dispute resolution has been developed in the Netherlands.[222] An example of a distinguished private initiative is the digital application 'Rechtwijzer' created by the Dutch legal Aid Board in collaboration with the University of Tilburg in 2005.[223] The application deals with 'relational disputes' covering a variety of legal matters such as: (1) divorce; (2) consumer claims; (3) government; (4) landlord-tenant relationships; (5) monetary claims; and (6) employment issues.[224] The application starts off with an online assessment aimed

[219] Kramer et al (n 174 above) 2.

[220] Delays in its implementation and an exceedance of the initial budges which had been set at 7 million euros. See Kramer et al (n 174 above) 2.

[221] Kramer (n 174 above) 12.

[222] Mainly facilitated by public-private network as well as by private organisations – See Kramer et al (n 174 above) 12.

[223] Kramer (n 174 above) 12.

[224] These fields are similar to those that South African law clinics deal with on a daily basis. The application is accessible online at 'Rechtwijzer' available at http://rechtwijzer.nl (accessed on 10 January 2019). See further Kramer et al (n 174 above) 15 paragraph 4.1.

at identifying the scope of claims and facilitating early settlements.[225] After the initial assessment, a 'Roadmap to Justice' is provided to parties in order to provide guidance on possible options available to solve the dispute.[226] The Roadmap is individually-tailored to the particular case, including the viewpoints of both litigants, therefore, both parties need to cooperate to achieve success.[227] However, if parties fail to cooperate and an agreement cannot be reached, 'Rechtwijzer' offers the possibility of consulting with legal experts in mediation or arbitration directly from their website.[228]

A further private initiative is the 'E-Court' launched in January 2010. E-Court focuses on contractual and civil (commercial) disputes, including disputes relating to monetary claims, employment, and other matters.[229] Parties are able to initiate and conduct the entire procedure online.[230] Parties should, prior to the dispute, stipulate in their contract that disputes would be handled by the E-Court as a precondition to initiating a procedure.[231] Parties are provided with login codes to enter the electronic dossier where information on the progress of the matter is available online (the dossier retains all data).[232] The procedure lasts for 8 weeks and results in an enforceable arbitral award issued by experienced legal professionals.[233]

(ii) Advantages and disadvantages

[225] See Kramer et al (n 174 above) 15 paragraph 4.1.

[226] The Roadmap includes several support tools to assist parties in reaching an agreement, such as a calculator for child maintenance. See further Kramer et al (n 174 above) 15.

[227] See Kramer et al (n 174 above) 15.

[228] Kramer et al (n 174 above) 15.

[229] The procedure costs €374, or €1000 if a hearing takes place (hearings can be initiated by an arbitral tribunal(which will determine the location) or by the parties) - see Kramer et al (n 174 above) 16. See further: 'e-Court' available at www.e-court.nl (accessed on 15 January 2019).

[230] Kramer et al (n 174 above) 16.

[231] Kramer et al (n 174 above) 16.

[232] Kramer et al (n 174 above) 16.

[233] The E-Court is, in fact, an arbitration proceeding that results in an enforceable award if it is in accordance with Dutch law - see Kramer et al (n 174 above) 16.

In terms of access to justice, the dispute resolution techniques (benefitting from multiple online features) mentioned above have clear advantages and disadvantages.

Through the online assessment of Rechtwijzer, information about different legal options are given to parties enabling them to solve their legal disputes and to avoid escalation of costs.[234] Secondly, both Rechtwijzer and the E-Court online electronic dossier do not require the physical appearance of the parties, thereby resolving any issues relating to the geographical distance between litigants (and saving them money).[235] Thirdly, the online nature of the dispute enables parties to follow the progress from anywhere and at any time (from the comfort of their own home) and at their own pace.[236] The online features advance access to justice by enabling litigants to navigate complex legal procedures, reduce costs (as they do not have to pay costs relating to time and money for travel purposes), and to receive cost-free legal information on the possible judicial options.[237] In addition, Rechtwijzer simplifies the procedure through the provisions of the Roadmap, giving parties step-by-step guidelines towards a legal solution.[238] Rechtwijzer contributes to a faster procedure due to its online nature and allowing continuous accessibility to the dossier from all devices.[239]

Kramer et al points out that there are inherent challenges to all online procedures.[240] These challenges include the problems associated with adequate safeguarding of procedural standard, technical issues, the possibility of unequal access or illiteracy when using online tools among parties, and privacy and data issues.[241] Another challenge

[234] Kramer et al (n 174 above) 16.

[235] Kramer et al (n 174 above) 16.

[236] Kramer et al (n 174 above) 16.

[237] Kramer et al (n 174 above) 16.

[238] Kramer et al (n 174 above) 16.

[239] Kramer et al (n 174 above) 16.

[240] Kramer et al (n 174 above) 16.

[241] Kramer et al (n 174 above) 16.

specifically pertaining to ODR methods relates to the enforcement of the outcomes.[242] In this regard, the E-Court has converted itself into an arbitration institute, and agreements became framed under arbitration rules.[243] Despite these obstacles, practice proves that (to date) Rechtwijzer and the E-Court have been considerably successful.[244]

3.5. BELGIUM

3.5.1. Introduction

Belgium has historically proven to lack development in the area of ICT.[245] According to *Taelman & Van Severen,* limited progress has been made towards the digitisation of the judiciary in the last decades.[246] In a new attempt to resolve the backlog in the Belgian courts, the current Minister of Justice of the Michel Government[247] has committed himself to do everything in his power to ensure that judgment is rendered within one year of initiation in ordinary (civil) cases.[248] In his plan entitled 'More Efficiency for More Justice',[249] a series of measures are announced aimed at improving the administration and functioning of the judiciary.[250] The plans include increasing the efficiency of the procedural rules without compromising quality, the goal is to assure 'reasonable justice

[242] Kramer et al (n 174 above) 16.

[243] Kramer et al (n 174 above) 17.

[244] Kramer et al (n 174 above) 17.

[245] Unpublished: H Robert 'Informatisering van Justitie: Een stand van zaken en een kritische evaluatie' unpublished LLM thesis, Universiteit Gent 2016/2017 26.

[246] P Taelman and C Van Severen *Civil Procedure in Belgium* (2018) Wolters Kluwer 26.

[247] Koen Geen, Minister of Justice since October 2014.

[248] As seen in Taelman & Van Severen (n 246 above) 23: Policy statement of the Ministry of Justice 'Parliamentary Acts 2014-2015' No. 54K0020/18 6 www.dekamer.be/FLWB/PDF/54/0020/54K0020018.pdf (accessed 20 January 2019).

[249] See K Geens 'Het Justitieplan: Een Efficiëntere Justitie Voor Meer Rechtvaardigheid' Federale Overheidsdienst Justitie available at www.koengeens.be/policy/justitieplan (accessed 20 January 2019).

[250] Taelman & Van Severen (n 246 above) 23.

in a reasonable delay at a reasonable cost'.[251] The digitisation of procedural rules is regarded as an important aspect in any modern justice system. Minister Koen Geens supports this view and has put efforts towards the complete digitisation of the judiciary by initiating numerous projects to this end.[252] Concrete steps towards implementing the objectives of the reform plan are being taken by the so-called Potpourri Acts. [253]

3.5.2. Developments towards digitisation

Numerous ICT-tools along with the Potpourri Acts have been utilised to facilitate the creation of the court of the future in Belgium. Specifically, the provisions introduced by Potpourri I, Potpourri III and Potpourri V have played a significant role in amending the rules of civil procedure.[254] Consequently, the Belgian Judicial Code has been adapted to advance the possibility of implementing modern, digital solutions.

(i) Potpourri I: Official Gazette 22 October 2015[255]

In the context of modernisation, Potpourri I aims to digitally adapt the rules of civil procedure, including the organisation of the judiciary to create faster and more efficient

[251] Taelman & Van Severen (n 246 above) 23.

[252] K Geens Court of the Future 'De informatisering van Justitie' available at https://www.koengeens.be/policy/de-informatisering-van-justitie (accessed 20 January 2019).

[253] See the Minister of Justice Koen Geen's website for more information on the Potpourri Acts available at https://www.koengeens.be/ (accessed 20 January 2019).

[254] Potpourri I promulgated on 19 October 2015 (*Belgian Official Gazette,* 22 October 2015(ed. 1)), Potpourri III promulgated on 4 May 2016 (*Belgian Official Gazette,*13 May 2016); Potpourri V promulgated on 6 July 2017 (*Belgian Official* Gazette, 24 July 2017). Articles 32*ter* and 32*quater* have been inserted into the Belgian Judicial Code by Potpourri I and III.

[255] In Dutch: 'Belgisch Staatsblad', note that the Belgian legislation is difficult to navigate due to the multiple dates applicable to the laws. Note also that Official Gazette before a date will mean that the *publication* date of the respective legislation is applicable.

procedures.[256] This is beneficial to all actors involved in proceedings, parties can expect their matters to be resolved quicker and the work processes of the court staff will be improved.[257] To this end, Article 32*ter* has been inserted into the Belgian Judicial Code, making provision for all communication to take place by means of a digital information system designated by the King.[258]

(ii) Potpourri III: Official Gazette 13 May 2016

The third Potpourri law focuses on creating an efficient, modern way of communication between judicial actors.[259] In terms of digitisation, the law included three unique steps: (1) contracts become electronic; (2) electronic signature for civil servants;[260] and (3) e-mail replaces the registered mail in internal communications.[261] Article 32*quater* was inserted into the Judicial Code providing for the electronic service of documents.[262]

(iii) Potpourri V: Official Gazette 24 July 2017[263]

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[256] *Belgian Official Gazette* 22 October 2015, further see the K Geens (Minister of Justice) 'Policy – Potpourri I' available at https://www.koengeens.be/policy/potpourri-i (accessed 20 January 2019).

[257] See Potpourri I: *Belgian Official Gazette* 22 October 2015 Article 9.

[258] Website of the JOD available at https://justitie.belgium.be/nl/niews/persbericthten/news_pers_2015-05-20 (accessed 20 January 2019). See also Article *32*ter of the Belgian Judicial Code. It should be noted that the King is further responsible for determining the rules regulating the information system in order to ensure confidentiality and effective communication. The King also has the power to make the use of the information system mandatory on certain authorities. Article 32*ter* is also applicable to 'E-Deposit' discussed below.

[259] See K Geens (Minister of Justice) 'Policy – Potpourri III' available at https://www.koengeens.be/policy/potpourri-iii (accessed 20 January 2019).

[260] Potpourri III makes provision for digital verification techniques guaranteeing the authenticity of electronic signatures. See also K Geens ICT Court of the Future 'Data Stromen en Justitie' available at www.koengeens.be/policy/datastromen -en-justitie (accessed 20 January 2019).

[261] See K Geens (n 259 above).

[262] Potpourri III: *Belgian Official Gazette* 13 May 2016.

[263] Potpourri V: *Belgian Official Gazette* 24 July 2017.

The fifth and final Potpourri simplifies, clarifies or harmonises several procedures to improve the functioning of the justice system and to reduce the workload of the courts.[264] It further has an impact on the modernisation and computerisation of the justice system, for instance, provision has been made for the step-by-step introduction of videoconferencing both for internal meetings and in the context of court proceedings.[265] Accordingly, as an initial step, the Belgian laws in respect of notaries have been modernised and now provide for the possibility of deeds to be executed by way of video conference thereby saving parties valuable time.[266]

(iv) *E-Service: Official Gazette 22 June 2017*[267]

On 31 December 2016, the electronic service of judicial documents was recognised under Belgian procedural law.[268] The new Articles 32*quater/1-3* of the Belgian Judicial Code provides that every physical and legal person is given an email address for judicial purposes.[269] The bailiff has the discretion, depending on the circumstances of each case, to serve the documents either personally or by way of electronic means.[270] The possibility of electronically serving documents has the undeniable benefit of alleviating administrative burdens and saving parties significant costs and time.

(v) E-Deposit: Official Gazette 22 June 2016

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[264] See Potpourri V: *Belgian Official Gazette* 24 July 2017. See also K Geens (n 260 above) Videoconferencing.

[265] See Potpourri V: *Belgian Official Gazette* 24 July 2017. See also K Geens (n 260 above) Videoconferencing.

[266] See also Schoups J Bats & G De Buyzer 'A last portion of Poutpourri' available at https://www.schoups.com/en/nieuws/30459?subid=0#a-last-portion-of-potpourr (accessed 20 January 2019).

[267] *Belgian Official Gazette* 22 June 2017, Royal Decree implementing articles 32*quater.1 and quarter 2.*

[268] The Royal Decree of June 2017 (see note above) implements some aspects of these new rules, but it will still take some time before the electronic service of judicial documents becomes (fully) operational.

[269] See Taelman & Van Severen (n 246 above).

[270] Taelman & Van Severen (n 246 above) 251-255.

E-deposit is a new ICT-tool providing for the electronic filing of written pleadings and supporting documents in certain courts.[271] The application, not only provides these documents to the clerk, but also puts them directly into the electronic court file.[272] The E-Deposit application offers benefits to all participants involved in a case. It creates a procedure whereby any party to the proceedings can submit a legal document online without having to travel to the clerk's office with the additional advantage of doing so at any time. The digital registry is open at all hours of the day.[273] For registry staff, the e-Deposit application reduces the manual labour necessary to place submitted conclusions and documents in the correct paper-based court file.[274] According to *Taelman & van Severen,* this is a first step towards a complete modernisation of judicial procedure in Belgium.[275]

(vi) VAJA database (Vonnissen en Arresten, Jugements et Arrêts – Judgements)

The Federal Public Service of Justice has introduced the new VAJA-database which is to replace the traditional way of storing judgments with the court registries.[276] A digitalised copy of all judgments pronounced by the Belgian judicial courts will be (electronically)

[271] See Taelman & Van Severen (n 246 above) 97. As of 2 Jul 2016, this tool is used in the Courts of Appeal, the Labour Courts of Appeal and the Commercial Courts. The FPS Justice intends to roll out this application to the other courts in the next few years.

[272] K Geens ICT 'E-Deposit' available at https://www.koengeens.be/policy/e-deposit (accessed 20 January 2019).

[273] Taelman & van Severen (n 246 above) 97.

[274] K Geens (n 273 above) See also Royal Decree of 16 June 2016 on electronic communication in accordance with article 32*ter* of the Judicial Code.

[275] Taelman & Van Severen (n 246 above) 96-97. The Royal Decree of 17 June 2016 has further been amended by the Royal Decree of 9 October 2018 to include a system for lawyers called the DPA- Deposit.

[276] See Taelman & Van Severen (n 246 above) 286 -293.

stored in this database.[277] The administrative workload of the so-called "post-judgment work process" will be significantly reduced as a result.[278]

3.6. CONCLUSION

There are numerous possibilities to advance access to justice in terms of a courtroom of the future, as demonstrated above. These possibilities include service via electronic means, videoconferencing, virtual courts, e-courtrooms and online dispute resolution. In this regard, the South African courts support the advancement and development of digitisation and have used their inherent powers in terms of section 173 of the Constitution to do so, especially where the interests of justice so require. However, it has further been noted that the court rules lack simple provisions in terms of technological advancements and that some courts are hesitant to acknowledge and adapt to changes and rather adhere to established principles in order to promote legal certainty and justice. As criticised by numerous judges and authors, the South African civil procedure rules are lacking significant development in respect of technology often requiring the judiciary to step in and advance access to justice goals in this regard. It should further be noted that certain procedures through electronic means are becoming more acceptable, however, often lack adequate provisions. The need to incorporate technology in civil process has, however, clearly been recognised and increasingly provisions are being implemented to establish a system of 'e-justice' in South Africa.

The five initiatives discussed in England and Wales above demonstrate the great progress made by the English government in modernising the courts and tribunals

[277] Taelman & Van Severen (n 246 above) 286-293.

[278] See Geens 'Data Stromen en Justitie' (n 260 above) available at https://www.koengeens.be/policy/datastromen-en-justitie (accessed 20 January 2019). Electronic lawyer cards will be available for every lawyer registered at a Belgian Bar as from March 2017. The lawyer's card contains a chip, your photograph, personal details; surname, first name, unique lawyer's number, a bar code and a card number and will serve as a means of identification to gain access on the Digital Platform for Lawyers.

services. The introduction of controlled pilot schemes as an initial step in reform have proven to be of great significance. These Practice Directions have the benefit of determining the success rate of new digital procedures before full-scale implementation, thereby saving costs and resolving technical issues early on. It is submitted that South African law can learn and benefit from the English examples of reform.

It is clear that the Dutch judiciary is dedicated to digitise the court system in an attempt to reduce costs and time spent on trial. Digital litigation is regarded as an important feature of access to justice and greatly encouraged. The Dutch civil procedure has created a process whereby a party can institute and finalise an entire claim online. All parties involved have access to the online portal and can communicate with each other swiftly and without expense. It should, however, be noted that caution is required where large-scale reform is implemented as implementation errors can rapidly emerge and create obstacles that are difficult to overcome where civil procedural rules are amended. The QAI programme has been brought to a sudden halt despite the judiciary's support and ambition due to budgetary constraints and fundamental flaws in its intended implementation. Nevertheless, it has been concluded that further digitisation is inevitable and that all systems already implemented will continue to be used. The Netherlands has further emphasised the benefits of online dispute resolution and enhanced information and communication to litigants. It has further been demonstrated that the advancement of technology may in certain circumstances be accessed through private entities.

The benefits and advancements made in terms of digitisation in Belgium are clear: (1) litigants are no longer dependant on fax machines, postmen or physical carriers, but can digitally upload documents from home; (2) litigants and lawyers are not bound by the office hours of the clerk; (3) adjudicators are able to consult documents remotely; (4) costs are saved for the judiciary due to the reduction in postage; and (5) access is secured based on eID or lawyer cards.[279] The number of radical reforms in Belgium will in addition

[279] See Geens 'Data Stromen en Justitie' (n 260 above).

facilitate electronically managing rulings, judgments and other documents related to court cases.

The advantages in terms of access to justice, especially in terms of faster and cheaper procedures, are undeniable in terms of digitisation. Civil procedure has evolved from oral hearings, to typewriters, to paper trials and now to online exchanges and South Africa should embrace these changes and amend the court rules to encompass digitisation accordingly.

CHAPTER 4: CONCLUSION

4.1. CASE MANAGEMENT

In Chapter 2 the lack of importance placed on the presentation and early determination of facts and evidence by the rules of South African civil procedure, as well as how the prospect of settlement in the pre-trial phase is underestimated was discussed.[1] In an unquestionably adversarial system, the rules applicable to the early stages of litigation focus on preparing parties for trial instead of directing the focus on the primary goal of resolving the dispute.[2] Legal practitioners far too often take full control of proceedings, use delay tactics, disregard options of settlement or delay delivering evidence to opposing parties and representatives.[3] Consequently, more delay and increased costs are experienced during litigation, in turn becoming an obstacle in achieving and advancing access to justice. It has further been pointed out that legal practitioners generally do not welcome the redistribution of powers regarding the control of proceedings in favour of a presiding officer, even where it may be in the interests of access to justice to do so.[4]

The numerous English reform trends experienced in the past decade serve as a great example of the many possibilities available in terms of reform. The reforms implemented in England and Wales include numerous changes to the pre-trial phase of litigation, case management rules and the presentation of evidence. The English rules have been directed at creating the overall mindset that trial should be regarded as a last resort in legal proceedings, something that, unfortunately, is still lacking in terms of the South African rules.[5] It should, however, be noted that the new case management rules specifically state that a judge should explore the possibility of

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1 See Chapter 2 part 2.2. pages 10 – 13.

2 See the discussion Chapter 2 part 2.2.2 on *Preparation for Trial* pages 10 – 13.

3 See (n 2 above).

4 See Chapter 2 part 2.2.3 (ii)(a) on *Previous attempts towards case management* pages 15 – 16.

5 See Chapter 2 part 2.3.2 *Pre-trial Protocols* pages 18 - 19 and see further the discussion Chapter 2 part 2.2.2 on *Preparation for Trial* pages 10 – 13.

settlement with the parties.[6] Previously, in terms of Rule 37 of the Uniform Rules of Court there was no provision enabling a judge to be involved in settlement negotiations, unless agreed to by all parties, because of the prohibition of disclosing certain offers or tenders of settlement to the court prior to a judgment being rendered.[7] It is therefore submitted that the judge's input in this regard will be of much significance in advancing settlement.

The Dutch civil system has demonstrated that no trivial mistakes or unnecessary delays will be tolerated and approach civil procedure in a business-like manner. Judges have been empowered to a greater extent in this regard to ensure that proceedings follow an orderly and timely process.[8] South African legal practitioners seem to prefer a traditional adversarial system, as discussed in chapter 2, where in some ways (it can be construed that) the impartiality of a judge takes precedence over the timely resolution of the dispute.[9] This being said, in many instances our courts have been granted with significant discretionary powers, especially if the interests of justice so dictate. The High Court uses its inherent power to control its own proceedings and often does so due to the lack of advanced and adequate civil procedural rules.[10] In some instances, however, courts are unable to overcome the barriers imposed by the inadequate rules and must follow and implement them blindly. It should be noted that the new case management rules give judges the power to ensure that proceedings follow an orderly and timely process whilst still protecting the impartiality of the trial judge.[11] This may, however, in the same instance result in longer litigation as the parties now must adhere to extensive case management before ultimately getting their day in court.

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6 See Rule 37A(11)(a) of the Uniform Rules of Court. Note, however, that Rule 37 of the Uniform Rules of Court makes provision for parties to attempt settlement, however, usually not under the direction of the trial judge as he/she is prohibited to have knowledge of certain settlement proposals.

7 See Rule 34(10) and 37(8)(b) of the Uniform Rules of Court.

8 See Chapter 2 part 2.4. *The Netherlands* on civil procedure in the Netherlands pages 26 – 31.

9 See Chapter 2 part 2.2.2 and 2.2.3 on the criticisms on South African civil procedure as discussed on pages 11 – 17.

10 See Chapter 3 part 3.2.3 *Progress made* for a discussion on several cases where the High Court has used its inherent power to adapt certain rules and provisions pages 56 – 67.

11 See Rule 37A(15) of the Uniform Rules of Court.

The reform experienced in the identified countries, especially the Netherlands and England, demonstrated the importance of the early determination of facts in litigation whereas the South African approach still mainly relies on this determination at trial.[12] The lack of emphasis on acquiring, producing and procuring evidence in the early stages of litigation results in numerous postponements where parties have endless opportunities to get their evidence to court, consequently causing disputes to last longer and to cost more.[13] In this regard, the new case management rules will have a profound effect on ensuring that several aspects of a matter are determined at an early stage in proceedings, before the matter proceeds to trial. Prior to the implementation of case management in South Africa, the control of proceedings were still firmly in the hands of legal practitioners frustrating settlement and early determination.[14] This has been a focal point of reform in the identified countries and the courts have been given extensive powers in terms of procedural control and are tasked with guarding against unreasonable delay and may take the steps to prevent such delay.[15] The distribution of powers between the court, the parties and their legal representatives is no longer a fierce debate in the Netherlands, something that has clearly not been achieved or acknowledged in South Africa.[16]

The lack of strict enforcement regarding the rules applicable to time periods and rules limiting the production of evidence at later stages in the litigation process serve to be a fundamental obstacle and rules should be implemented or amended, as seen in

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12 See Chapter 2 part 2.2.2; 2.2.3 and 2.2.4 pages 11 - 17.

13 See Chapter 2 part 2.2.2; 2.2.3 and 2.2.4 pages 11 – 17.

14 See Chapter 2 part 2.2.1 and 2.2.2 pages 10 - 13.

15 See Chapter 2 part 2.4.4 *Case Management Powers (the current state of affairs)* page 28 – 30 on the judge's power in the Netherlands.

16 See for instance the discussion on the negative attitude displayed towards increasing judicial power and the introduction of case management in 2010 in Chapter 2 part 2.2.3. (ii) (a) at page 15 – 16. It should, however, be noted that the new case management rules have been implemented despite the previous attitude towards them, however, that the legislature has made sure to protect the impartiality of judges by creating the role of a case management judge apart from the trial judge. It should further be noted that the trial judge's powers have not been increased by the new rules on case management.

England, the Netherlands and Belgium, to reduce the possibilities of prolonging the process.[17]

As mentioned in Chapter 2, the Belgian experience demonstrates the potential value of soft law (as explained above) where certain practices and rules are established by legal actors in practice instead of reform by legislative intervention. In South Africa, however, the various Practice Directives applicable to legal practice and the rules regarding the conduct and the necessary steps to be taken in terms of litigation differ from court to court. This causes confusion amongst practitioners, especially during the pre-trial phase, and creates a certain degree of fragmentation. It would therefore be advantageous for all legal participants if the rules and directions in relation to the various Practice Directives are amended in order to create cohesion and to advance access to justice goals, this can only be achieved by an overall amendment to the court rules or these Practice Directives. In this regard, it should further be noted that the new Commercial Court Directive has incorporated witness statements, a novelty in South African civil procedure, which may result in confusion amongst practitioners in respect of the conduct of the commercial court's proceedings.

The developments in terms of civil procedural reform in South Africa should, however, not be disregarded. At the beginning of chapter 2, the assumption was that South African civil procedure must still undergo numerous reforms to achieve what other countries have in terms of case management. A hand full of reforms have been implemented to create a system that may be capable of resolving disputes earlier and more cost effectively, however, these reforms are to a certain degree still inconsequential and South African civil procedure remains an unpleasant experience for most litigants due to its delay and costs.[18] This was the situation until the very recent amendments to the Uniform Rules of Court, as fully discussed at the end of Chapter 2, where a complete system of case management provisions has been implemented.[19] Following the introduction of Rule 37A of the Uniform Rules of Court by Government Gazette No. 42497, the court rules now provide that it is compulsory

[17] See Chapter 2 and relevant discussions.

[18] See Chapter 2 part 2.2 pages 10 – 17.

[19] See *Government Gazette* No. 42497 introducing Rule 37A to the Uniform Rules of Court.

for certain matters to be subjected to case management and that no court date will be issued until the matter has been certified as trial ready by a case manager.[20]

Clearly, from the new provisions regulating extensive case management, South African courts have become aware of the potential value that pre-trial conferences may hold in terms of resolving and securing the timely adjudication of disputes. As in England and the Netherlands, where reforms have been implemented to speed-up and simplify litigation in the early stages of litigation, the introduction of case management and the new Commercial Court Practice Directive in South Africa have amplified the importance of the pre-trial stage in civil procedure.[21] In terms of case management, there are specific rules that come into play when a matter is deemed "ready for trial" and it has been specifically stipulated that no court date will be issued until such a time.[22] Case management currently only applies to matters as identified in the rules, however, the rules provide for an open list and any matter may be subjected to case management if deemed necessary.[23] Case management is still preceded with a pre-trial conference where clarity is sought between the parties in respect of facts and issues.[24] Thereafter, case management conferences are held until such a time as the matter has adequately been ventilated and consequently certified as trial ready.[25] The new rules make specific reference to a judge's power to impose a case management schedule, with or without the consent of the relevant parties.[26] This resembles reform experienced in Belgium regarding the power conferred on judges to determine and impose a procedural calendar in civil disputes.[27]

The Commercial Court Directive has limited its application to specific matters and requires that certain conditions be met before any action can be designated as a

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[20] See Chapter 2 part 2.6.2 *New developments in South* Africa pages 39 – 40.

[21] See Chapter 2 part 2.3.2 *Pre-trial Protocols* pages 18 – 19.

[22] See Rule 37A(8) of the Uniform Rules of Court.

[23] See Rule 37A(1) of the Uniform Rules of Court.

[24] See Rule 37A(7) of the Uniform Rules of Court.

[25] See Rule 37A(5)(a) of the Uniform Rules of Court.

[26] See subrules (4); (5); (8); (9) and (12) of Rule 37A of the Uniform Rules of Court.

[27] See Chapter 2 part 2.5.2 *The amendments to the preparatory phase* pages 32 – 33.

commercial court case and before it can proceed to trial.[28] This especially resembles reform in England where several pilots are aimed at creating courts where specific matters are heard making it possible to implemented targeted disclosure and to limit the evidence required at trial. Rule 37A provides for specific matters to be dealt with before the matter can go to trial, thereby limiting time spent on unnecessary aspects of disputes between parties and consequently limiting evidence.

In terms of earlier determination in disputes, case management has the advantages in ensuring that parties ventilate their claims fully under the direction of the court to further ensure that unnecessary delays are avoided, however, as pointed out by *Theophilopoulos* whether South African courts have the judicial resources available to successfully conduct and implement case management remains to be seen.[29] It is submitted that the judiciary should attentively evaluate the new case management rules so that any challenges or complications which may arise can be dealt with swiftly.

The European countries have also clearly demonstrated the advantages of docketing and a procedural power shift to adjudicators. The case management rules specify that a case will be administered to a case manager who will regulate the process of the case and ensure that the dispute is adjudicated in a reasonable time. The Commercial Court Directive has incorporated the advancements mentioned above and provides that one (or two) judge(s) should be designated to one case and that the same judges should be present throughout the proceedings. It should be mentioned that the new case management rules differ from the provisions contained the Directive as the rules provide that the case management judge may not preside over the trial unless specifically requested by both parties.[30]

As in England, the Commercial Directive has introduced the concept of witness statements in South Africa and no reference is made to the leading of oral evidence.

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[28] See the Commercial Court Practice Directive 2018 Chapters 1, 2 and Schedule 1 to the Directive. Further note that the Directive indicates that Schedule 1 is to serve as a guideline only and is not a closed list.

[29] See Theophilopoulos (n 1 in Chapter 2) last page.

[30] See Chapter 2 part 2.6.2. (i) *New Case Management Rule 37A* pages 40 – 47.

No general discovery is required and instead the judge(s) may allow for the targeted disclosure of documents.[31] As seen from the different disclosure orders in England, having set rules in respect of disclosure and the required evidence for certain matters can save parties valuable time and lead to accelerated adjudication as the relevant facts are determinable at an earlier stage in time.[32] This not only saves parties time and costs in respect of procuring voluminous unnecessary evidence but increases settlement prospects at an earlier stage in time.[33] If parties deem additional evidence to witness statements necessary, a written application must be made in advance of the trial and such evidence will usually also be limited.[34] It is clear that the process is intended to result in the speedy adjudication of a matter in the Commercial Court, however, contradictory to the aforesaid requiring parties to apply to court for several secondary matters may result in more delay and may prejudice certain parties, it remains to be determined whether the provisions of the Commercial Court are advantageous.

In terms of case management, various possibilities for reform in South African civil procedure remain. Although the new reforms discussed resemble the advancements made in the identified countries, South Africa has only just embarked on these procedural changes. The challenge of creating and advancing access to justice will never be an easy process. It involves not only the amendment and introduction of procedural rules, but dedication from all branches of government and support from all legal participants.[35] The effects of the new case management rules and the Directive and the new provisions should be monitored closely, evaluated and observed in the upcoming years to determine whether the new provisions have a positive effect on the overall development and progression of litigation. It is, however, submitted that these attempts towards reforms are in itself a positive step for South African civil procedure. It is submitted that all participants should dedicate themselves to encourage the

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31 Similar to the provisions of the English Flexible Trials Scheme and Shorter Trials Scheme – see Chapter 2 part 2.3.5(i) and (ii) pages 24 – 26.

32 See Chapter 2 part 2.3.2; 2.3.4 and 2.3.5.

33 See Chapter 2 part 2.4.5 *Success of the Dutch Reforms* pages 30 – 31.

34 Commercial Court Practice Directive 2018.

35 See Chapter 2 part 2.6.1(vi) *Consistent and ongoing reforms* page 38.

success of case management in the civil courts and the Commercial Court Practice Directive, which in terms of this research, shows significant promise.

4.2. DIGITISATION

An obstacle experienced in numerous civil justice systems is the lack of adequate statistics regarding the duration of litigation and the publication of judgments. Limited research is available to determine exactly where civil systems are lacking and to identify where positive influences are most notable. The possible influence of publishing this information digitally has been identified and holds great promise in terms of adequate assessment and awareness. It further should be noted that where civil justice systems are digitised, gathering the statistics mentioned above becomes increasingly possible. Digitisation has also shown to be pivotal in managing and securing all records linked to a case. The trends pertaining to digitisation as discussed in chapter 3 are in summary:

4.2.1. Video Technology

One of the Practice Directions implemented under the English civil procedural rules is the Video Hearing Pilot Scheme.[36] This scheme creates the possibility for parties to attend court via an internet-enabled video link.[37] The advantages in terms of access to justice and in terms of convenience as well as time saved in relation to court hearings are immense in this regard. The pilot is currently applicable to proceedings in respect of setting aside default judgments and is to be tested and evaluated before its further roll out. Video technology is already used in criminal courts, in both England and South Africa, to allow certain victims and witnesses to give evidence without having to suffer emotional stress by coming face to face with accused persons. Belgium also underwent reform to include the possibility of using video conferencing.[38] The laws concerning notarial practices now provide that deeds may be executed by

[36] See Chapter 3 part 3.3.2. (iii) *Video Hearing Pilot Scheme* pages 74 – 75.

[37] See Chapter 3 part 3.3.2. (iii) *Video Hearing Pilot Scheme* pages 74 – 75.

[38] See Chapter 3 part 3.5.2 (iii) *Developments towards digitisation* pages 88 – 89.

way of video conference.[39] Similarly, in South Africa some improvements in respect of videoconferencing have been experienced. The use of this digital tool has been incorporated into both civil and criminal cases. The South African courts have proven to embrace technological developments where court rules lack same and have used their inherent powers to make sure that the interests of justice are achieved.[40] It has been demonstrated that, although it has not been fully incorporated (may it be due to a lack of competent provisions or due to budgetary constraints), video conferencing has been utilised in South African civil procedure to secure oral evidence where certain parties are unable to physically attend court.[41] It should be noted that a new Bill has been introduced proposing extensive rules incorporating the use of video conferencing in civil proceedings.[42] Therefore, the courts will no longer have to rely on their inherent power in circumstances where a matter warrants the use of video conferencing and parties can rely on the rules, further enabling video conferencing to be utilised in matters in the magistrates' courts as well.[43] The advantages of video conferencing are clear in respect of saving costs, decreasing time spent traveling to court and avoiding postponements in respect of securing certain witnesses and testimony in court.

4.2.2. Electronic service of documents

In the Netherlands, the possibility of initiating a claim electronically has been introduced by the recent reforms and communication between parties can fully take place online.[44] Similarly, in England, amendments have made it possible to issue proceedings and file documents online in certain circumstances.[45] In terms of the electronic service of documents, amendments have granted bailiffs in Belgium the power to serve documents on persons by way of email where the circumstances

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39 See Chapter 3 part 3.5.2 (iii) *Developments towards digitisation* pages 88 – 89 specifically.

40 See Chapter 3 part 3.2.3 *Progress made* and the cases discussed pages 56 – 67.

41 See Chapter 3 part 3.2.3 (ii) *Video Conferencing* pages 62 – 67 on how video conferencing has been utilised.

42 See Judicial Matters Amendment Bill 2018 and discussion in Chapter 3 part 3.2.3. pages 62 – 64.

43 Judicial Matters Amendment Bill 2018.

44 See Chapter 3 part 3.4.2 (i) and (ii) pages 79 – 84. Note that the roll out of QAI has been put on hold an that it's full implementation has therefore not taken place in all the Dutch courts.

45 See chapter 3 part 3.3.2 (i) and (ii) pages 68 – 74.

permit.[46] South Africa does not provide for this opportunity and the service of documents by the sheriff still requires a physical exchange.[47] As discussed, with reference to the *CMC Woodworking* case, progress has been seen and our courts have permitted substituted service to take place by way of social media.[48] This has, however, not been incorporated into our civil procedural rules and the possibilities, although present, are therefore limited to circumstances and the discretion of judges.[49] Further, due to inadequate drafting, service by electronic means is limited and only applies to subsequent documents and proceedings can therefore not be initiated in this way.[50]

4.2.3. Electronic Files and Electronic Communication with the courts

England has introduced an electronic filing system enabling parties to issue proceedings and submit documents online.[51] The advantages include saving a vast amount of time by eliminating the requirement of travelling to court and enabling parties to submit documents at any time from the comfort of their homes. The English reforms experienced in respect of digitisation have mostly been implemented by way of Practice Directions and pilot schemes, creating a closed environment where new initiatives and amendments can be tested, and their success can be monitored and assessed.

In the Netherlands, amendments have been directed at providing a legal framework for the digital communication with the courts.[52] Progress has been made in terms of

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46 See Chapter 3 part 3.5.2 (iv) *E-Service: Office Gazette 22 June 2017* page 90.

47 But for substituted service in limited circumstances.

48 See Chapter 3 part 3.2.3 (i) *Substituted Service – Service of court process by social media* pages 57 – 62.

49 See Chapter 3 part 3.2.3 (i) *Substituted Service – Service of court process by social media* pages 57 – 62 on substituted service by way of electronic means.

50 See Chapter 3 part 3.2.2 (i) *The "lacuna" in the Uniform Rules of Court* pages 55 – 56 and Rule 4A of the Uniform Rules of Court.

51 See Chapter 3 part 3.3.2 (ii) *Electronic Working Pilot Scheme (CE-File)* pages 71 – 74 and Direction 51O.

52 See Chapter 3 part 3.4. pages 78 - 87 on the digital advancements made in the Netherlands.

digitally submitting claims and documents with the courts.[53] In this regard, South Africa has made certain attempts and, as mentioned above, plans to pilot an eFiling system at the Superior Courts has been announced.[54] Accordingly, it is now possible to request a court file from the court by electronic means, saving parties much time by eliminating the requirement to stand in endless lines and wait for designated parties to find (often not) these files.[55] Further progression regarding digitising Dutch civil procedure has been experienced by the creation of a digital case file in a digital environment referred to as 'My Case' where all information concerning the relevant case will be available.[56] All procedural steps can now be taken through this digital environment and documents can be served by way of email.[57]

Similarly, the Belgian reforms include the possibility of electronically depositing documents directly into the court file.[58] No longer is there a requirement to physically attend court and wait in endless lines in order to complete small, trivial steps in the litigation process, significantly relieving administrative burdens. This further, secures all documents electronically and decreases the possibility of loss, known to be a common occurrence in South African courts where civil procedural rules do not provide for the electronic submission of documents.

The South African civil procedural rules regarding digitisation pertaining to the serving, filing, and lodging of documents are wanting if compared to the advancements made in the foreign jurisdictions. It has, at least, been identified as an objective of reform and attempts are currently underway to create an adequate electronic system. Limited progress has been observed and amendments have been made in terms of rules

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53 See Chapter 3 part 3.4.2 *The Quality and Innovation of the Judiciary ("QAI")* pages 79 – 84 and Article 125(3) of the Dutch Code of Civil Procedure.

54 See Chapter 3 part 3.2.1 pages 52 – 53.

55 In the Pretoria High Court the request for a file form indicates that you may request these files via email with an email address at the bottom.

56 See Chapter 3 part 3.4.2 (i) *Preliminary steps towards Digitisation in the Netherlands* and the discussion on 'My Case' pages 80 – 83.

57 See chapter 3 part 3.4.2 (i) *Preliminary steps towards Digitisation in the Netherlands* pages 80 – 83.

58 See Chapter 3 part 3.5.2 *Developments towards digitsation* on electronic development in Belgium, pages 88 – 92 especially part (v) page 90 – 91.

permitting the electronic service in certain circumstances. The rules are, however, drafted in terms that contradict the exact purpose of them as pointed out by *van Loggerenberg* and should be amended in this regard.[59] In respect of exchanging and providing courts with documents, rules have not embraced the advantages that technology may hold and mostly, physical exchange is required. There are however circumstances where judgment has been rendered by way of email, although this is an exception to the rule and a rare occurrence.[60] This situation has, however, very recently been recognised and approached by the Office of the Chief Justice by the implementation of a concrete electronic system already functioning in certain pilot projects, discussed at the end of this chapter.

4.2.4. Online Claims and Procedures

In terms of the Dutch reforms, it is possible to lodge certain claims using a secured web-portal with the rest of the procedure also taking place online, apart from a possible oral hearing.[61] The English reform plan to create online courts has been initiated by creating a new online service under a Practice Direction, creating the possibility for litigants to claim money owed, resolve disputes out of court and access mediation online.[62] Early evidence suggests that the online system improves access to justice and higher engagement of defendants while encouraging settlement.[63] In the Netherlands a private initiative for an online court, the E-Court, has been launched enabling parties to initiate and conduct the whole procedure online similar to the online court in England, the E-Court is further discussed below.[64]

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59 See Chapter 3 part 3.2.2 (i) *The "lacuna" in the Uniform Rules of Court* pages 55 – 56 and Rule 4A of the Uniform Rules of Court.

60 From anecdotal evidence, however, note that the new "Caselines" system discussed below intend to fully implement judgment by email.

61 See Chapter 3 part 3.4.2 *The Quality and Innovation of the Judiciary ("QAI")* pages 79 – 84 and (n 188 and 189 of Chapter 3).

62 See chapter 3 part 3.3.2 (i) *Online Courts and the New Online Civil Money Claims pilot* pages 68 – 71.

63 See Frazer (n 109 of chapter 3).

64 See Chapter 3 part 3.4.3 *Digitisation of out-of-court dispute resolution in the Netherlands* pages 84 – 87 and the discussion on the E-Court.

4.2.5. Out of Court Dispute Resolution

Several methods for out-of-court dispute resolution have been developed in the Netherlands. Two private initiatives (Rechtwijzer and the E-Court) have been identified and discussed in Chapter 3 and the advantages of these initiatives prove to be promising in terms of solving disputes quickly and cheaply. The success experienced in terms of these initiatives is, however, disputable and in regard to implementation in a South African context, as these initiatives may serve to be impossible due to the complex challenges associated with the initiatives.[65] It should, however, be noted that despite the inherent challenges and obstacles *Kramer et al* has indicated that the initiatives have been considerably successful.[66] It should be noted that these private initiatives, however, relate to mediation and arbitration as opposed to the online court in England.[67]

4.2.6. Online Divorce Pilot

Another pilot scheme has been initiated in England with the purpose of assessing new practices and procedures regarding facilitating certain matrimonial orders to be filed via an online system.[68] It is currently possible to apply for an uncontested divorce digitally via this online system, removing the need of filling in paper forms and sending them to court manually, consequently saving time and costs.[69]

4.2.7. Caution

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[65] See See Chapter 3 part 3.4.3 *Digitisation of out-of-court dispute resolution in the Netherlands* pages 84 – 87.

[66] See See Chapter 3 part 3.4.3 *Digitisation of out-of-court dispute resolution in the Netherlands* pages 84 – 87.

[67] Which operates for actions in the County Court small claims track and parties may apply for default judgement. See Chapter 3 part 3.3.2 (iii) *Video Hearing Pilot Scheme* pages 74 – 75.

[68] See Chapter 3 part 3.3.2 (iv) *Online Divorce Pilot* pages 75 – 76.

[69] See chapter 3 part 3.3.2 (iv) *Online Divorce Pilot* pages 75 – 76.

When any civil system undergoes reform, a certain degree of caution is required. As seen from the Dutch experience, resources can rapidly run out and implementation flaws are inherent to a complete digitisation of a justice system.[70] A question that begs for attention is whether South Africa has the revenue to digitise civil procedure? As seen from England and the Netherlands, significant amounts of money are required to complete a reform of this magnitude. In this regard, proper statistics are necessary to further determine the possibility of success in South Africa.

4.2.8. Most recent developments

As demonstrated in chapter 3 above, the South African courts have embraced the duty to properly advance procedures in terms of technology. Although developments are limited in application, the prospect of improvement soon is clearly visible. It is submitted, however, that this duty cannot only be imposed on the courts but that adequate rules in this regard need to be drafted. If the rules of court fail to provide for possibilities to utilise technology, a significant amount of court time will continue to be spent on far-reaching applications and interpretations to include technological advancements in civil procedure.

On the 27th of September 2019, a Briefing Session Presentation was held by *Judge President Dunstan Mlambo* where the new "Caselines" initiative was discussed. The Judge President discussed several topics in regards to the current challenges experienced in the courts, pointing out that the current system is a dated, manual process and the hard copy court files are voluminous resulting in crowded chaotic file rooms that are hard to navigate. The soon-to-be-implemented electronic case management system is based on the software used by the courts in the United Kingdom and aims to ensure efficiency and effectiveness of the court administration. The Office of the Chief Justice has already conducted a pilot process in which it tested the system on: (1) certain opposed and unopposed matters; and (2) one Full Court appeal. The Justice President reported that despite experiencing and identifying certain gaps, the end results are positive. The rollout of Caselines is to be expanded during the fourth term of the year, starting on the 7th of October 2019, to include

[70] See Chapter 3 part 3.4.2 (ii) *The state of affairs in digital communication* pages 83 – 84.

opposed motions, special motions and the Third Court. New and pending trials will proceed as usual until an e-filing component of the system is ready to be implemented. Some trials will be conducted on Caselines as a test run. However, parties may apply to the Registrar for their trials to be conducted through Caselines should they wish. As discussed during Chapter 3, the benefits of an electronic case management system include saving significant amounts in costs and time spent at court. The Judge President further stipulated that all Court Orders will be emailed to legal practitioners and that this project is currently underway. It is anticipated that this initiative will have extremely positive results, however, it is submitted that the rollout of the initiative, as intended, should have a step by step approach before its overall implementation. The South African courts should further implement strategies to assure that the new system is understandable and accessible to all legal practitioners and that the court staff are trained and adept in running the systems and explaining them to the general public. It should be noted that there are currently no Practice Directives, Court Rules or legislation pertaining to Caselines which clearly indicates that South African civil procedure is indeed affected by soft law. As seen from the Dutch experience, there are certain inherent challenges to online and technological advancements and it is further submitted that the judiciary should ensure that certain precautions are in place should any challenges surface.

4.3. THE FUTURE OF CIVIL PROCEDURAL REFORM IN SOUTH AFRICA

The challenge of creating and advancing access to justice is usually an extremely difficult process. It involves not only the amendment and introduction of procedural rules, but dedication from all branches of government and support from all legal participants.[71] A balance has to be sought between: (1) the time and funds invested into a civil matter and the timely adjudication and outcome thereof; (2) between the distribution of powers between the parties and the judge; and (3) society's needs and government's resources. This research has demonstrated the various reforms available in terms of civil procedure and how these reforms are advantageous in respect of access to justice. It should be noted that although the reforms discussed are welcomed, the challenges inherent to them are only beginning and that ongoing

[71] See Chapter 2 part 2.6.1 (vi) *Consistent and ongoing reforms* page 38.

reforms should follow with adequate steps in place to ensure the success of these reforms. In this regard, in order to give full attention to the rate of success of these reforms the South African legislature and judiciary should dedicate itself to establishing procedures whereby this information can be recorded and statistics can follow. This will further assist in determining where the problems are most evident and which solutions are most prone to success. It is further submitted that the identified countries have shown that a step by step approach is a necessity in fundamental reforms as many challenges can often rapidly arise. It is submitted that all participants should dedicate themselves to encourage the success of the current reform strategies being implemented in South African civil procedure. As seen from the new Commercial Court Directive, insertion of Rule 37A, the Judicial Matters Amendment Bill of 2019 and other amendments and initiatives, the legislature has noticed the lack of rules regulating digital advancements and benefits of case management and are increasingly acknowledging and creating rules to reform South African civil procedure, which in terms of this research has shown significant promise.[72]

[72] As seen in the provisions of the Commercial Court Directive 2018 stipulating that an appropriate means for communications and the exchange and filing of documents needs to be created at the first case management conference.

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