

Using social media as evidence in South African courts

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List of contents

List of abbreviations	iii
Keywords and abstract	iv
1 Introduction	1
1.1 <i>Defining social media</i>	1
1.2 <i>The relevance of social media to the law of evidence</i>	3
2 Classification of social media within the context of the law of evidence	6
2.1 <i>The traditional forms of evidence</i>	6
2.2 <i>Forms of social media as evidence</i>	14
2.3 <i>Conclusion</i>	16
3 The admissibility of social media evidence	16
3.1 <i>Relevance</i>	16
3.2 <i>The exclusionary rules</i>	25
3.3 <i>Authenticity</i>	40
3.4 <i>Originality</i>	47
3.5 <i>Conclusion</i>	51
4 Means of proving social media evidence	51
4.1 <i>Forms of presenting social media evidence</i>	52
4.2 <i>Discovery</i>	53
4.3 <i>Testimony by a witness</i>	55
4.4 <i>Judicial notice</i>	59
4.5 <i>Conclusion</i>	67

5	Probative value of social media evidence	68
5.1	<i>Inferences</i>	69
5.2	<i>Presumptions</i>	74
5.3	<i>The provisions of Section 15 of the ECTA applicable to probative value</i>	81
5.4	<i>Conclusion</i>	82
6	Conclusion and recommendations	83

List of abbreviations

BH	-	<i>Business Horizons</i>
CPA	-	<i>Criminal Procedure Act 51 of 1977</i>
CPEA	-	<i>Civil Proceedings Evidence Act 25 of 1965</i>
ECTA	-	<i>Electronic Communications and Transactions Act 25 of 2002</i>
IRMR	-	<i>International Retail and Marketing Review</i>
JBL	-	<i>Juta's Business Law</i>
JQR	-	<i>Juta Quarterly Review</i>
JMLR	-	<i>John Marshall Law Review</i>
LEAA	-	<i>Law of Evidence Amendment Act 45 of 1988</i>
NULR	-	<i>Northwest University Law Review</i>
OECD	-	Organisation for Economic Co-operation and Development
PELJ	-	<i>Potchefstroom Electronic Law Journal</i>
RJLT	-	<i>Richmond Journal of Law and Technology</i>
RoL	-	<i>Review of Litigation</i>
SAJCJ	-	<i>South African Journal for Criminal Justice</i>
SJLS	-	<i>Singapore Journal for Legal Studies</i>
TSAR	-	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
UBLJ	-	<i>University of Botswana Law Journal</i>
UGC	-	User Generated Content

Keywords

Law of Evidence – Social Media Law – Admissibility – Documentary evidence -
Probative value of social media evidence - Means of proof – Originality

Abstract

This dissertation examines the applicability of current rules of the Law of Evidence to social media evidence. It argues that the current Law of Evidence should be sufficient to render social media evidence admissible in South African courts of law, although it may be necessary to re-interpret certain requirements with reference to the electronic nature of social media evidence. It further argues that a strict application of the originality rule should not be followed, but that more emphasis should be laid on authenticating social media evidence. It also evaluates recent changes in legislation with specific reference to the Electronic Communications and Transactions Act 25 of 2002 and its applicability to social media evidence.

1 Introduction

1.1 Defining social media

In order to form a proper understanding of the implications of social media on the law of evidence, one first needs to understand the nature of social media and the different forms it may take.

According to Kaplan and Haenlein:¹

Social Media is a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content.

According to the authors the term *Web 2.0* refers to an ideological shift away from webpage, content and application design by individuals, to a more collaborative effort where anyone with the necessary knowledge and skills can participate in content design and generation.² This participation can also be done in real-time.³ User Generated Content (hereafter UGC) "is usually applied to describe the various forms of media content that are publicly available and created by end-users".⁴ Social media websites keep a record, akin to a transcription, of both the private and public communications of end-users with each other and the world at large.⁵

The term *end-user* or *user* refers to the person utilising the social media platform created by the developer who is a member of the public.

Kaplan and Haenlein base their definition of UGC on the definition proposed by the Organisation for Economic Co-operation and Development (hereafter the OECD) which requires content to meet the following three requirements in order to be defined as social media:⁶

- *Publication* requires not only publication in the traditional sense, but specifically that content must be published on an internet site accessible to the public or a specified portion thereof.

1 Kaplan and Haenlein 2010 *BH* 61.

2 Kaplan and Haenlein 2010 *BH* 61.

3 Uncel 2011 *Jurimetrics* 46.

4 Kaplan and Haenlein 2010 *BH* 61.

5 Uncel 2011 *Jurimetrics* 46.

6 OECD 2007 <http://browse.oecdbookshop.org/oecd/pdfs/free/9307031e.pdf> [date of use 31 May 2014].

- *Creative effort* requires content to not be a mere parroting of content found elsewhere but should involve some creative effort on the part of the user publishing the content.
- *Non-commercial intention* which means that UGC should be produced without the expectation of profit or remuneration.

The definition proposed by the OECD is too restrictive to properly define UGC (and by extension social media) within a legal context, as social media may be used by end-users for profit⁷ or to disseminate content which is not necessarily original but may give rise to legal consequences.⁸

In this study the term *social media* is used according to the definition proposed by Kaplan and Haenlein and only needs to satisfy the element of publication as proposed by the OECD. Therefore, for content to be classified as social media, the following elements must be present:⁹

- The content is found on the internet.
- The content is published on an internet site accessible by the general public.
- The person who published the content is an end-user.

7 An example of this is YouTube's monetisation policy in terms of which any user that generates original content may opt to earn money on that content. The user will then earn money based on the number of times the content is viewed and be paid from advertising revenue earned by the developer. YouTube is a social media site where users can post content in the form of video clips. See YouTube.com 2015 https://www.youtube.com/account_monetization [date of use 1 June 2015].

8 Copyright infringement is an example where content published on social media may give rise to legal consequences, but the content is not original in nature.

9 The term *internet* is used in the widest sense in this study. It not only includes traditional web domains with the *www* prefix, but also other internet-based applications such as Twitter, WhatsApp and MXit.

Within the broad spectrum of social media, Kaplan and Haenlein¹⁰ identify six different classifications: collaborative projects,¹¹ blogs, social networking services,¹² content communities,¹³ virtual social worlds¹⁴ and virtual game worlds.¹⁵

The type of information that can be published on social media platforms may include any form of information such as text, video and audio, documents, hyperlinks and applications. The only prerequisite for publication is that the content must be in digital form.

1.2 The relevance of social media to the law of evidence

During the past decade the use of social media proliferated to an astounding degree. Facebook, which launched in 2004, is currently the most popular social media platform in South Africa with 9.6 million monthly users as of September 2013¹⁶ and an unprecedented 1.28 billion monthly users worldwide as of the first quarter in 2014.¹⁷

The law of evidence is primarily concerned with the quest for truth and seeks to admit evidence that will assist a court in reaching the proper conclusion. More often the law of evidence is formulated to exclude questionable evidence, where the risks of inaccuracy or untruthfulness are too great or where the admission of certain types of evidence will cause unfair prejudice.¹⁸

Social media evidence may be a veritable treasure trove of information for courts to take into account. The gunman in the recent armed attack on two television journalists in Virginia posted two videos on Twitter which showed him pointing the weapon at one

10 Kaplan and Haenlein 2010 *BH* 62.

11 E.g. Wikipedia which is a free online encyclopaedia that is “written collaboratively by those who use it” Wikipedia.org -2015 <http://en.wikipedia.org/wiki/Wikipedia:Introduction>.

12 Such as Facebook and Twitter. For a more detailed definition of social networking services see Roos 2012 *SALJ* 383.

13 See e.g. YouTube and Instagram.

14 E.g. *Second Life* which is “is a free 3D virtual world where users can socialize, connect and create using free voice and text chat” Google.com Unknown <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=second%20life> [date of use 1 June 2015].

15 E.g. *World of Warcraft* which is an online game that can be played by any person for a monthly subscription fee.

16 Meier 2013 www.bluemagnet.co.za/blog/the-state-of-social-media-in-south-africa-2013 [date of use 31 May 2014].

17 Statista.com 2014 <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [date of use 10 June 2014].

18 Zeffertt, Paizes and Skeen *The South African Law of Evidence*; Schmidt and Rademeyer *Law of Evidence*; Schwikkard *et al Beginsels van die Bewysreg*.

of the victims over another victim's shoulder.¹⁹ After fatally shooting the two journalists, the perpetrator committed suicide. The video evidence could, however, be relevant at an inquest. Social media can also have far-reaching consequences that cannot be controlled.

After the Boston Marathon bombing on 15 April 2013, the FBI launched a public manhunt for the suspects and posted grainy photographs of the suspects online, thereby "crowd-sourcing" their investigation. The manhunt went viral online and soon massive communities on Reddit, 4Chan, Facebook and Twitter joined the manhunt by posting footage, sharing theories and combing every piece of evidence they could get their hands on online and initially identified the wrong person.²⁰

In the recent bail application for an accused charged with statutory rape, the defence sought to introduce the alleged victim's Facebook profile in evidence to help establish that the accused thought the victim was older than 16. The magistrate told defence counsel that the court could not consider Facebook content as evidence.²¹ His statement is clearly wrong, as courts can and have taken Facebook content into account in South Africa, but it is necessary to evaluate how and under which circumstances courts should take social media evidence into account.

In a number of recent cases²² courts were tasked with the settling of disputes where the *facta probanda* occurred on social media. When one takes into account the rapid technological advancement that makes it easier for people to gain access to the internet and social media,²³ it becomes clear that social media will only become more relevant in the day-to-day practice of law in South Africa.

Social media also became an immensely powerful tool for marketers worldwide,²⁴ and with the enactment of new legislation that specifically regulate marketing, such as the

19 McLaughlin and Shoichet 2015 <http://edition.cnn.com/2015/08/26/us/virginia-shooting-wdbj/> [date of use 27 August 2015].

20 Lee 2013 <http://www.bbc.com/news/technology-22214511> [date of use 27 August 2015].

21 Shange 2015 <http://www.news24.com/SouthAfrica/News/Sex-was-consensual-claims-Mandela-grandson-20150821> [date of use 27 August 2015].

22 *Heroldt v Wills* 2013 2 SA 530 (GSJ); *Isparta v Richter* 2013 6 SA 529 (GNP); *Dutch Reformed Church Vergesig v Sooknunan t/a Glory Divine World Ministries* 2012 3 All SA 322 (GSJ).

23 According to emarketer.com the number of smart-phones in use increased from 1.13 billion units in 2012 to 1.75 billion units in 2014. Emarketer.com 2014 www.emarketer.com/Article/Smartphone-Users-Worldwide-Will-Total-175-Billion-2014/1010536 [date of use 31 May 2014].

24 Stiehler 2012 *IRMR* 86.

Consumer Protection Act,²⁵ social media is permeating into all aspects of modern life and the law has to adjust accordingly.

The legislation applicable to the law of evidence and electronic data, chief of which is the *Electronic Communications and Transactions Act*²⁶ (hereafter the ECTA), has been enacted prior to the existence of social media as it is known today. Furthermore, section 3 of the ECTA makes specific provision that the ECTA should not be interpreted in such manner as to exclude existing statutory or common law. The ECTA should therefore be regarded as an act that empowers the use of electronic communication and transactions, but without restricting existing law and business practises.²⁷

Consequently the common law of evidence can still be used to admit electronic evidence. However, the common law of evidence had difficulty in the past with technological advancements much less complex than social media and the internet.²⁸ These difficulties are discussed in greater detail in chapter 2.

Evidence derived from social media may comprise documentary evidence, photographic evidence, video evidence or even real evidence. It is therefore necessary to determine the impact of the ECTA and the common law rules of evidence on social media evidence. Other legislation, such as the *Criminal Procedure Act*²⁹ (hereafter the CPA), the *Civil Proceedings Evidence Act*³⁰ (hereafter the CPEA) and the *Law of Evidence Amendment Act*³¹ (hereafter the LEAA) should also be evaluated with regard to social media evidence.

From the internet-based nature of social media it is clear that all social media interaction occurs on computers or other electronic devices that are connected to the internet. Although the ECTA managed to clear up some of the confusion regarding the admissibility and evidentiary weight of electronic evidence, as well as whether

25 *Consumer Protection Act* 68 of 2008.

26 *The Electronic Communications and Transactions Act* 25 of 2002.

27 See also Section 4 of the ECTA.

28 De Villiers(1) 2010 TSAR 558.

29 *Criminal Procedure Act* 51 of 1977.

30 *Civil Proceedings Evidence Act* 25 of 1965.

31 *Law of Evidence Amendment Act* 45 of 1988.

computerised documents qualify as original documents,³² application of the ECTA has not been consistent.³³

This study endeavours to determine which evidentiary rules apply to social media; in which circumstances they should find application; and what the underlying reasoning behind the classification of social media should be.

In chapter 2 the existing law of evidence is examined with regard to the classification of evidence. Social media evidence is then evaluated and classified according to the existing rules of evidence as to whether, and in which circumstances, it will qualify as documentary or real evidence.

Chapter 3 examines the admissibility requirements applicable to social media evidence including relevance, authenticity, originality and exclusionary rules.

In chapter 4 the different principles that will assist a party in proving social media evidence in court are discussed. This relates to the different forms of social media and how to bring the actual evidence before court; the rules relating to discovery and their applicability to social media evidence; which testimony witnesses may require in order to prove social media evidence; and the doctrine of judicial notice.

Chapter 5 evaluates the principles regarding the probative value that will apply where social media evidence is admitted. Finally, chapter 6 will sum up the different conclusions of the preceding chapters and make some recommendations for possible future development of the evidentiary principles applicable to social media evidence.

The current state of the law of evidence in certain foreign jurisdictions is examined in order to determine whether it may be necessary for the South African law of evidence to develop more and to explore recent interpretations of existing rules. This will not be done as a formal comparative study of foreign law and will only be used to illustrate possible other interpretations of existing legal principles that are broadly similar to South African legal principles in the context of the law of evidence. The chief jurisdictions used are those of the United States of America, Canada and England.

2 Classification of social media within the context of the law of evidence

32 Schmidt and Zeffertt "Evidence" 548-549.

33 De Villiers(2) 2010 TSAR 720.

2.1 Traditional forms of evidence

Although some writers³⁴ identify a number of different types of evidence, such as testimony or oral evidence, hearsay evidence, circumstantial evidence, documentary evidence and real evidence, this classification is too broad for the purpose of this study.

From the definition of hearsay evidence in Section 3(4) of the LEAA³⁵ it is clear that it may be oral or in writing, and that the rule rather relates to the witness tendering the evidence than to the form the evidence takes. If evidence falls within the definition of hearsay evidence, there are certain exclusionary rules which must be addressed before the evidence will be admissible, and as such hearsay evidence should rather be treated as an exclusionary rule³⁶ than as a type of evidence. The impact of the hearsay rule on social media evidence is dealt with later in chapter 3 which examines admissibility.³⁷

Circumstantial evidence is defined by Schmidt and Zeffertt³⁸ as:

A circumstantial fact is one from which an inference may properly be drawn as to the existence, or non-existence, of a fact in issue.

From the discussion on circumstantial evidence by Zeffertt, Paizes and Skeen³⁹ it is clear that circumstantial evidence, and the rules relating thereto, relates to relevance, onus and the rules regarding the proper drawing of inferences. As such it will be dealt with briefly in chapter 5 which examines the probative value of evidence.

It is necessary to determine which forms of evidence are recognised in South African law of evidence in order to determine the rules applicable to each form, and then to evaluate whether social media qualifies as any of these forms and under which circumstances.

34 Keane and McKeown *Modern Law of Evidence* 10.

35 *The Law of Evidence Amendment Act* 45 of 1988.

36 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 369-402.

37 Specifically par 3.2.5.

38 Schmidt and Zeffertt "Evidence" 438.

39 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 93-119.

Traditionally evidence may take three different forms, namely oral evidence, documentary evidence and real evidence.⁴⁰ Oral evidence is evidence presented by way of oral testimony⁴¹ by witnesses testifying under oath or affirmation in Court, and is subject to the rules that relate to oral testimony such as certain exclusionary rules, cross-examination and the prohibition against asking leading questions during evidence in chief.⁴² Although oral evidence will in most cases still be required to establish the relevance of other forms of evidence,⁴³ or in instances where oral testimony are required to meet the requirements relating to the hearsay rule,⁴⁴ oral evidence in and of itself falls outside the scope of this study.

Social media consists of information in digital form. Consequently this study only deals with oral evidence where it is necessary with regard to the relevant rules relating to the admissibility, weight and means of proving the other forms of evidence which social media may take.

2.1.1 *Real and documentary evidence*

In *S v M*⁴⁵ the court defines real evidence as:

... an object which, upon proper identification, becomes, of itself, evidence (such as a knife, photograph, voice recording, letter or even the appearance of a witness in the witness-box).

According to Schmidt and Zeffertt⁴⁶ real evidence has also been extended to cover documents where the document is not presented as a statement but as an object. This would be the case where the evidence is presented to prove that the document exists or was sent to a specific person, as opposed to the contents of the document being true.⁴⁷

40 De Villiers(1) 2010 TSAR 560. See also Schwikkard *et al Beginsels van Bewysreg* 389-441; Schmidt and Zeffertt "Evidence" 520-559 and *S v Mpumlo* 1986 4 All SA 197 (E) at 201; Lin 1993 SJLS 504.

41 Oral evidence may also take some other form which is not, strictly speaking, oral, such as sign language. See Schmidt and Zeffertt "Evidence" 524.

42 Schmidt and Zeffertt "Evidence" 520-535.

43 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 703.

44 S 34(1)(b) of the *Civil Proceedings Evidence Act* 25 of 1965.

45 *S v M* 2002 2 SACR 411 (SCA) 432.

46 Schmidt and Zeffertt "Evidence" 535.

47 See *S v M* 2002 2 SACR 411 (SCA) 432 where a letter was received into evidence as proof that the letter was sent by the appellant to a witness and the contents was found to be irrelevant in that instance.

Documentary evidence, on the other hand, has been defined very widely.⁴⁸ In *Secombe and others v Attorney-General and others*⁴⁹ the court defined a document as follows:

The word 'document' is a very wide term and includes everything that contains the written or pictorial proof of something. It does not matter of what material it is made. If it contains in writing or cyphers proof of some facts it is a document, and the fact that a number of leaves happen to be bound together so as to take the appearance of a book cannot make a difference. If it in fact contains written proof of facts, it is a document.

This definition was expanded with the enactment of the LEAA, where Section 33 states that the term document includes: "any book, map, plan, drawing or photograph".

Although the definition appears to be straightforward, the practical application has been problematic, especially with new technological advancements. One example of this is the question regarding the admissibility of video tapes and audio recordings, and specifically whether it should be classified as real or documentary evidence.⁵⁰ The classification is necessary in order to determine which evidentiary rules are applicable.

In *S v Mpumlo*⁵¹ the court took the view that a video recording does not constitute a document within an evidentiary context and categorised it as real evidence. The court's reasoning was based on the fact that the information captured on a video tape requires a video machine to render the information capable of being perceived by the human senses and that the manner in which information is captured onto a video tape does not qualify as "writing" within the meaning of the definition of "document" in Section 34 of the CPEA.⁵²

The court in *S v Mpumlo*⁵³ remarked that:

It is not however necessary, or perhaps possible, to say where the line should be drawn between documents and articles that are not documents. It is however far less difficult to determine on which side of the dividing line a particular item falls.

48 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 685.

49 *Secombe and others v Attorney-General and others* 1919 TPD 270 at 277-278.

50 De Villiers(1) 2010 TSAR 558.

51 *S v Mpumlo* 1986 4 All SA 197 (E).

52 *S v Mpumlo* at 202.

53 *S v Mpumlo* at 201.

The court's optimistic view regarding the ease with which it can be determined where a specific piece of evidence falls on the "dividing line" between documentary and real evidence has not been borne out by the case law.⁵⁴

In *S v Ramgobin*⁵⁵ the court took the opposite view and classified video tapes as documentary evidence, which required the video tapes not only to be authenticated as a prerequisite for admissibility, but also made it subject to the "originality" rule. The court's reasoning was profoundly influenced by expert testimony regarding the possibility of tampering and editing that would cast doubt upon the credibility and authenticity of a recording, and would consequently also influence its reliability and evidential value. The court also considered the judgment of *S v Mpumlo* and regarded it as incorrect.⁵⁶

In *S v Ramgobin* the court considered that the *dicta* in *S v Singh*⁵⁷ (which only related to the admissibility of audio tapes) was binding. In *S v Singh* the court held that audio tapes was to be dealt with as documents, and as such it was made subject to the originality rule. As a result the court in *S v Ramgobin* held that video tapes should be regarded as documentary evidence, as the court was of the opinion that no practical difference can be drawn between the admissibility of the audio portion and the video portion of a video tape.⁵⁸

In *S v Baleka(1)*⁵⁹ the court held video tapes to constitute real evidence. The court analysed the legal position in detail, with specific reference to the residuary provisions in the *Criminal Procedure Act* relating to the common law of evidence and the position of the law of evidence relating to video tapes in England as on 30 May 1961. It also considered *S v Mpumlo* and *S v Ramgobin*. The court came to the conclusion that the law of evidence had still been in a state of flux at the time and that no hard and fast rule had been laid down at the time when the English courts' decisions were no longer binding upon South African courts. Furthermore, the court held that the main English

54 This is clear from the cases of *S v Mpumlo*, *S v Baleka(1)* 1986 4 All SA 428 (T) and *S v Ramgobin* 1986 4 SA 117 (N) which related to video tapes as evidence. See also *S v Ndiki* 2007 2 All SA 186 (CK) and *Narlis v South African Bank of Athens* 1976 2 SA 573 (A) which relates to computer-generated evidence.

55 *S v Ramgobin* 1986 4 SA 117 (N).

56 *S v Ramgobin* at 125D.

57 *S v Singh* 1975 1 SA 330 (N).

58 *S v Ramgobin* at 129I.

59 *S v Baleka(1)* 1986 4 All SA 428 (T).

decision of *R v Stevenson*,⁶⁰ relied upon in the judgment of *S v Singh*, which in turn was followed in *S v Ramgobin*, did not state any authority for its decision to classify tape recordings as documents and as such was incorrect.

The court in *S v Baleka(1)* then further analysed the reasoning in *S v Ramgobin* and *S v Singh* regarding the respective courts' fears relating to the possibility of tampering with both video and audio tapes and came to the conclusion that the court in *S v Singh* incorrectly conflated the separate issues of authenticity and originality.⁶¹ The court held that authenticity relates to the question of cogency and weight, whereas originality (which is only applicable in the case of documentary evidence) relates to the question of admissibility.

De Villiers⁶² criticised the decision of *S v Baleka(1)* for being vague with regard to the statement that authenticity does not relate to admissibility but only to cogency and weight. According to De Villiers⁶³ the question of whether any evidence is "genuine and authentic" is in fact a question of admissibility. This principle is also in accordance with other authorities⁶⁴ on the law of evidence.

It is submitted that although the court's use of the word *authenticity* was regrettably vague, the principles set out in *S v Baleka(1)* are correct. Perhaps the use of the word *reliability* would have been clearer insofar as it relates to the inherent dangers of video and audio evidence. Consequently evidence must be proven to be genuine and authentic with regard to admissibility (in the sense that the specific piece of evidence is relevant to the enquiry at hand and is what it purports to be). However, where the reliability of the evidence is in issue (for example where there are allegations of interference or deletion or some other issue which affects the reliability) such issues should be evaluated when the court is considering the probative value or weight of the evidence in question.

As seen from the conflicting decisions set out above, the courts have not been uniform in their application of the rules of evidence relating to video evidence. The specific question relating to the distinction between real and documentary evidence, as it

60 *R v Stevenson and others* 1971 1 All ER 678.

61 *S v Baleka(1)* at 431.

62 De Villiers(1) 2010 TSAR 567.

63 De Villiers(1) 2010 TSAR 567.

64 Zeffertt and Paizes *The South African Law of Evidence* 837-842.

relates to video evidence, has not been dealt with by a court other than the High Court. The closest the Supreme Court of Appeal has come to clarifying the issue was in *S v Nieuwoudt*⁶⁵ where it noted *obiter* that the approach of *S v Baleka(1)* appeared to be more acceptable.⁶⁶

The approach used by the court in the English case of *Hill v R*⁶⁷ to determine whether an article is a document has much to commend it:

...I think the form which the so-called document takes is perfectly immaterial so long as it is **information conveyed** by something or other; it may be anything upon which there is written or inscribed information.⁶⁸

According to this view, it is required that the evidence must contain information that makes it a document. This accords with the view of earlier English authority that a document is something which seeks to communicate ideas or information.⁶⁹

Although visibility and reproducibility has in the past been held to be necessary for an article to constitute a document⁷⁰ these requirements are no longer enforced in a strict sense. It is now sufficient that the writing or other form of information is rendered perceptible by some kind of intervention such as a projector for microfilms or transcripts of audio tapes.⁷¹

It therefore appears that the position set out in *S v Mpumlo* regarding the necessity of perceptibility to the human senses is incorrect when seen in the light of the judgment of *Hill v R* and the so-called "residuary provisions" set out in section 252 of the CPA.⁷²

It must be noted that certain writers⁷³ have called for the creation of a fourth *sui generis* category of evidence, which should more aptly deal with the evidence created by modern technology such as computers and the internet. As the law currently stands courts have dealt with evidence such as photographs, video, computer evidence and evidence obtained from the internet as either real or documentary where it has been

65 *S v Nieuwoudt* 1990 4 SA 217 (A).

66 *S v Nieuwoudt* at 231D.

67 *Hill v R* 1945 1 All ER 414.

68 Own emphasis.

69 De Villiers(1) 2010 TSAR 564.

70 De Villiers(1) 2010 TSAR 564.

71 Schmidt and Zeffertt "Evidence" 548-549.

72 *Criminal Procedure Act* 51 of 1977.

73 Schmidt *Bewysreg* 361; Schmidt and Zeffertt "Evidence" 547 (fn1).

in issue. This is also the approach taken by the American courts with regard to electronic evidence, where the source of the electronic evidence is compared to the most similar non-electronic source and the same evidentiary principles are applied.⁷⁴

All forms of social media contain information in digital form and most forms of social media are made with the idea of communicating ideas, information or views to other users. The question now raised is: *Where does the distinction between real evidence and documentary evidence lie and when should social media evidence be considered to be one or the other?*

2.1.2 The purpose test

It appears from a number of sources⁷⁵ that when a court is tasked with determining whether evidence should be dealt with as documentary or real evidence, the purpose for which the evidence is presented should be taken into account.

If the presenter's purpose is for the court to read or listen to and interpret the contents of a piece of evidence, such evidence should be considered documentary evidence.⁷⁶

If the fact in issue is whether the document exists, the condition thereof or some other issue relating to the document's appearance,⁷⁷ the document is tendered as real evidence.⁷⁸

It is submitted that this test should be sufficient in order to determine whether a particular piece of social media should be dealt with as real or documentary evidence.

De Villiers⁷⁹ suggests a five-stage approach to use when evaluating documentary evidence. The first stage would be to determine whether a specific piece of evidence is real or documentary in nature. This should be evident from the evidence itself. Only if it is determined that the evidence is a document will the next step be necessary. Stage two would then be to determine whether the document constitutes documentary evidence or not. It is during this stage that the purpose test should be utilised in order to determine whether a document is presented as documentary evidence or as an

74 Frieden and Murray 2011 *RJLT* 2.

75 Schmidt and Zeffertt "Evidence" 538; De Villiers(1) 2010 *TSAR* 567; *S v Ramgobin* at 125; Quansah 2007 *UBLJ* 123; *S v Ndiki* 2007 2 All SA 185 (CK) par 20.

76 De Villiers(1) 2010 *TSAR* 569.

77 E.g. whether an envelope had been signed across the fold or whether it had been opened.

78 Schmidt and Zeffertt "Evidence" 535.

79 De Villiers(1) 2010 *TSAR* 568-569.

object. Stage three would be to determine whether the common law of evidence or statutory law of evidence should be used with regard to the specific piece of evidence. Stage four is where the evidence is measured against the rules relating to admissibility and only once the evidence is admitted, stage five, where the evidence as a whole is evaluated and the weight of the evidence is determined.

2.2 Forms of social media as evidence

Social media may take many different forms, all digital in nature, which may be presented as evidence, including text, photographs, video, audio, hyperlinks⁸⁰ and any combination of some or all of these forms.

According to the purpose test set out in paragraph 2.1.2, the over-arching factor when determining whether to receive social media evidence as either real or documentary evidence, would be the purpose for which the evidence is presented.

If the purpose test is utilised, it may have the consequence that a specific piece of evidence may be received as either real or documentary evidence, depending on the presenter's purpose.

This difference is better illustrated with an example: A defendant posted a video to YouTube. The video is therefore social media evidence on the basis of the definition set out in paragraph 1.1. If a plaintiff should institute action against the defendant who posted the video on the basis of an averred copyright infringement, the video is presented as evidence that the copyright was infringed by the defendant. As such, the purpose in presenting the video as evidence to the court is to prove that it was in fact posted by the defendant and that it contains copyrighted material.

In this instance the video is presented as real evidence, as the court is not concerned with the interpretation of the content and only needs to observe that the video does in fact contain copyrighted material.

80 Although hyperlinks have the appearance of text, it is differentiated from text because a hyperlink links to further information which is only evident once the link is clicked or if one looks at the underlying computer code for the hyperlink. Hyperlinks are most commonly identified as a piece of text which is blue in colour and underlined. Although this may differ from website to website, it is usually identifiable by the change of the colour of the text.

On the other hand, if a plaintiff issued summons against the defendant on the basis of allegedly defamatory statements contained in the video, the video is presented to prove:

- the actual words used and the defamatory nature of any statement contained therein; and
- that the defendant made (or published) the statement.

Since the court will be required to listen to and watch the video and to interpret the contents therein, the video is presented as documentary evidence.

The purpose of the presenter has to be determined by the court on a case-by-case basis. Although the forms that social media evidence may take are diverse, it should be possible to determine which rules of evidence are applicable to the social media evidence in each instance if one utilises the purpose test set out by De Villiers and always keep the context within which the evidence is presented in mind.

From the case law that has dealt with social media as evidence,⁸¹ it appears that the most common way for social media evidence to be placed before court is by way of printouts from the relevant web page, alternatively by taking *screenshots*⁸² of the content and using a physically printed copy of the screenshot. Once again, one must take the purpose for which the evidence is presented into account when determining whether that evidence is real or documentary evidence.

In the *Heroldt* case the evidence was presented to show the defamatory nature of certain comments made by the respondent. The court therefore interpreted the words used in the comments published by the respondent and the evidence was classified as documentary.

In the case of *Experian South Africa v Haynes*⁸³ the court utilised a printout of the respondent's LinkedIn profile, which had been attached to the applicant's replying

81 *Heroldt v Wills; Experian South Africa v Haynes* 2013 1 SA 135 (GSJ); *Dutch Reformed Church Vergesig v Sooknunan t/a Glory Divine World Ministries*.

82 A screenshot is the equivalent of a photograph taken by a camera, the only difference being that the instrument used to capture the image is a computer and not a camera. It must be noted that newer models of mobile phones (the so-called smartphones) also have the capability of capturing the image displayed on the screen as a screenshot.

83 *Experian South Africa v Haynes* 2013 1 SA 135 (GSJ).

affidavit, to confirm that the respondent had in fact connected with certain people in violation of a restraint of trade agreement. A printout of a web page is akin to a photograph and as such should be dealt with as documentary evidence.⁸⁴ Although the admissibility of the LinkedIn profile was not disputed by the respondent, the mere acceptance of such social media evidence, without examining the rules relating to admissibility, is open to critique and will be discussed in greater depth in the next chapter.

2.3 Conclusion

Social media evidence can take a number of different forms, all of which can be classified as either documentary or real evidence. The form it should be received as will be determined by the purpose test: if the evidence is tendered to prove that the contents thereof is true, it should be received as documentary evidence; if it is tendered to prove something other than the contents being true, it should be dealt with as real evidence.

The following chapter deals with the rules regarding admissibility of either real or documentary evidence.

3 The admissibility of social media evidence

Although documentary and real evidence may bear some resemblance to each other as discussed in detail above⁸⁵ each has their own admissibility requirements, although there is some overlap.

For real evidence to be admissible it has to meet the requirements of being relevant⁸⁶ and authentic,⁸⁷ whereas documentary evidence needs to be relevant, authentic, original and it must be stamped (where applicable).⁸⁸

84 Sections 33 and 34 *Civil Proceedings Evidence Act* 25 of 1965.

85 Paragraph 2.1.1.

86 De Villiers(1) 2010 TSAR 572.

87 Schwikkard *et al Beginsels van die Bewysreg* 426; Schmidt and Zeffertt "Evidence" 535; Zeffertt, Paizes and Skeen *The South African Law of Evidence* 703.

88 Schmidt and Zeffertt "Evidence" 538; Schwikkard *et al Beginsels van die Bewysreg* 437; Zeffertt, Paizes and Skeen *The South African Law of Evidence* 685; De Villiers(1) 2010 TSAR 572.

In addition to these requirements, the evidence in question (whether real or documentary) must not be influenced by one of the exclusionary rules which may render the evidence inadmissible even if it does satisfy the other requirements.

3.1 Relevance

The general rule relating to admissibility is that all relevant evidence is admissible, unless it is excluded due to the operation of one of the exclusionary rules.⁸⁹ The general rule, although stemming from the English common law⁹⁰ has found confirmation in legislation.⁹¹ This does not mean that all logically relevant evidence, or which may be capable of logical persuasion, is necessarily admissible in a court of law, nor does it mean that any evidence logically irrelevant to the question in hand is necessarily inadmissible. Relevance has a more technical meaning within a legal context.⁹²

The determination of relevance within a legal context "is essentially a matter of reason and common sense".⁹³ Whenever relevance is to be determined there are two variables in juxtaposition that need to be evaluated. The first is logical relevance or rational persuasion and the second is the extent to which the reception of such evidence is deemed undesirable for various reasons.⁹⁴

According to Zeffertt, Paizes and Skeen:⁹⁵

The test is essentially a practical one. The court should consider all material which may help it reach a proper conclusion. But the value of some evidence is outweighed by the problems it creates. Balancing the competing considerations is, within the limits of fairly wide general principles, a matter for the discretion of the judicial officer.

Although the determination of relevance must ultimately be done by the judicial officer in the specific case where the issue arises, a number of broad principles have crystallised in order to assist courts during the determination process.

89 Schmidt and Zeffertt "Evidence" 434.

90 Schwikkard *et al Beginsels van die Bewysreg* 47.

91 Section 210 of the CPA and S2 of the CPEA.

92 Schmidt and Zeffertt "Evidence" 435.

93 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 219.

94 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 222.

95 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 222.

According to Schmidt and Zeffertt⁹⁶ relevant evidence falls in one of four classes, namely:

- as constituting a fact in issue (the *facta probanda*);⁹⁷
- as evidence from which the existence (or non-existence) of a fact in issue may properly be drawn (indirect or circumstantial evidence, the *facta probantia*);
- as a requisite for the admissibility of other evidence; and
- as regards the reliability of other evidence or relating to the credibility of witnesses.

The United States' *Federal Rule of Evidence 401* has a similar test for determining relevance:

Evidence is relevant if:

- (a) it has a tendency to make any fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.⁹⁸

Rule 402⁹⁹ is similar to the South African legislative provisions set out in section 2 of the CPEA and section 210 of the CPA, which are both couched in negative terms and exclude any irrelevant evidence as being inadmissible.

The four-fold classification propounded by Schmidt and Zeffertt¹⁰⁰ does not deal with evidence which is usually admitted as a matter of course, namely background evidence. According to the notes of the Advisory Committee on the *Federal Rules of Evidence*¹⁰¹ background evidence is universally admitted as necessary to form a proper understanding of the case and it is therefore legally relevant.

96 Schmidt and Zeffertt "Evidence" 437.

97 The *facta probanda* constitute the necessary facts that need to be proven by a litigant in order to succeed with his/her case and are determined by the substantive law applicable to the dispute. See Schmidt and Rademeyer *Bewysreg* 6.

98 Rule 401 of the Federal Rules of Evidence Legal Information Institute *Rule 401* https://www.law.cornell.edu/rules/fre/rule_401 [date of use 19 August 2015].

99 Legal Information Institute *Rule 402* https://www.law.cornell.edu/rules/fre/rule_402 [date of use 19 August 2015].

100 Schmidt and Zeffertt "Evidence" 437.

101 Legal Information Institute Rule 401 https://www.law.cornell.edu/rules/fre/rule_401 [date of use 19 August 2015].

3.1.1 *Direct evidence of the facts in issue*

Where evidence directly proves or disproves a fact in issue (the *factum probandum*) it will always be relevant.¹⁰² The facts in issue may be reduced by way of formal admissions in both criminal and civil law matters, and only the facts that remain in dispute after the formal admissions have been taken into account will need to be proven.¹⁰³ This constitutes a waiver of proof by the party against whom the evidence is brought.¹⁰⁴

Where the *facta probanda* occurred on social media, such as in the *Heroldt, Isparta* and *Dutch Reformed Church Vergesig* cases (which all relate to defamatory comments posted on Facebook), the social media evidence will always be relevant and would therefore meet the requirement of relevance for both real and documentary evidence.

3.1.2 *Indirect evidence, evidence as requirement for admissibility of other evidence and evidence regarding credibility of witnesses and reliability of other evidence*

Evidence that tends to prove or disprove a fact in issue indirectly will also be relevant.¹⁰⁵ In *R v Mpanza*¹⁰⁶ the court held that: "Facts are ... relevant if from their existence inferences may properly be drawn as to the existence of a fact in dispute." When evidence of this nature is presented, it becomes necessary for the court to weigh the competing interests against each other as set out in paragraph 3.1.

During this stage the court will make a value judgment regarding the potential weight of the evidence.¹⁰⁷ It must be kept in mind that there is no uniform standard against which evidence must be measured before it is deemed relevant.¹⁰⁸ This is a value judgment made by the court in the circumstances of each case by carefully taking into account the competing interests. On the one hand the court should consider all evidence which may help it to reach a proper conclusion, whilst on the other hand there are certain policies and rules which must also be taken into account and may require the exclusion of relevant evidence.

102 Schmidt and Zeffertt "Evidence" 438.

103 Schmidt and Zeffertt "Evidence" 439.

104 Schwikkard *et al Beginsels van die Bewysreg* 505.

105 Schwikkard *et al Beginsels van die Bewysreg* 50.

106 *R v Mpanza* 1959 2 SA 352 (A) at 362E-F.

107 Schwikkard *et al Beginsels van die Bewysreg* 51.

108 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 222.

The first difficulty that needs to be overcome is to determine whether the evidence will be sufficiently legally relevant. In *R v Trupedo*¹⁰⁹ the fact in issue was the identity of the perpetrator. The intruder made two footprints outside the house in question and a police dog was allowed to smell the footprints. The accused and seven other people were sleeping in a nearby room and the police dog was allowed to smell each of the eight people in turn. The dog smelled the accused first, went on to smell each of the other seven people, finally returned to the accused and barked.

The trial court admitted this evidence as proof that the accused was in fact the perpetrator, but this was held by the then Appellate Division to have been in error, as this type of evidence was unreliable and almost completely worthless. In dismissing the evidence, the court also took into account the dramatic nature of the evidence and the possibility that a jury may give the evidence exaggerated importance and thereby prejudice the accused unfairly.¹¹⁰

The possibility of prejudice, coupled with the unreliable nature of the evidence itself, was enough for the court to determine that the evidence should have been inadmissible as being insufficiently relevant.

Although this decision was followed by the same court in *S v Shabalala*¹¹¹ on substantially similar facts, this does not mean that evidence of animal behaviour will always be inadmissible in every conceivable circumstance.¹¹² The value judgment must be made in every case upon its own merits, taking into account the facts of that particular case.

When evaluating whether evidence will be relevant to the enquiry at hand, a court must also determine the potential weight the evidence may have. Evidence that has no value to prove or disprove any of the issues the court needs to determine will be irrelevant to the enquiry at hand and should therefore be inadmissible. Potential weight (as opposed to final weight) must be considered when determining relevance.¹¹³

109 *R v Trupedo* 1920 AD 58.

110 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 223.

111 *S v Shabalala* 1986 4 SA 734 (A).

112 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 223-224.

113 Schwikkard *et al Beginsels van die Bewysreg* 51.

Admissibility and weight (and by extension the question of whether the party bearing the *onus* has satisfied it) must not be confused with each other.¹¹⁴

During the enquiry into the potential weight of the evidence to be introduced, the court must also be aware of other practical considerations which may render the evidence inadmissible. In *Delew v Town Council of Springs*¹¹⁵ the court was concerned with so-called "similar fact evidence". The dispute related to electricity charges levied against the appellant by the respondent, and the appellant's defence was that the electricity meters were defective and sought to introduce evidence of previous years' charges to prove that the charge that formed the basis of the dispute was excessive. The high court, on appeal, confirmed that the evidence was inadmissible and the reasons for its decision related not only to legal, but also to practical considerations.

The court held that the only way to determine whether it would be proper to draw the inference from the "similar facts" which the appellant sought to have drawn, would entail a lengthy investigation into other facts and would require the court to adjudicate the same issue on the collateral facts that it has to adjudicate in the first instance. This would entail a proliferation of collateral issues which are not connected to the issue in dispute and which would ultimately waste time without bringing the dispute any closer to finalisation.

Zeffertt, Paizes and Skeen¹¹⁶ state that:

The Court will require a high degree of relevance before it will receive evidence which involves a lengthy investigation of collateral issues or is likely to cause prejudice or confusion, or raise difficult questions of credibility, or whose reception would materially involve any other serious disadvantage.

Frieden and Murray¹¹⁷ distinguish between logical relevance and pragmatic relevance in American jurisprudence. The requirement of logical relevance is not difficult to establish in American law,¹¹⁸ and it is only when pragmatic relevance is considered that difficulties arise. The pragmatic relevance requirement is codified in Federal Rule

114 *S v Baleka*(1) 1986 4 All SA 428 (T).

115 *Delew v Town Council of Springs* 1945 TPD 128.

116 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 222.

117 Frieden and Murray 2011 *RJLT* 4-7.

118 Frieden and Murray 2011 *RJLT* 4-5 and *Lorraine v Markel American Insurance Company* 241 F.R.D at 541.

of Evidence 403¹¹⁹ which gives a court the discretion to exclude logically relevant evidence where the probative value of the evidence is substantially outweighed by the dangers of:

- unfair prejudice;
- confusing the issues;
- misleading the jury;
- undue delay;
- wasting time; or
- the needless presentation of cumulative evidence.

Although the principles of South African law relating to relevance have not been codified in a fashion similar to the *Federal Rules of Evidence*, the principles are broadly the same.

When taking American jurisprudence in consideration, however, one should be aware of the fact that the jury system has necessitated a formulistic and rigid evidentiary system.¹²⁰ One should therefore guard against merely transplanting American principles into South African law by carefully examining the underlying rationale behind any particular rule (and its application by American courts) against South African legal principles with specific reference to the *Constitution of the Republic of South Africa*, 1996, the LEAA, the CEAA and the CPA.

The American courts' application of the evidentiary principles regarding admission of electronic evidence (and by extension social media evidence) may be instructive factors to consider when South African courts are wrestling with the same questions, but they should always be interpreted with South African legal principles in mind.

In *Experian South Africa (Pty) Ltd v Haynes*¹²¹ the issue in dispute was whether the respondent had breached a restraint of trade agreement with the applicant. The respondent denied that he had obtained any confidential information or customer connections whilst he was employed with the applicant. The court examined the

119 *Federal Rules of Evidence Rule 403*, 1975 (as amended) https://www.law.cornell.edu/rules/fre/rule_403 [date of use 23 August 2015].

120 *S v Baleka(1)* 1986 4 All SA 428 (T) at 432.

121 *Experian South Africa (Pty) Ltd v Haynes* 2013 1 SA 135 (GSJ).

contents of the respondent's LinkedIn profile¹²² (which had been attached to the applicant's replying affidavit) and used it to confirm the seniority of the position the respondent had fulfilled in the applicant's business as well as confirmation that the respondent was in contact with the applicant's customers after he left the employment of the applicant.¹²³ It would appear that the admissibility (and by extension the relevance) of the LinkedIn profile was not disputed.¹²⁴

From the *Experian* case it is clear that social media evidence was used as indirect evidence to disprove the respondent's defence, and as such deemed relevant.

Where evidence is required to render other evidence admissible, social media evidence would, in principle, be relevant. This should be determined on an *ad hoc* basis by the court tasked with the enquiry, and it is submitted that the other rules relating to the admissibility of social media evidence should be adhered to.

Likewise, social media evidence that relate to the credibility of witnesses or the reliability of other evidence would be relevant. It should therefore, in principle, be possible to cross-examine a witness on previously inconsistent statements made by that witness on social media and social media evidence may also be used as corroborating evidence.

What makes social media evidence unique and distinguishable from other forms of evidence is the massive platform created where anyone (without requiring any specific technical knowledge or skills other than knowing how to use a computer, tablet or smartphone) may disseminate personal information, photographs, video and opinions to potentially the entire world. The scope of social media may therefore entail the additional risk that social media evidence may be deemed undesirable for the reasons relating to practicality and prejudice as set out above. Although this has to be determined on a case-by-case basis, courts may require a higher degree of relevance in order to offset the disadvantages flowing from the admission thereof.

122 LinkedIn is a social media network that provides a platform for professionals to connect with other professionals worldwide by listing skills, making connections and obtaining endorsements from other professionals for their specific skillset. Source: https://www.linkedin.com/about-us?trk=hb_ft_about.

123 *Experian South Africa (Pty) Ltd v Haynes* at paragraphs 42 and 49-50.

124 See *Experian* case paragraph 49.

In order for courts to properly apply the rules relating to legal relevance to social media evidence, it would require an understanding of how social media functions and what its capabilities and limitations are. This also appears to be the approach taken by the courts in the *Heroldt*, *Isparta* and *Dutch Reformed Church Vergesig* cases, where the judges took some time to delve into the basic functionality of Facebook. As Erlank¹²⁵ notes in his discussion of the *M v B*¹²⁶ case:

The court in the current case therefore accepted these descriptions and background information as sufficient and the technical novelty of social media now seems to have been effectively incorporated into our law, to such an extent that it will not be necessary in future cases to waste precious time on rehashing the basics.

In appropriate circumstances the very nature of social media evidence may in itself be relevant. For example the publication of defamatory matter on social media may go *viral*¹²⁷ which may compound a plaintiff's damages, although whether these damages will be recoverable is another matter entirely. Even the mere possibility of going viral may have to be considered by courts when evaluating principles like the "balance of convenience" when adjudicating applications for interdicts.

Cases using social media evidence will become more frequent and social media evidence will be utilised more often as it continues to permeate modern society.¹²⁸ The relevance of social media evidence may also stretch further than mere posts on social networking websites.

In *Rosemary Carter v The Dominion of Canada General Insurance Company*¹²⁹ the plaintiff in a personal injury lawsuit was ordered to discover her internet history and Facebook account use history to the defendant. Although the relevance threshold for

125 Erlank 2014 JQR Aug-Oct 2014.

126 *M v B* 2015 1 SA 270 (KZP).

127 "Viral" in this instance is used to describe the process of sharing information on social media from person to person in very quick succession which may be aggravated by the functionality of some social media services of sharing content to multiple other people with a single click. The most well-known instance of social media going viral is probably the music video for Gangnam Style which stands at more than 2.3 billion views. Officialpsy 2012 *Gangnam Style* <https://www.youtube.com/watch?v=9bZkp7q19f0> [date of use 19 August 2015].

128 Social media evidence has not only been used in defamation (*Heroldt*, *Isparta* and *Dutch Reformed Church Vergesig*) and restraint of trade (*Experian*) cases, but has also made inroads in labour law (*Beaurain v Martin* NO 2014 35 ILJ 2443 (LC)) and have even been used as a means to effect service (*CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD)). See also generally Erlank 2014 JQR.

129 *Rosemary Carter v The Dominion of Canada General Insurance Company* 2010 203 CRR (2d) 222.

an order of this kind is lower than would be the case for admissibility during trial proceedings, it may serve as an indication that lawyers worldwide will continue to find new and innovative ways to find legal relevance in the treasure trove of information that is social media. The court found that the request for information had a "semblance of relevance" which was what was required at that stage of the proceedings. The court held further:¹³⁰

It does so, by possibly providing a window into what physical capacity the plaintiff has to keyboard, access the internet and communicate with family and friends on Facebook and thus what capacity she may have to work.

It is therefore important to examine all avenues of possible relevance when dealing with social media.

¹³⁰ *Rosemary Carter v The Dominion of Canada General Insurance Company* 2010 203 CRR (2d) 222 at p 236.

3.2 Exclusionary rules

3.2.1 Character

Character evidence is admissible in South Africa if it would have been admissible in terms of English law on 30 May 1961. This is by virtue of the so-called "residuary" provisions of the CPA¹³¹ and the CPEA.¹³² Theoretically, in English law, character evidence refers to evidence of general reputation and not to specific opinions held by the witness.¹³³ In practice this line is somewhat blurred and evidence that an accused was a good father, conscientious employee or had a good war record was admitted¹³⁴ although it appears to be confined to general assertions and not specific instances of good behaviour.

In criminal cases evidence-in-chief led by the state to the effect that the accused has a bad character, is inadmissible,¹³⁵ unless the character evidence has some bearing on issues unrelated to the reputation of the accused.¹³⁶ The state may also not cross-examine the accused on specific instances of bad behaviour unless it falls within one of the exceptions set out in Section 197 of the CPA.¹³⁷

By extension of the existing rules, social media evidence presented only to show that the accused is a bad person (and therefore more likely to be guilty) would be inadmissible as being irrelevant. However, if social media evidence that portray the accused in a negative light is presented for the purpose of rebutting evidence by the accused of his/her own good character, as an element of the crime with which he/she is charged, or to show that the accused's intentions were not innocent, such evidence would be relevant to something other than the reputation of the accused and would therefore be admissible. These examples are not exhaustive.¹³⁸

Where social media evidence relating to a witness' character is put to any witness for the purpose of attacking that witness' credibility, it would be admissible, subject to the

¹³¹ S227(1).

¹³² S42.

¹³³ Schmidt and Zeffertt "Evidence" 440.

¹³⁴ Zeffertt, Paizes and Skeen *The South African Law of Evidence* 228 fn5.

¹³⁵ Schmidt and Zeffertt "Evidence" 441.

¹³⁶ See for example Zeffertt, Paizes and Skeen *The South African Law of Evidence* 236-238 for an in-depth discussion of when character evidence will be relevant to an issue.

¹³⁷ Zeffertt, Paizes and Skeen *The South African Law of Evidence* 234-235.

¹³⁸ See Zeffertt, Paizes and Skeen *The South African Law of Evidence* 227-250; Schmidt and Zeffertt "Evidence" 440-449; Schwikkard *et al Beginsels van die Bewysreg* 62-74.

privilege against self-incrimination and the bounds of decency and propriety as well as relevance.¹³⁹ Where evidence is put to a witness, it must be properly proven within the course of the trial, failing which it may be declared inadmissible at a later stage.¹⁴⁰

In civil cases the character of the plaintiff and the defendant is normally irrelevant,¹⁴¹ although there are exceptions.¹⁴²

The peculiar nature of social media must be taken into account, especially when evaluating the relevance of character evidence. According to Grimmelman:¹⁴³

Social-network-site profiles are wholly social artefacts: controlled impressions for a specific audience, as much performative as informative. Every letter and pixel of Barack Obama's Facebook profile was carefully crafted to send the precise messages his campaign wanted to send.

Although not every person puts the same amount of thought into their social media profiles as that of the president of the United States during an election campaign, a person's online profile is not necessarily a true reflection of who they are. Nor are the posts on their walls or Twitter feeds necessarily a reliable barometer of all their views and interests. Social media as character evidence should therefore be treated with circumspection.

3.2.2 *Similar fact evidence*

"Similar facts" in the law of evidence refers to facts that are similar to the facts in issue, but do not form part of the *facta probanda*. This exclusionary rule is concerned with determining the principles when similar fact evidence would be admissible.¹⁴⁴

Ultimately the admissibility of similar fact evidence is a question of its degree of relevance. In *S v Banana*¹⁴⁵ the court examined the authority on similar fact evidence and came to the conclusion that the test is whether the probative value of the similar

139 Schmidt and Zeffertt "Evidence" 440.

140 Schmidt and Zeffertt "Evidence" 531.

141 Schmidt and Zeffertt "Evidence" 440.

142 The character of a party may be relevant as an element to the dispute, such as defamation cases, claims for seduction (where the virginity of the plaintiff is in issue). See Schmidt and Rademeyer *Bewysreg* 441.

143 Grimmelman 2008-2009 *Iowa Law Review* 1153.

144 Schmidt and Rademeyer *Law of Evidence* 15-3.

145 *S v Banana* 2000 3 SA 885 (ZS).

fact evidence is strong enough to offset the prejudice its admission may cause.¹⁴⁶ It is therefore a question of legal relevance that the court must determine.

When evaluating the relevance of similar fact evidence, the court will also take constitutional considerations into account. Accordingly a court will more readily admit similar fact evidence when the accused seeks to introduce it than when the state wants to introduce it against the accused.¹⁴⁷

The first issue to be determined is that of logical relevance. According to Schmidt and Rademeyer¹⁴⁸ there needs to be a nexus in time, method or circumstance¹⁴⁹ (as opposed to mere similarity) between the similar facts and the facts in dispute.

Similar facts have been admitted as proving continuity,¹⁵⁰ to rebut coincidence¹⁵¹ and to rebut an alibi.¹⁵² The question will always be one of relevance and the competing interests of admitting all relevant evidence and prejudice must also be kept in mind.

Social media evidence of similar facts would therefore, in principle, be admissible if it is relevant and it wouldn't cause undue prejudice, subject to the other evidentiary rules relating to the admissibility of real and/or documentary evidence.

3.2.3 *Opinion*

What is meant by opinion evidence is that the opinion is not the fact in issue but rather evidence about a fact in issue that is to be determined by the court. The fundamental rule is that a witness is not allowed to state his/her opinion on a matter to be determined by the court.¹⁵³ An admissible opinion must also be given *viva voce* in court.¹⁵⁴ It may not be handed in from the bar except with the opponent's consent¹⁵⁵ nor may it be read out by a witness and presented as a written document.¹⁵⁶

146 *S v Banana* at 895-896.

147 Schmidt and Rademeyer *Law of Evidence* 15-3.

148 Schmidt and Rademeyer *Law of Evidence* 15-4.

149 *R v Bond* 1906 2 KB 389 at 424.

150 *Valkin v Daggafontein Mines Ltd* 1960 2 SA 507 (W).

151 *R v Roets* 1954 3 SA 512 (A).

152 *R v Dlamini* 1960 1 SA 880 (D).

153 Schmidt and Rademeyer *The Law of Evidence* 17-4.

154 Schmidt and Rademeyer *The Law of Evidence* 17-4.

155 *Government of the Republic of South Africa v Ngubane* 1972 2 SA 601 (A).

156 *R v Van Schalkwyk* 1948 2 SA 1000 (O).

Opinion evidence does not satisfy the definition of social media as it is not digital and consequently falls outside the scope of this study.

3.2.4 Hearsay

Although the exclusionary rule relating to hearsay evidence was received into South African law from English law, the introduction of the LEAA means that the admission of hearsay evidence is now exclusively regulated by statute.¹⁵⁷

The LEAA¹⁵⁸ defines hearsay evidence as: "... evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

In terms of Section 3(1) of the LEAA, the general rule is that hearsay evidence is inadmissible unless:

- a) each party against whom the evidence is sought to be introduced consents to the admission thereof;
- b) the person on whose credibility the probative value relies also testifies at the proceedings; or
- c) the court may admit the evidence in the interest of justice after having regard to:
 - i. the nature of the proceedings;
 - ii. the nature of the evidence to be admitted;
 - iii. the purpose for which the evidence is tendered;
 - iv. the potential probative value of the evidence;
 - v. the reason why the evidence is not given by the person on whose credibility the probative value of the evidence depends;
 - vi. any prejudice to a party which the admission of such evidence might cause; and
 - vii. any other factor which, in the opinion of the court, should be taken into account.

If the court is informed that the person on whose credibility the probative value of the evidence depends will himself/herself testify at a later stage, the evidence may be

¹⁵⁷ Schmidt and Rademeyer *The Law of Evidence* 18-4.

¹⁵⁸ LEAA S3(4).

provisionally admitted, but if such person does not testify during the proceedings, the evidence must be excluded unless it is admitted in terms of Section 3(1)(a) or (c) of the LEAA.¹⁵⁹

Prior to the enactment of the LEAA, the admission or exclusion of hearsay evidence was dealt with in terms of the English Common law, with the effect that voluminous case law surrounding the hearsay exceptions developed. Although the enactment of the LEAA had a profound impact on this area of the law of evidence, Schmidt and Rademeyer¹⁶⁰ are of the view that the common law relating to hearsay evidence still has a role to play, as it was not the legislator's intention to restrict the admission of hearsay evidence any further.

Schmidt and Zeffertt¹⁶¹ are also of the view that courts may take previous case law and the common law relating to hearsay into account when determining whether to admit hearsay evidence in terms of Section 3(1)(c) of the LEAA.

It should also be kept in mind that the provisions of Section 3 of the LEAA are "subject to the provisions of any other law",¹⁶² which implies that any other statutory means of admissibility would still be available to a litigant.¹⁶³ The enactment of the ECTA may have a significant role to play in the admission of social media hearsay evidence.

The difficulties with the admission of evidence that are computer-generated or stored came to the fore in *Narlis v South African Bank of Athens*.¹⁶⁴ The case was adjudicated prior to the enactment of the LEAA, and the respondent had sought to introduce computerised records of a bank account in order to prove the indebtedness of the appellant as surety in the court *a quo*.¹⁶⁵ To this end the court examined whether the evidence would be admissible in terms of Section 34(1) of the CPEA, which provides for the admission of documentary evidence of a fact in issue if the original document is produced; if the person who made the documentary statement had personal

159 Schmidt and Zeffertt "Evidence" 470.

160 Schmidt and Rademeyer *Bewysreg* 474.

161 Schmidt and Zeffertt "Evidence" 473.

162 LEAA S3(1).

163 *Giesecke and Devrient South Africa (Pty) Ltd v Minister of Safety and Security* 2012 2 SA 137 (SCA).

164 *Narlis v South African Bank of Athens* 1976 2 SA 573 (A).

165 *Narlis v South African Bank of Athens* 576-578.

knowledge of the facts; or if the documentary statement formed part of a continuous record and that person is called as a witness.

Section 34(1)(b) provides for an exception to the hearsay rule and allows a court the discretion to admit the documentary statement if it is not reasonably practical for the person who made the statement to testify or if that person is for some reason unfit or unable to testify.¹⁶⁶ The court in *Narlis* came to the conclusion that the evidence was inadmissible because the statement sought to be introduced was computer-generated and a computer is not "a person" for the purpose of Section 34(1) of the CPEA.¹⁶⁷ As such it could not be admitted in terms of the provisions of Section 34 of the CPEA.

It is submitted that this reasoning is based on a flawed understanding of how a computer works. No matter how automated a computer system is, there is ultimately a person or persons responsible for the proper functioning of that system.¹⁶⁸ It can therefore be argued that any computer-generated statement is ultimately made by a person and that the means used by that person to make the statement is the computer system.

These difficulties have been addressed with the enactment of the ECTA. Section 15(1) of the ECTA provides that:

In any legal proceedings the law of evidence must not be applied so as to deny the admissibility of a data message, in evidence –

- (a) on the mere grounds that it is constituted by a data message; or
- (b) it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

Social media evidence, by its very nature, is generated or posted by a person (the end-user). It is therefore unlikely that courts will follow the *Narlis* decision when evaluating social media evidence, especially seen in the light of more recent legislative provisions as set out above.

¹⁶⁶ Section 34(1) of the CPEA.

¹⁶⁷ *Narlis v South African Bank of Athens* at 577.

¹⁶⁸ The software developer is responsible for the programming of a system and the end-user is responsible for the input of data.

For the purpose of Section 34 of the CPEA Schmidt and Zeffertt¹⁶⁹ distinguish between two types of documents:

- (a) Documents that reflect a statement of intention by the writer (such as wills and contracts).
- (b) Documents reflecting statements of fact (such as affidavits).

According to their view only type (b) documents will constitute hearsay evidence as type (a) documents are not tendered to prove the truth of their contents.

Consequently social media evidence that constitutes hearsay should be dealt with in the same manner as any other form of hearsay evidence in terms of Section 3 of the LEAA.

Where the party against whom the hearsay evidence is to be introduced consents to the admission thereof, the exclusionary rule against the admission of hearsay evidence expires, and the evidence will be admitted in terms of Section 3(1)(a) of the LEAA.¹⁷⁰

If the person on whose credibility the probative value of the hearsay evidence depends will himself/herself testify at the proceedings, the hearsay evidence may be admitted since the truth of the hearsay evidence may be tested by questioning the person on whose credibility it depends. The possibility of prejudice also falls away as the court will have the opportunity to evaluate the credibility of the witness itself.¹⁷¹ It is essential for admission under Section 3(1)(b) that the witness on whose credibility the hearsay evidence depends confirms the contents of the hearsay evidence and can be cross-examined thereon failing which the hearsay evidence may not be admitted in terms of Section 3(1)(b).¹⁷² The court also has a discretion in terms of Section 3(1)(c) of the LEAA to admit hearsay evidence.

169 Schmidt and Zeffertt "Evidence" 538.

170 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 370.

171 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 370.

172 *S v Ndhlovu and Others* 2002 2 SACR 325 (SCA) at para 28-34.

Courts will more readily exercise the discretion set out in Section 3(1)(c) in civil trials¹⁷³ than in criminal trials¹⁷⁴ as it is imperative to maintain the constitutional right of an accused to a fair trial. In *S v Ramavhale*¹⁷⁵ the court held that a judge:

... should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so.

The factors the court needs to consider when deciding whether to admit hearsay evidence in the interest of justice, are set out in sub-sections (i) to (vii) of Section 3(1)(c).¹⁷⁶

When evaluating whether social media evidence constitutes hearsay it is essential to determine whether or not the probative value of the evidence to be adduced depends on the person giving the evidence or on someone else. If the probative value depends on someone other than the person giving the evidence, such evidence can only be admitted in terms of one of the three sub-sections of Section 3 of the LEAA discussed.

When admission is sought in terms of Section 3(1)(c) it must be borne in mind that the purpose of the prohibition against hearsay evidence is founded on the premise that it is fundamentally risky to use hearsay evidence as a means of ascertaining the truth, since the person on whose credibility the evidence relies is not subject to the normal safeguards of the law of evidence such as answering a number of questions which gives background and context and being subject to cross-examination during which the other party may not only test the veracity of the evidence but may also observe the witness' general demeanour.¹⁷⁷

The general untrustworthiness of hearsay evidence may not necessarily be applicable to social media evidence. According to Bellin:¹⁷⁸

Statements broadcast on social media or via text messaging, however, are often quite reliable because they are (1) uttered while events are unfolding and

173 *Metedad v National Employer's General Insurance Co Ltd* 1992 1 SA 494 (W).

174 *S v Ndhlovu and Others* at para 16.

175 *S v Ramavhale* 1996 1 SACR 639 (A) at 650.

176 For a full discussion on this aspect of the admission of hearsay evidence see Schwikkard *et al Beginsels van die Bewysreg* 300-306; Zeffertt, Paizes and Skeen *The South African Law of Evidence* 371-380; Schmidt and Rademeyer *The Law of Evidence* 18-9 to 18-15.

177 Zeffertt and Paizes *The South African Law of Evidence* 2nd ed 336.

178 Bellin 2013 *Minnesota Law Review* 11.

so reflect participants' perceptions prior to the distorting effects of litigation (and time), and (2) preserved in precisely the form in which they were uttered.

Where witnesses' memory of utterances by another person may degrade over time, statements made online remain intact as originally posted, and even where it is changed or edited after the fact, the mere fact of changing or editing leaves a trace that can be observed.

Because electronic statements on social media are invariably recorded¹⁷⁹ and can be shown in court, electronic hearsay has one less danger because when a witness testifies in court as to what another person said, the witness in court may be mistaken about the actual words used in addition to any inaccuracy in the statement made to him.

A statement made online also does not require the co-operation of a witness. It is objectively observable by the court itself.

3.2.5 *Res gestae*

According Zeffertt, Paizes and Skeen:¹⁸⁰

The central notion of the doctrine [of *res gestae*], therefore, is that evidence may be admissible either because it is itself a fact in issue or a fact relevant to an issue, or because it is so closely associated in time and circumstance with the transaction under investigation that it has a high degree of relevance.

Although the concept of *res gestae* has been criticised,¹⁸¹ it still forms part of the South African law of evidence. The doctrine of *res gestae* mostly relates to relevance theory and hearsay, and it should be borne in mind that the provisions of Section 3 of the LEAA will still apply to the *res gestae* if it qualifies as hearsay in terms of that act.¹⁸² The admission of *res gestae* is to enable the court to see the "whole story", subject to the rules relating to hearsay.

179 Bellin 2013 *Minnesota Law Review* 38.

180 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 411.

181 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 411-412.

182 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 412.

In terms of the common law the courts have received statements that accompany or explain a relevant act,¹⁸³ spontaneous statements,¹⁸⁴ statements that prove a state of mind¹⁸⁵ and statements that prove physical sensations.¹⁸⁶

The first obstacle that evidence which qualifies as *res gestae* must overcome is that of relevance.¹⁸⁷ When evaluating the relevance of *res gestae* the court should utilise the test set out in paragraph 3.1. The second obstacle that may hinder admission of *res gestae* is the rules relating to hearsay.

If social media evidence is relevant and forms part of the *res gestae* it would in principle be admissible, subject to exclusionary rules and the other rules relating to admissibility (being authenticity and the originality rule discussed below).

3.2.6 *Prior consistent statements*

Prior consistent statements relate to what a witness has said (or wrote) previously outside the witness box.¹⁸⁸ It amounts to a witness stating during his/her testimony that he/she said what he/she is saying in court on a previous occasion as well. This type of evidence is not hearsay, as the witness is testifying to what he/she said on a previous occasion and the probative value of the evidence does not therefore depend on someone else.

This type of evidence is of questionable relevance¹⁸⁹ and it bears the further risk that witnesses would repeat their version prior to going to court in order to shore up their case or that the court's time would be wasted by hearing repetitive evidence with little to no probative value.¹⁹⁰

Previous consistent statements have little relevance if it is only tendered to prove consistency and, because of the attendant disadvantages, the general rule is that

183 *Lenssen v R* 1906 TS 154.

184 *S v Tuge* 1966 4 SA 565 (A).

185 *Estate De Wet v De Wet* 1924 CPD 341.

186 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 426.

187 Zeffertt, Paizes and Skeen *The South African Law of Evidence* 413-414.

188 Schmidt and Rademeyer *Law of Evidence* 14-3.

189 A previous consistent statement can only enhance the credibility of a witness, but because of the possibility of the witness just repeating his/her version on multiple occasions in order to make him seem more credible, this type of evidence has little probative value. See Schmidt and Rademeyer *Law of Evidence* 14-4.

190 Schmidt and Rademeyer *Law of Evidence* 14-4.

previous consistent statements are inadmissible.¹⁹¹ If evidence of previous consistent statements is tendered to prove something other than mere consistency, it may be relevant enough to be admitted and, if there are other factors which increase its evidential value enough to offset the disadvantages, it will be admitted.¹⁹²

Previous consistent statements have been admitted to rebut an accusation of recent fabrication¹⁹³ and evidence of a previous identification is usually admitted as the previous identification usually bears more weight than identification in court (which is suspect by its very nature).¹⁹⁴ Previous consistent statements are also admissible in criminal cases where the offence is of a sexual nature.¹⁹⁵

3.2.7 *Extrinsic evidence*

If a juristic act is incorporated into a written document, it is not generally permissible to admit evidence extraneous to the document to contradict, vary or add to the terms of the document.¹⁹⁶ For ease of reference in this paragraph the document that records the juristic act will be referred to as "the contract", although this rule not only relates to the law of contract but has also been applied to wills, court judgments and negotiable instruments.¹⁹⁷

Although this rule is usually referred to as the "parol evidence rule" it does not only exclude oral evidence but also other documentary evidence if it seeks to contradict, alter or vary the terms of the contract.¹⁹⁸

The general rule is that extrinsic evidence to a contract is inadmissible but there are exceptions.¹⁹⁹ Where a party seeks rectification of a contract in a case where the

191 Schmidt and Rademeyer *Law of Evidence* 14-4.

192 Compare the cases of *R v Stephen Jood* 1949 1 SA 298 (G) and *Van der Harst v Viljoen* 1977 1 SA 795 (C). In both cases the issue sought to be proven was the paternity of a child. In the *Jood* case the mother testified that she had told her aunt on a previous occasion that the accused was the father of the child. This was held to be inadmissible. In *Van der Harst* the court admitted a letter written by the mother to the alleged father which, whilst not bearing a direct accusation, had enough evidential weight in the circumstances to offset the disadvantages of admission. See also Schmidt and Rademeyer *Law of Evidence* 14-4 and 14-5.

193 *R v Dart*(2) 1951 1 SA 483 (W) and *S v Bergh* 1976 4 SA 857 (A).

194 Schmidt and Rademeyer *Law of Evidence* 14-7.

195 Sections 56 and 59 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

196 Schmidt and Zeffertt "Evidence" 491.

197 Schmidt and Zeffertt "Evidence" 491.

198 *Strydom v Coach Motors (Edms) Bpk* 1975 4 SA 838 (T) at 840E.

199 Schmidt and Zeffertt "Evidence" 492 and *Strydom v Coach Motors* at 840F-G.

contract does not reflect the true intention of the parties, extrinsic evidence is not excluded by the operation of this rule.²⁰⁰

Another exception is where the validity of the juristic act incorporated into the contract is attacked. Therefore evidence of its illegality, fraud or misrepresentation may be adduced.²⁰¹

Where extrinsic evidence is required in order to determine whether a suspensive condition has been fulfilled or not, such evidence will be admissible²⁰² as would be the case where there is a subsequent variation or rescission of the contract.²⁰³

It therefore follows that social media evidence extrinsic to a contract will be admissible if it falls under one of the exceptions to the rule.

3.2.8 Privilege

Privilege is divided by Schmidt and Rademeyer²⁰⁴ into privilege that protect a private person and privilege in the public interest. This division is also used by Schmidt and Zeffertt²⁰⁵ and Schwikkard *et al.*²⁰⁶

According to Schwikkard *et al.*²⁰⁷ there are three fundamental differences between private privilege and the privilege that attaches to the state:

- Secondary or circumstantial evidence is admissible to prove the matter to which private privilege applies, whilst circumstantial evidence surrounding the public privilege will remain inadmissible.
- A private person who has some form of private privilege may waive the privilege, whilst waiver of public privilege may only be done with the express authorisation of the minister of the responsible department of state.
- Private privilege must be raised by the person to whom the privilege applies and the court may not raise the privilege on behalf of a litigant. In the case of public privilege the court may raise the privilege itself such is in

200 Schmidt and Zeffertt "Evidence" 492.

201 Schmidt and Zeffertt "Evidence" 493.

202 Schmidt and Zeffertt "Evidence" 494.

203 *De Klerk v Old Mutual Insurance Co Ltd* 1990 3 SA 34 (E).

204 Schmidt and Rademeyer *Law of Evidence* 20-3.

205 Schmidt and Zeffertt "Evidence" 497 and 513.

206 Schwikkard *et al* *Beginnels van die Bewysreg* 133 and 171.

207 Schwikkard *et al* *Beginnels van die Bewysreg* 174.

cases of national security or the privilege protecting the identity of informers.

Privilege prevents the admission of evidence that would otherwise be admissible. According to Schwikkard *et al*²⁰⁸ the public interest in preventing certain types of evidence from being admitted weighs more than the public interest that the administration of justice must not be thwarted and forms the rational basis of the rules relating to privilege.

The privileges that may be raised by private persons are the privilege against self-incrimination; marital privilege; legal professional privilege and "without prejudice" statements; and the privilege for a tax payer in terms of Section 4(1) of the Income Tax Act.²⁰⁹

These will be briefly discussed below, with specific reference to whether social media evidence, which may fall under any of the aforementioned privileges, will be admissible or not.

3.2.8.1 Privilege against self-incrimination

This privilege may be claimed by a witness during evidence in court in both criminal and civil proceedings.²¹⁰ It can only be claimed in court during testimony for each question that may elicit an incriminating response.²¹¹ Thus any incriminating evidence posted by a person on social media will not be protected by this privilege. Alternatively the posting (publication) of incriminating evidence on social media may constitute an implied waiver of privilege.

3.2.8.2 Marital privilege

With this privilege the communication between the parties to a marriage, putative marriage, customary marriage or customary union is protected from disclosure.²¹² The effect is therefore that neither party may be compelled to disclose communications made to the other party during the marriage or union. This should also be applicable to any communication made by one spouse to the other by means of social media.

208 Schwikkard *et al* *Beginnels van die Bewysreg* 173.

209 *Income Tax Act* 58 of 1962.

210 Schmidt and Zeffertt "Evidence" 499.

211 Schmidt and Zeffertt "Evidence" 499.

212 Schmidt and Zeffertt "Evidence" 501 and *Justice Laws Rationalisation Act* 18 of 1996 s 4.

It should also be noted that the privilege just relates to the compellability of a witness against his/her spouse and does not prevent either spouse from disclosing communication protected by this privilege voluntarily.²¹³

²¹³ Schmidt and Zeffertt "Evidence" 502.

3.2.8.3 Legal professional privilege

This privilege prevents the admission of evidence of communications between a lawyer and his/her client, and was formally recognised by the then Appellate Division in *S v Safatsa*²¹⁴ for the first time.²¹⁵ This privilege operates against the lawyer as well as third parties if the communication was between the lawyer and the third party in confidence when litigation was pending or contemplated.²¹⁶

The privilege is for the client and not the lawyer²¹⁷ and can therefore only be waived by the client. This rule not only relates to *viva voce* evidence in court, but also extends to discovery.²¹⁸

It must be borne in mind that this privilege only prevents the lawyer and his/her agents from disclosing privileged information and does not operate against independent third parties that may come to know the information.²¹⁹

This privilege will apply to communications on social media between a client and his/her lawyer, but with the proviso that if such communications should come to the knowledge of a third party by means of publication on social media, the client cannot prevent the third party from disclosure. It seems unlikely that any lawyer or client will conduct privileged communication on the more public forms of social media, but accidental publication might be possible and in such event the evidence of a third party will not be inadmissible due to the operation of this privilege.

3.2.8.4 "Without prejudice" communications

Although communications made without prejudice during settlement negotiations is inadmissible it does not really constitute a privilege. Admissions and communications made by parties during *bona fide* settlement negotiations is protected from disclosure because it is in the public interest that litigants firstly attempt to avoid litigation and the concomitant expenses, delays and hostility.²²⁰

214 *S v Safatsa* 1988 1 SA 868 (A).

215 Schwikkard *et al Beginsels van die Bewysreg* 159.

216 Schmidt and Zeffertt "Evidence" 503.

217 *S v Moseli (2)* 1969 1 SA 650 (O) 652-653.

218 Schmidt and Zeffertt "Evidence" 503.

219 Schmidt and Zeffertt "Evidence" 503.

220 Schmidt and Zeffertt "Evidence" 510.

It is not the words "without prejudice" that protects a communication from disclosure if settlement negotiations are unsuccessful, but the fact that the communication was intended to form part of a *bona fide* attempt to settle the dispute.²²¹ It also covers oral and written matter that flows from the negotiations even if it is not expressly stated to be without prejudice.²²²

Social media evidence should therefore be protected from disclosure if it consists of communication made in the course of *bona fide* settlement negotiations. As an example, WhatsApp messages between two litigants containing certain admissions by either party regarding subsequent litigation will be inadmissible if it was done with the intention of settling the matter.

3.2.8.5 Income Tax Act privilege

In terms of Section 4(1) of the *Income Tax Act*²²³ any person who may obtain information during the course of the exercise of his/her duties in terms of the act is obliged to preserve its secrecy.²²⁴ If social media evidence consists of communications made to a tax official it would therefore fall under this privilege.

3.2.9 Informal admissions

An informal admission (in the sense of some fact or circumstance that the party has admitted outside of court and is to his/her detriment), as opposed to a formal admission made in terms of the procedural law, does not remove the admitted fact from the issues. The fact must still be proven as well as the informal admission thereof.²²⁵ The informal admission will therefore serve as corroboration that the fact in issue is true.

Informal admissions are usually introduced in evidence by someone that read or heard the admission and the rules relating to hearsay should be kept in mind.²²⁶ If the person who made the admission testifies himself/herself, the hearsay will be admitted in terms of Section 3(1)(b) of the LEAA. If the person who made the admission does not testify, the court still has the discretion in terms of Section 3(1)(c) to admit the evidence and

221 Schmidt and Zeffertt "Evidence" 510.

222 *Hoffend v Elgeti* 1949 3 SA 91 (A).

223 *Income Tax Act* 58 of 1962.

224 Schmidt and Zeffertt "Evidence" 512.

225 Schmidt and Rademeyer *Law of Evidence* 19-4.

226 Schmidt and Rademeyer *Law of Evidence* 19-4.

will, in practice, usually admit it.²²⁷ The rationale behind this is that what a person admits to his/her detriment will usually be true.²²⁸

Although self-serving statements are generally inadmissible because it is not to the declarant's detriment, any self-serving statements that are part of the informal admission will also be admissible.²²⁹ The admission cannot be proved by the declarant's side and must first be proven by the opposing side before he/she may rely on the self-serving portions of the admission.²³⁰

Social media evidence that constitutes an informal admission will therefore, in principle, be admissible in evidence subject to the other rules relating to admissibility.

3.3 Authenticity

In order for either documentary or real evidence to be admissible in evidence the party seeking its admission must prove that the evidence is authentic prior to it being admitted.²³¹

Real evidence needs to be properly identified, mostly to help establish its relevance to the dispute at hand.²³² Once the real evidence is admitted the judicial officer is entitled to draw his/her own conclusions and may observe the real evidence himself/herself to that end.

Documentary evidence also needs to be authenticated before it will be admissible in evidence. It is important to note that authenticating a document does not necessarily mean that the content of the document is true, only that the document is what it purports to be.²³³

American federal law of evidence also requires that evidence must be authenticated or identified, and in order to do that: "the proponent must produce evidence sufficient to support a finding that the evidence is what the proponent claims it is".²³⁴ Federal

227 Schmidt and Rademeyer *Law of Evidence* 19-4.

228 Schmidt and Rademeyer *Law of Evidence* 19-4.

229 Zeffertt and Paizes *Essential Evidence* 157.

230 Schmidt and Rademeyer *Law of Evidence* 19-5.

231 Schmidt and Zeffertt "Evidence" 538; Schwikkard *et al Beginnels van die Bewysreg* 437; Zeffertt, Paizes and Skeen *The South African Law of Evidence* 685; De Villiers(1) 2010 TSAR 572.

232 Zeffertt and Paizes *Essential Evidence* 271.

233 De Villiers(1) 2010 TSAR 573.

234 Legal Information Institute Unknown *Rule 901. Authenticating or Identifying Evidence* https://www.law.cornell.edu/rules/fre/rule_901 [date of use 23 August 2015].

rule of evidence 901(b)²³⁵ goes further by giving a non-exclusive list of examples of evidence which would meet the requirement of authenticity such as:

- testimony by a witness that has knowledge of the evidence in question;
- an opinion of a non-expert who is familiar with the author's handwriting;
- a comparison of the new evidence by the court or an expert witness with evidence that has already been authenticated;
- evidence with any distinctive characteristics;
- testimony by a witness that recognises someone's voice from a recording; and
- evidence about a process or system.

In South Africa, authenticating a document usually means that the person adducing it needs to prove that it was written or made by the person who purported to do so.²³⁶ Usually the writer will identify the document, call someone who saw him/her write it or someone that can identify the writer's handwriting.²³⁷

If a party seeks to admit documentary evidence in terms of Section 34 of the CPEA, the person who wrote, made or produced the document must authenticate that document in writing and must acknowledge that he/she is responsible for the accuracy of the document.²³⁸ This can be done by writing the document in his/her own hand or signing or initialling the document or in some other manner as long as it qualifies as "writing" within the meaning of Section 34(4) of the CPEA.

It must further be noted that the facts contained in the document must form part of the writer's personal knowledge or of a continuous record where the writer performs a duty in which he/she records facts which may reasonably form part of the personal knowledge of the persons giving him the information to record.²³⁹ If the requirements of Section 34(1)(a) are not met, the document may still be admitted in terms of the common law²⁴⁰ though it may then constitute hearsay evidence and in order for such evidence to be admissible, the rules relating to hearsay must be kept in mind.

235 Legal Information Institute Unknown *Rule 901. Authenticating or Identifying Evidence* https://www.law.cornell.edu/rules/fre/rule_901 [date of use 23 August 2015].

236 Zeffertt and Paizes *Essential Evidence* 264.

237 Zeffertt and Paizes *Essential Evidence* 264.

238 S 34(4) of the CPEA and Schmidt and Zeffertt "Evidence" 545.

239 Section 34(1)(a)(i & ii) of the CPEA.

240 De Villiers(1) 2010 TSAR 563.

Consequently the court will have the discretion to admit a document which is a statement of fact even when the person who made the statement does not testify at the proceedings. This discretion must be exercised in terms of Section 34(1)(b) of the CPEA and Section 3 of the LEAA.

It is submitted that the difficulties created by the *Narlis* decision²⁴¹ have been addressed with the enactment of Section 15 of the ECTA. In terms of the section the rules of evidence may no longer be interpreted to exclude evidence just because it is a data message.²⁴² It is therefore submitted that data messages may be admitted according to the existing rules of evidence relating to either real or documentary evidence (depending on the nature of the evidence as discussed in chapter 2).

When examining the authenticity requirement relating to electronic evidence, De Villiers²⁴³ emphasises that authenticity relates to the process during which the electronic evidence was compiled and not to the result. The truthfulness or reliability of the result goes to weight and not to admissibility.²⁴⁴ However, the requirement of authenticating the process should not be overemphasised.

According to Storm:²⁴⁵

Requiring an extensive and technical foundation as a prerequisite for admissibility only perpetuates the judicial myth that electronic record systems are inherently less trustworthy than conventional systems. It increases the complexity of trials and diminishes efficiency in judicial rulings on admissibility. It also unfairly burdens the proponent of a computer record.

It should be borne in mind that Storm's view mostly relates to computer records kept on structured computer systems utilised for a specific purpose such as running a business.

It is submitted that, where the author of social media evidence can be identified and would himself/herself testify to the authenticity of the document, the process by which the social media evidence is created, stored or published would largely be irrelevant (depending on the circumstances of the case).

241 The court found that computer evidence was inadmissible in terms of Section 34 of the CPEA because a computer is not a "person" for the purpose of the CPEA.

242 I.e. it is digital in nature.

243 De Villiers(2) 2010 TSAR 725.

244 *S v Baleka (1)*.

245 Storm 1984 JMLR 153.

The enactment of Section 15(4) of the ECTA has had the effect that certain types of data messages²⁴⁶ may be authenticated by certification of an "officer in the service of such person". It should be borne in mind that where a statutory provision overrides certain rules of evidence (such as the prohibition of hearsay evidence) the statutory provision should be strictly complied with if the evidence is to be admitted.²⁴⁷ For social media to be admitted in terms of Section 15(4) of the ECTA, it must have been created by a person in the "ordinary course of business" and must be certified as correct by an officer in the service of such person.²⁴⁸

Problems regarding the authentication of social media evidence would arise where the author of the post cannot be identified. According to Grimmelman²⁴⁹ social media may have profiles that are intelligible but fake.²⁵⁰ The details of the author as reflected on social media may also be insufficient to determine who the person behind the profile is.

This difficulty would obviously vary between social media platforms. For example, on LinkedIn the entire purpose of the social media platform would be defeated if the correct details (at least insofar as it relates to the person's name and contact details) are not reflected on that person's profile. Another example is YouTube, where a person may construct an entirely fictitious persona²⁵¹ or an inherently anonymous persona.²⁵²

If social media evidence cannot be authenticated it will in all probability be held to be inadmissible. It may be instructive to examine the ways of authenticating specific electronic evidence used by the American federal courts as an indication of what will be necessary to authenticate electronic evidence in South Africa.

246 Data messages made by a person "in the ordinary course of business" – S 15(4) of the ECTA.

247 Schmidt and Zeffertt "Evidence" 470-476.

248 S 15(4) of the ECTA.

249 Grimmelman 2008-2009 *Iowa Law Review* 1152-1153.

250 *Fake* is used here in the sense that the profile does not relate to an actual person but rather to a persona constructed by someone or it may purport to be the profile of a celebrity without being authorised thereto by the celebrity in question.

251 Hoffman 2015 <https://www.youtube.com/user/FiMFlamFilosophy/about> [date of use 28 June 2015].

252 Unknown 2015 <https://www.youtube.com/user/CaedoGenesis/about> [date of use 24 June 2014].

3.2.1 E-mail and text messages

According to Frieden and Murray²⁵³ the easiest way to authenticate e-mail or text messages is to secure an admission by the sender or author that he/she did in fact send the message in question. A recipient may also authenticate a message in appropriate circumstances.²⁵⁴

Although it differs from state to state, it appears that some American courts are prepared to set the threshold for authentication of e-mail and text messages relatively low,²⁵⁵ with the proviso that any other authentication issues should be dealt with when examining the probative value of the evidence.²⁵⁶ An e-mail or text message may also be authenticated by comparing it to other evidence from the same e-mail address or cell phone number that has already been authenticated.²⁵⁷

It would appear that information from the e-mail evidence itself may be used in authentication. For example, if the e-mail address from which the e-mail originated is "joe.soap@placeofemployment.co.za" a court may rightfully presume (especially if there is some other corroborating evidence to that effect) that the e-mail was sent by a person, Joe Soap, and that he works at "place of employment".

An electronic signature (even if it is just the person's name typewritten at the end of the e-mail or by way of an e-mail signature) may also be sufficient to identify the person who sent the e-mail and may assist a party in authenticating the evidence in appropriate circumstances. It is submitted that the South African courts' approach regarding this should be pragmatic rather than formalistic.²⁵⁸ It is further submitted that the principles underpinning the authentication of e-mail and text messages can also be applied to social media evidence where the use of the social media platform is analogous to an e-mail or text message.²⁵⁹

253 Frieden and Murray 2011 *RJLT* 19.

254 Frieden and Murray 2011 *RJLT* 19.

255 *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006) <https://casetext.com/case/us-v-safavian-4> [date of use 24 August 2015].

256 Frieden and Murray 2011 *RJLT* 20.

257 Frieden and Murray 2011 *RJLT* 20.

258 *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd* 2014 JDR 2469 (SCA) at para 25.

259 Examples of such analogous use is Facebook and WhatsApp messages.

3.2.2 Chatroom communications

According to Frieden and Murray²⁶⁰ a proponent seeking to authenticate chatroom transcripts as evidence needs to prove the following:

- (1) The person alleged to be the sender had access to the computer from which the chats were conducted.
- (2) The chats in question were conducted at the same time as chats which the defendant admitted to conducting.
- (3) The chats were conducted using a screen name created by the defendant.
- (4) The content of the chats were similar to chats the defendant admitted to conducting.

It is also important for the proponent to ensure that the transcripts presented in court accurately reflect the actual chat conversation²⁶¹ which may be done by ensuring that the transcript is internally consistent with respect to its content, time stamps of messages and so forth.

Because chatroom conversations are not done face-to-face, and the screen names used are often aliases with no indication of a person's real identity, establishing authorship of chatroom conversations may be a particularly difficult obstacle to overcome. This can be overcome by leading circumstantial evidence by witnesses that testify that they have chatted with the alleged person on a previous occasion, that the alleged author used the same alias and that there would be no motive for someone to impersonate the alleged author.²⁶²

These are non-exclusive examples. A court has to determine the appropriate manner to authenticate chatroom transcripts by taking all relevant circumstances of the case in which it is sought to be introduced into account.

260 Frieden and Murray 2011 *RJLT* 20-21.

261 Frieden and Murray 2011 *RJLT* 21.

262 Frieden and Murray 2011 *RJLT* 21.

3.2.3 Websites

The authentication of websites raises three distinct questions according to Goode:²⁶³

- (1) What was actually on the website?
- (2) Does the exhibit or testimony accurately reflect it?
- (3) If so, is it attributable to the owner of the site?

The second question can be answered most easily in practical terms since it only requires testimony that the exhibit is the same as that which appeared online.²⁶⁴

Because of well-publicised hacking incidents, it appears that courts most often focus on the third question, as it would be possible for someone other than the website's owner to post content on the website.²⁶⁵ It is submitted that the nature of the site should be a relevant factor during the consideration of which testimony is required by a court to authenticate website evidence. According to Frieden and Murray:²⁶⁶

current printouts from reputable business sites, such as bankofamerica.com or verizon.com, are less likely to be subject to the same scrutiny as the online-encyclopaedia Wikipedia, a blog, or another website where content is easily manipulated.

It may be more problematic when the evidence of a website's content that no longer appears online (but has appeared in the past) is introduced as evidence. It is submitted that the main consideration in such a case should be on how the website content was preserved prior to its introduction in court. Testimony by a competent witness on how the evidence was retained; that it remained unaltered; and how it came to the possession of the party that seeks to introduce it should be sufficient to authenticate such evidence.

3.2.4 Computer-generated records

It appears that the American courts have had similar difficulty as those expressed in the *Narliss* case in admitting computer-generated records.²⁶⁷ Generally computer records in American courts may be authenticated by a witness who can provide

²⁶³ Goode 2009 *RoL* 11.

²⁶⁴ Goode 2009 *RoL* 11.

²⁶⁵ Goode 2009 *RoL* 12.

²⁶⁶ Frieden and Murray 2011 *RJLT* 22.

²⁶⁷ Frieden and Murray 2011 *RJLT* 24-25.

testimony on how the records are generated, stored and maintained.²⁶⁸ The difficulty experienced by American lawyers can be found in the different levels of scrutiny which their courts apply to computer-generated evidence.

Some courts will only require that the custodian of the computer system from which the evidence originates testify to its authenticity, whereas other courts will require technical evidence from the programmers, the functionality of the hardware and what hardware and software were used to generate, store and maintain the data.²⁶⁹

It is submitted that unless the proper functioning of the social media platform is specifically placed in dispute with specific allegations (backed up by relevant evidence), the presumption of continuity²⁷⁰ and the doctrine of judicial notice²⁷¹ should be sufficient to authenticate the portions of social media evidence which stems from the social media platform itself.²⁷²

3.4 Originality

3.4.1 The general rule

Schmidt and Rademeyer²⁷³ distinguish between primary and secondary evidence²⁷⁴ and state that where the contents of a document is in issue only the original document will be admissible unless the original has been lost, destroyed or cannot be found after a proper search, in which case secondary evidence would become admissible.²⁷⁵

It is only when the contents of the document must be proven that the originality rule comes into effect. If the fact in issue is something extraneous to the document and the document is being tendered to prove that fact, then secondary evidence about the document will be admissible.²⁷⁶

268 Frieden and Murray 2011 *RJLT* 24.

269 Frieden and Murray 2011 *RJLT* 24-25.

270 See paragraph 5.2.2.1 below.

271 See paragraph 4.4 below.

272 Examples of this functionality are the tick marks on WhatsApp that indicate that a message was delivered and read, time stamps on Facebook posts, etc.

273 Schmidt and Rademeyer *Law of Evidence* 11-3.

274 Primary evidence is the document itself. Secondary evidence is a copy or some other form of evidence about the document which is not the document itself.

275 Schmidt and Rademeyer *Law of Evidence* 11-3 fn 53. See also *R v Amod & Co (Pty) Ltd* 1947 3 SA 32 (A).

276 Schmidt and Rademeyer *Law of Evidence* 11-14 – 11-15.

In *R v Amod & Co (Pty) Ltd*²⁷⁷ the accused was charged with selling goods above the regulated price. The state tendered oral evidence of witnesses that could remember the purchase price. The counter-foils of the invoices were also tendered in evidence but the originals could not be found. It was argued that the oral evidence regarding the purchase price amounted to secondary evidence about the invoice (and was therefore inadmissible). The court rejected this argument and held that the oral evidence was not secondary evidence of the document, but direct evidence of the purchase price and was therefore not affected by the originality rule.

Where social media evidence is presented to a court it would almost invariably be in the form of a printout or screenshot from which the social media evidence would be perceivable. Although the document before court would be the printout or screenshot, the actual evidence would remain the social media evidence itself.

Practically speaking it would be the most convenient for social media evidence to be put before court in the form of ink and paper unless something else is required to present it to court, such as a projector and sound system where a video is tendered as evidence.

During the Section 14(2) assessment, the court should keep the following in mind:

- Some social media platforms allow the user or author of a post to edit the post after the fact.²⁷⁸ If a post is edited on Facebook for example, it would reflect as "Edited" on the post itself. It could, however, mean that the data message is not "complete and unaltered" as required by Section 14(2)(a) of the ECTA; and
- It is also possible for the author of a social media post to delete a post²⁷⁹ which would in effect "destroy" the original. In such a case secondary evidence of the social media post (if the content of the post is in issue) may become admissible as one of the exceptions to the originality rule.

3.4.2 The exceptions to the originality rule

3.4.2.1 Admission of documents

If the contents of a document are admitted, it is not necessary for the original document to be admitted in evidence.²⁸⁰ Where a formal admission of a document's contents is

²⁷⁷ *R v Amod & Co (Pty) Ltd* 1947 3 SA 32 (A).

²⁷⁸ Facebook.com 2015 <https://www.facebook.com/help/1376303972644600>.

²⁷⁹ Twitter 2015 <https://support.twitter.com/articles/18906-deleting-a-tweet#>.

²⁸⁰ Schmidt and Rademeyer *Law of Evidence* 11-16.

made, the issue of secondary evidence does not arise as the contents of the document are not in issue.²⁸¹

The normal rules relating to admission would apply here.²⁸² In civil proceedings, if a party does not object to the admissibility of a document, the court will usually infer that the party consented to the admission of the document, but in criminal proceedings the court will be more cautious before attributing an informal admission of the admissibility of a document to an accused's failure to object to the admissibility.²⁸³

3.4.2.2 Secondary evidence

In common law there have been a number of exceptions where secondary evidence of the contents of a document will be admissible and there are also statutory provisions which allow the admission of secondary evidence in lieu of the original.²⁸⁴

Where the original document was destroyed or has been lost the court may allow secondary evidence, although it needs to be proved that a diligent search was made and that the original could not be found.²⁸⁵

Even if the original document still exists and can be found, the court may admit secondary evidence if it would be impossible or highly inconvenient for the original document to be brought to court.²⁸⁶

If the document is in the possession of the opposing party and that party has refused to produce the document, notwithstanding notice given to that party to produce the document, the court will allow secondary evidence on the contents of the document.²⁸⁷

Where the document is in the possession of a third party and that third party lawfully refuses to produce it²⁸⁸ the court will allow secondary evidence.²⁸⁹

281 Schmidt and Rademeyer *Law of Evidence* 11-16 and *R v Shrives* 1957 1 SA 602 (N).

282 Schmidt and Rademeyer *Law of Evidence* 11-6.

283 *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier SA Polisie, Noord-Transvaal* 1972 1 SA 376 (A).

284 Schmidt and Rademeyer *Law of Evidence* 11-17 – 11-19.

285 *R v Amod & Co (Pty) Ltd.*

286 Schmidt and Rademeyer *Law of Evidence* 11-17. This would be the case with documents (not used only in the sense of ink and paper but in its widest sense) such as gravestones or walls bearing writing or where it would be unlawful to remove the document.

287 Schmidt and Rademeyer *Law of Evidence* 11-17.

288 E.g. the third party is not within the jurisdiction of the court and a subpoena *duces tecum* cannot be served upon him/her.

289 Schmidt and Rademeyer *Law of Evidence* 11-18.

Secondary evidence of official documents may be admitted in terms of Section 234(1) of the CPA and Section 20(1) of the CPEA by means of a certified copy or excerpt from the document.

Section 34 of the CPEA also makes provision that a court may accept a copy of an original document if that copy would be admissible in terms of Section 34(1) and the only requirement is that the court must be convinced that "undue delay or expense would otherwise be caused".²⁹⁰

Section 15(4) of the ECTA allows secondary evidence of a data message as long as it was made in the ordinary course of business and is certified as correct by an officer in that person's service.²⁹¹

Section 14(1) of the ECTA makes provision that:

- (1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if:
 - (a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and
 - (b) that information is capable of being displayed or produced to the person to whom it is to be presented.²⁹²

The assessment referred to in section 14(1)(a) requires that the integrity of the data message must be assessed and that the following factors should be considered during the assessment:

- whether the information has remained complete and unaltered except for any endorsement or change that would flow naturally from the process of converting information to the data message;
- for what purpose the information was generated; and
- any other relevant circumstances.

Section 14 of the ECTA therefore gives courts the discretion to allow data messages as evidence in spite of the fact that it is not "original". As discussed above, the definition of *data message* in the ECTA is sufficient to cover social media evidence and it is

²⁹⁰ S34(2) of the CPEA. See also Schmidt and Rademeyer *Law of Evidence* 11-19.

²⁹¹ Section 15(4) of the ECTA.

²⁹² Section 14(1) of the ECTA.

submitted that this discretion should be exercised and that courts should rather focus on the requirement of authenticity where there are doubts regarding the reliability of the social media evidence.

3.5 Conclusion

The basic criterion for admissibility of social media evidence is relevance. Only evidence relevant to the enquiry before the court will be admissible, whereas irrelevant evidence will be inadmissible. Determining whether social media evidence is sufficiently legally relevant for admission will only become problematic when it is presented as indirect evidence of a fact in issue; credibility evidence; or as an admissibility requirement for other evidence, as there will then be competing interests which must be weighed against each other.²⁹³

The exclusionary rules that are most likely to have an impact on the admission of social media evidence are the rules against admission of hearsay, character and similar fact evidence, previous consistent statements and informal admissions. The current exclusionary rules should be sufficient when looking to admit social media evidence, although it is possible that new exceptions to the exclusionary rules will develop over time.

Authenticating social media evidence of a documentary nature should be more important than the mechanical application of the archaic originality rule. It is also important that the authentication of social media evidence should not be confused with the reliability or probative value of that evidence. The originality rule have been further watered down by the enactment of Section 14 of the ECTA which supports the submission that courts should rather ensure that social media evidence is properly authenticated in order to ensure that doubtful evidence is excluded or can at least be tested by the other evidentiary mechanisms such as cross-examination.

4 Means of proving social media evidence

When considering means of proving social media evidence, the form in which it may be presented, with specific reference to recent case law, is firstly discussed. The rules relating to discovery will also play an integral part in admitting social media evidence

²⁹³ The interest that a court should have regard to all evidence which may help it reach the truth must be weighed against any prejudice that may flow from admitting that evidence.

and are discussed secondly, after which the principles and requirements of testimony by a witness in order to tender social media evidence as proof are examined. Finally the principles of judicial notice are discussed and the application of the *Federal Rules of Evidence* of the United States are examined to determine whether it may be of assistance in extending the doctrine of judicial notice where social media evidence is concerned.

4.1 Forms of presenting social media evidence

Where the court is required to observe evidence with its own senses (whether by mere observation, as is the case with real evidence, or by reading a document or listening to a tape recording²⁹⁴ or watching a video)²⁹⁵ the evidence needs to be presented to the court in a form that would enable it to do so. In this regard the courts and legislator have been fairly practical.²⁹⁶

In *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*²⁹⁷ the court had to decide whether to grant an order authorising substituted service of a notice to attend a pre-trial hearing via Facebook message. The defendant's attorneys of record had withdrawn some time before and the plaintiff's attorneys could not manage to trace the physical address of the defendant in order to serve the notice on him. The court raised the question that the Facebook account to which the plaintiff sought to send the message may be fake or fraudulent. In response the plaintiff (by way of affidavit) attached printouts of photographs obtained from the defendants Facebook profile which showed the defendant in the company of friends. The court accepted this as sufficient proof to waylay any reasonable possibility of a fake or fraudulent account as the defendant was readily identifiable.²⁹⁸

In the *Experian* case, which was brought on application proceedings, the court accepted a printout of the respondent's LinkedIn account.²⁹⁹ The court was concerned with whether or not to enforce a restraint of trade against the respondent. The respondent's defence amounted to a denial that he had learned any "trade secrets" of

294 *S v Ramgobin* 1986 2 All SA 511 (N).

295 *S v Baleka(1)* 1986 4 All SA 428 (T).

296 S232 of the *Criminal Procedure Act* 51 of 1977.

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

298 *CMC Woodworking Machinery v Pieter Odendaal Kitchens* at 611.

299 *Experian South Africa (Pty) Ltd v Haynes* 2013 1 SA 135 (GSJ) and paragraph 2.2.

the applicant and also denied that he was in contact with the applicant's clients. The court accepted a print-out of the respondent's LinkedIn profile in order to establish what the respondent's job description was whilst he was employed by the applicant, and also to establish that he "connected" with representatives of some of the applicant's biggest clients on LinkedIn.

It is submitted that where the social media evidence is capable of being reproduced in court in the form of a printout this would be the most practical way to do so. The printout has to be authenticated and also be a clear and legible copy, but it should in principle be sufficient to enable the court to evaluate the evidence once it is properly admitted.

If the social media evidence is in some form that cannot be presented as a printout (such as an online video), it is submitted that modern technology is more than capable of displaying the actual evidence to the court by way of projector, sound systems or such other way as may be appropriate to enable the court to observe the social media evidence for itself. With mobile data technology it should also be possible to show a video or play a sound clip to the court directly from the internet.

4.2 Discovery

When considering the principles surrounding discovery of documentary evidence, a clear distinction must be drawn between criminal and civil proceedings.

4.2.1 Discovery in civil matters

In civil proceedings the rules of the both the Magistrate's³⁰⁰ and High Courts³⁰¹ make provision to facilitate the proof of real and documentary evidence. In terms of the rules, a party wishing to use a document, tape recording, plan, diagram, model or photograph must give notice to the opposing party that he/she intends to use that evidence. This is a prerequisite for being able to use the evidence during trial. It should be noted that the word *document* is not defined in the rules and consequently it should bear its ordinary meaning as "a piece of written, printed or electronic matter that provides information or evidence."³⁰² It would therefore be necessary to discover any social

300 See Rules 23(10) and 24(6) in Van Loggerenberg *Jones & Buckle The Civil Practice of the Magistrate's Courts in South Africa Volume II The Rules* 23-3 and 24-2.

301 See Rules 35(9) and 36(10) in Van Loggerenberg *Erasmus Superior Court Practice* B1-249 and B1-265.

302 Van Loggerenberg *Erasmus Superior Court Practice* B1-251.

media evidence if required to do so in order to be able to use the social media evidence during trial.

The notice may also request the opposing party to admit that the document or tape recording was properly executed and is what it purports to be or to admit the plan, diagram, model or photograph. If the party receiving the notice should not respond within the prescribed time, it will be deemed that that party made the admission. If a party should require the evidence to be authenticated, he/she runs the risk of bearing the costs of the proof of such evidence.³⁰³ The effect of these rules is that the authenticity requirement with regard to the evidence is dispensed with where the rules are complied with.

These rules only deal with the need to authenticate a document and do not have any impact on the other rules of admission. Therefore documentary evidence will still need to meet the requirements of relevance and originality even if the authenticity is admitted or deemed to be admitted in terms of the rules.

It should also be noted that where a party has been requested to make discovery under oath in terms of the rules, that party may only utilise documents and tape recordings that were in fact discovered. If a party neglected to include a document in his/her discovery affidavit he/she will not be able to use that document at the trial, although the opposing party may use the document.³⁰⁴

4.2.2 The accused's right to access to documents held by the state (docket contents)

The so-called "blanket docket privilege" which the prosecution enjoyed since the decision of the Appellate Division in *R v Steyn*³⁰⁵ was declared unconstitutional after the *Constitution of the Republic of South Africa*, 1996 came into effect and was replaced with a more flexible judicial discretion by the Constitutional Court in *Shabalala v Attorney-General, Transvaal*.³⁰⁶ In terms of this judicial discretion the court must determine whether the accused's right to a fair trial will be unfairly infringed if he/she is denied access to certain documents in possession of the state. The court should take

303 Rule 35(9) and Rule 36(10)(a) and (b) of the Uniform Rules of Court in Van Loggerenberg *Erasmus Superior Court Practice* B1-249 and B1-265 respectively.

304 Schmidt and Rademeyer *Law of Evidence* 11-6.

305 *R v Steyn* 1954 1 SA 324 (A).

306 *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC).

all relevant circumstances, such as the possibility that the accused will interfere with state witnesses, into account. This discretion is interlocutory in nature and may be amended or changed at a later stage.³⁰⁷ The state is obliged to make a full disclosure of all material that it seeks to use during the trial³⁰⁸ which would include social media evidence where the prosecution should seek to use it.

Unless the contents of a document (and by extension also social media evidence) are formally admitted by the defence, the state will need to meet all the requirements of admissibility before the court will receive that evidence. Although the state will not be barred from using documentary evidence during the trial that was not disclosed to the defence, this may result in the acquittal of the accused if taken on appeal. The question will remain whether the accused had his/her right to a fair trial unfairly infringed by the state's omission to disclose the evidence in question and if that is the case the accused may well be acquitted on appeal.³⁰⁹

The accused has no obligation to "discover" to the state any documents he/she intends to use during the trial but will need to meet all the requirements of admissibility relating to documents or real evidence which he/she seeks to lead in order to properly place the evidence before court.

4.3 Testimony by a witness

Although there are some statutory exceptions to the general rule,³¹⁰ documentary evidence has to be authenticated by the testimony of a competent witness.³¹¹ Authentication in this case means that the document is proven to be what it purports to be, as opposed to contents of the documentary evidence being true. The truth or falsehood of the contents of documentary evidence is evaluated when considering the probative value of that specific evidence when measured against all the evidence presented to the court in that specific case and does not have any influence on the admissibility thereof.³¹²

307 Schmidt and Rademeyer *The Law of Evidence* 20-15 to 20-16.

308 Schmidt and Rademeyer *The Law of Evidence* 20-16.

309 See *Shabalala v Attorney-General, Transvaal and Crossberg v S* 2008 3 All SA 329 (SCA).

310 E.g. *The Documentary Evidence from Countries in Africa Act* 62 of 1993 and S17 of the CPEA.

See also the discussion on discovery in civil matters in paragraph 4.2.1 above.

311 Schmidt and Zeffertt "Evidence" 538.

312 *S v Baleka*(3) 1986 4 SA 1005 (T) at 1023.

According to Schmidt and Zeffertt³¹³ documentary evidence may be authenticated by the author; a witness to the document; or by a person who can identify the handwriting or signature of the author. Other than to meet the requirement of authentication, testimony may be required to meet the other requirements relating to admissibility.³¹⁴

It is submitted that the current rules relating to admissibility of documentary evidence may need to be re-interpreted in appropriate circumstances, but that the basic principles remain applicable and sufficient to admit social media evidence.

It would appear that the requirement of authenticity has recently been emphasised more than the originality rule.³¹⁵ Mere allegations of a lack of originality or authenticity (without leading evidence in support of the allegations) will not be sufficient to render documentary evidence inadmissible where evidence was led to authenticate it, even where it was not explicitly proven to be original.³¹⁶

It should also be borne in mind that the authentication of electronic evidence, and by extension social media evidence, may also play a role when making the value judgment on the probative value of the evidence. Where, in the circumstances of the case, the authenticating evidence is so strong that one can be almost certain that the social media evidence before the court is a true reflection of the actual social media post made by the purported author, the mentioned social media evidence will have greater probative value than where some uncertainty over the authenticity of the evidence before court exists (depending on the purpose for which the evidence is tendered). This will, however, change from case to case and has to be evaluated against the factual matrix of the specific case.

It may be instructive to examine the rules relating to authentication used by federal courts in the United States in terms of the *Federal Rules of Evidence*, 1975 (as amended). According to Frieden and Murray³¹⁷ the seminal decision which deals with the admission of electronic evidence in a federal court is *Lorraine v Markel American*

313 Schmidt and Zeffertt "Evidence" 538-539.

314 That is relevance, originality and to avoid the exclusionary rules like hearsay.

315 Zeffertt and Paizes *Essential Evidence* 128.

316 *Botha v S* 2010 2 All SA 116 (SCA).

317 Frieden and Murray 2011 *RJLT* 3.

Insurance Company.³¹⁸ The decision model applied by the court in *Lorraine* was similar to the model used by courts for the admission of more traditional forms of evidence.³¹⁹

The court in *Lorraine* formulated a five-step approach when dealing with the admissibility of electronic evidence:

- Firstly, relevance must be established. This will be sufficient if the electronic evidence to be introduced renders some point in issue more or less probable.
- Secondly, the proponent of the electronic evidence must establish authenticity. This will be sufficient when the proponent establishes that the electronic evidence is what it purports to be.
- Thirdly, the proponent must examine the rules relating to hearsay and if the evidence does constitute hearsay, whether or not it may still be admitted in terms of one of the exceptions to the federal hearsay rule.
- Fourthly, the rule regarding the originality of the evidence must be addressed.
- Lastly, the proponent of the electronic evidence must establish that the potential probative value of the evidence outweighs any possible prejudice that may flow from the admission thereof.³²⁰

The approach used by the court in *Lorraine* is broadly similar to the purpose approach advocated by De Villiers and discussed more in depth in chapter 2.³²¹ Furthermore, the American rules relating to hearsay should not be applied in local cases, as South African hearsay law is governed by section 3 of the LEAA and is less rigid than its American counterpart.

It will therefore be necessary to present testimony (whether by expert witness or any other competent witness) to lay the necessary foundation for the admission of the social media evidence and to address the requirements of legal relevance, authenticity, originality and any other exclusionary rules that may be applicable.

318 *Lorraine v Markel American Insurance Company* 241 F.R.D 534-584.

319 Frieden and Murray 2011 *RJLT* 3.

320 *Lorraine v Markel American Insurance Company* 241 F.R.D 540, 541-542, 562-563, 576 and 583.

321 See p 13.

When due regard is given to section 14 of the ECTA read together with the existing evidentiary rules, it is submitted that authenticating social media evidence should be regarded as more important than the technical requirements of originality. If the rules relating to originality are strictly enforced, courts would quickly devolve into a quagmire of technical evidence with no real purpose. In this instance the practical approach adopted by the court in *S v Baleka*(3) is supported.³²²

Social media platforms are utilised by people of all generations on a daily basis to communicate with each other and the world in general. It would be archaic and unnecessary for courts to distrust such evidence solely because of its novel nature. Storm's³²³ view that the reliability of computer evidence may be presumed unless evidence is led that some essential test or check had been omitted, should therefore be supported. It is further submitted that this presumption of reliability may safely be extended to social media evidence. It should therefore not be necessary to lead evidence about the reliability of the relevant social media platform as part of authenticating social media evidence.

The requirement of authenticity would be satisfied where the author of the social media evidence testifies to the authenticity thereof. It is further submitted that testimony by someone that saw or perceived the social media evidence authored by someone else should be sufficient to authenticate it without falling afoul of the hearsay rule, as long as that person bears personal knowledge thereof. This will only be required where authorship or authenticity is disputed and may require oral testimony that the witness has communicated with the alleged author on that social media platform on previous occasions or some other form of evidence that will waylay any suspicion of a false account.³²⁴ The court may also take cognisance of the internal consistency of the social media evidence and may draw inferences from it in appropriate circumstances.

Testimony by a witness may also be required to establish the relevance of the social media evidence. This should be evaluated on a case by case basis bearing in mind the principles set out in paragraph 3.1. If the reliability or accuracy of the social media evidence is disputed it will be necessary to lead oral evidence to shore up or attack the credibility of social media evidence. This may be done by leading expert evidence, but

322 *S v Baleka*(3) 1986 4 SA 1005 (T) at 1023G.

323 Storm 1984 JMLR 121.

324 *CMC Woodworking Machinery v Pieter Odendaal Kitchens* at 611.

due to the costs and time involved in expert testimony of a highly technical nature, it is submitted that other avenues of proof are open to a litigant as well.

In *S v Baleka*(3) the court had to adjudicate on the admissibility of audio tapes introduced by the prosecution. The defence attacked the tapes on the basis that they were not proven to be original and the court had listened to exhaustive expert testimony regarding the possibility of tampering with the audio on the tapes. When criticising the decision of *S v Ramgobin* that held audio tapes to be documentary evidence and therefore subject to the "best evidence" rule the court remarked that:

... the evidence of a tape recording can be gainsaid by calling the speakers themselves or members of the audience to cast doubt on its authenticity and veracity. An accused does not stand helplessly tied to the stake of a tape recording.³²⁵

The appropriate testimony to attack or confirm the credibility of social media evidence has to be determined on a case-by-case basis but it stretches further than merely focusing on the technical aspects of the evidence.

4.4 Judicial notice

4.4.1 Background of the doctrine of judicial notice

When a court takes judicial notice of a fact, it negates the need to prove that fact.³²⁶ A court may take judicial notice of facts that are so notorious or well-known that it would be absurd to require a party to formally prove that fact.³²⁷ The concept of judicial notice developed in order to make trials more efficient and less time-consuming.³²⁸ Judicial notice may only be taken of relevant facts.

According to Bellin and Ferguson³²⁹ in common law:

... several categories of fact were regularly judicially noticed, including geographic facts, scientific facts, historical facts, local facts, facts necessary to fulfil the judicial function (including interpreting words, court records, and law), and a broader (and more contestable) category of facts that were "commonly known".

325 *S v Baleka*(3) 1986 4 SA 1005 (T) at 1023G.

326 Schmidt and Rademeyer *Law of Evidence* 6-4.

327 Schmidt and Rademeyer *Law of Evidence* 6-4.

328 Bellin and Ferguson 2014 *NULR* 1143.

329 Bellin and Ferguson 2014 *NULR* 1146.

Facts which may be judicially noted in the United States' common law were initially restricted to a number of broad categories, namely:

- Geographical facts: This category may entail taking judicial notice of geographical features such as rivers, mountain ranges, the location of streets and towns. These were usually facts of a general nature and not specifics, possibly due to the possibility of error in mapping technology at the time.³³⁰
- Scientific facts: Courts have taken judicial notice of scientific facts regarding how nature functions (such as the effect of temperature, gravity and certain qualities of matter) as well as generally accepted scientific conventions such as standardised weights and measurements. It would appear further that the yardstick used was general acceptance of the fact in the scientific community.³³¹
- Historical facts: These facts were judicially noticed if it was known generally by most people in society and related to things like the historic time of sunrise or sunset.³³²
- Facts to fulfil judicial responsibilities: Examples of these facts would be judicial records and legislation which, in certain instances, extended to governmental documents and reports. Because it may be necessary for a court to interpret words used in slander or defamation cases, courts also took notice of certain language customs and meanings.³³³
- Commonly known facts: These were facts that were considered to be "general knowledge". The problem with the judicial notice of these facts was that the fact noticed may have been entirely wrong.³³⁴

Schmidt and Rademeyer³³⁵ are of the view that the doctrine of judicial notice has much in common with rebuttable presumptions, and further that any fact which has been judicially noticed may be rebutted by contrary evidence. However, according to the authors:

330 Bellin and Ferguson 2014 *NULR* 1147.

331 Bellin and Ferguson 2014 *NULR* 1148.

332 Bellin and Ferguson 2014 *NULR* 1148-1149.

333 Bellin and Ferguson 2014 *NULR* 1149.

334 Bellin and Ferguson 2014 *NULR* 1151-1152.

335 Schmidt and Rademeyer *Law of Evidence* 6-5 to 6-6.

The primary difference is that judicial notice is intended to operate when the fact noticed is so certain that its rebuttal is almost unthinkable. Judicial notice is only taken of a commonly known fact or one that can be ascertained immediately and with certainty; and in the highly exceptional case where that fact is refuted, it simply means that notice was incorrectly taken.³³⁶

In South African law judicial notice may be taken of notorious facts, readily ascertainable facts and the law.³³⁷ Schmidt and Rademeyer³³⁸ explain:

Notice is taken of the law because it would be pointless to adduce evidence about it before legally qualified officials who are empowered to determine what the law is. Notice is taken of readily ascertainable facts and of notorious facts because such facts can be determined accurately without evidence, or are so notorious that evidence would be superfluous.

With regard to notorious facts, there have been some misconceptions in the past relating to whether the fact should be notorious everywhere and to all "reasonable" persons before judicial notice may be taken. According to Schmidt and Rademeyer³³⁹ this is due to an incorrect formulation of the rule in the first place. They advocate a more subjective criterion in the sense that judicial notice may be taken of any fact notorious enough to be known to any court that has the necessary jurisdiction to hear the matter (but not to any specific person or judge).³⁴⁰

South Africa and the United States of America share a common ancestry in the law of evidence, but the introduction of the *Federal Rules of Evidence* had a profound impact on the doctrine of judicial notice within the American jurisdiction.³⁴¹ Their application of the doctrine may be instructive and may indicate to South African courts in which ways the doctrine can find application in the information age.

Federal Rule of Evidence 201(b) provides that:

- (b) The court may judicially notice a fact that is not subject to reasonable dispute because it:
 - (1) is generally known within the trial court's territorial jurisdiction; or

336 Schmidt and Rademeyer *Law of Evidence* 6-5.

337 Schmidt and Rademeyer *Law of Evidence* 6-7.

338 Schmidt and Rademeyer *Law of Evidence* 6-7.

339 Schmidt and Rademeyer *Law of Evidence* 6-7.

340 Schmidt and Rademeyer *Law of Evidence* 6-7.

341 Bellin and Ferguson 2014 *NULR* 1153-1155.

- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

The introduction of the second part of the sub-rule shifts the focus away from a court-centred approach to a source-centred approach and broadens the scope of the judicial notice doctrine.³⁴² This had the effect in the United States that courts have taken judicial notice of facts found on the internet, as long as the source of the facts are not subject to reasonable dispute.³⁴³

The general rules relating to the admissibility of documentary evidence (and by extension any documentary evidence found on the internet) may prove too difficult for litigants, seeking to use information gleaned from the internet, to overcome. For example: any person outside the court room will not hesitate to rely on Google Maps to navigate to an unknown location, but in order to meet all the requirements of admissibility for documentary evidence, a litigant that seeks to use such evidence may require further authenticating evidence from a Google employee; an explanation by Google as to the accuracy thereof to establish its probative value; and an "original" of the evidence unless he/she manages to bring the evidence within the exceptions to the general rules.

4.4.2 Proposed legal rationale for taking judicial notice of facts found on the internet

According to Bellin and Ferguson³⁴⁴ the doctrine of judicial notice is a sensible alternative to requiring the formal admission in evidence of "common knowledge" facts found on the internet, thereby avoiding the problems created by the admissibility requirements and exclusionary rules.

The main danger that must be guarded against in the United States is that courts should not take judicial notice of facts that are inaccurate, as judicially noticed facts stand as proven unless rebutted³⁴⁵ and are not subject to the normal safeguard of cross-examination to weed out potential issues with the evidence such as bias on the

³⁴² Bellin and Ferguson 2014 *NULR* 1155.

³⁴³ Bellin and Ferguson 2014 *NULR* 1156-1157.

³⁴⁴ Bellin and Ferguson 2014 *NULR* 1158 "When a party either lacks the time or resources to establish the authenticity of a pertinent website, or cannot lay the foundation for an exception to the hearsay prohibition, the legal effort to admit information gleaned from the website runs into a dead end. Often the dead end will seem pointless, bizarre and unfair. The online information may be extremely reliable, highly relevant, and for all practical purposes unobjectionable."

³⁴⁵ Schmidt and Rademeyer *Law of Evidence* 6-7.

part of the author, untruthfulness and recent fabrication.³⁴⁶ Accuracy is therefore of critical concern where judicial notice is concerned. The *Federal Rules of Evidence* requires that judicial notice may only be taken of facts from "sources whose accuracy cannot reasonably be questioned".³⁴⁷ It is therefore of critical importance to assess the accuracy of the source prior to taking judicial notice of any facts stemming from it.

In this regard Bellin and Ferguson³⁴⁸ formulated a legal framework for taking judicial notice of facts found on the internet that seeks to address any possible deficiencies and problems whilst providing a sound scientific foundation. They identified four factors relating to the source of the fact that the court need to consider before it may take judicial notice of a fact found on the internet:

- Knowledge of the subject matter.
- Independence from relative bias.
- Motivation to ensure the accuracy of the information.
- Other factors.

This legal framework proposed by Bellin and Ferguson is supported and each of the factors will be briefly discussed below.

4.4.2.1 Knowledge of the subject matter

A great number of websites on the internet exist solely to disseminate information formulated by experts to the broad public.³⁴⁹ The expertise of the author of the information will be essential to determine not only the accuracy of the fact stated but also the probative value that should be attached thereto. Courts should therefore decline to take judicial notice of facts authored by an anonymous person or someone that does not have any knowledge of the subject matter.

Further support for this factor may be found in the fact that expert testimony may be presented as evidence as an exception to the general prohibition against opinion evidence. Although expert testimony does not have a direct correlation with the doctrine of judicial notice, its emphasis on the requirement of specialised knowledge

346 Bellin and Ferguson 2014 *NULR* 1166.

347 Rule 201(b)(2) *Federal Rules of Evidence*, 1975.

348 Bellin and Ferguson 2014 *NULR* 1167-1172.

349 Bellin and Ferguson 2014 *NULR* 1168.

broadly supports the requirement that a court should have regard to the expertise of the source of internet information before it may take judicial notice thereof.

This factor may also be required to establish the legal relevance of the facts which are to be admitted by judicial notice.

4.4.2.2 Independence from relative bias

Although a source may have the necessary expertise to publish a fact or opinion, this does not necessarily mean that the source is reliable. The source may have a bias which would colour the way the facts are presented and in turn mislead a court.³⁵⁰ This is especially problematic in the American system where a jury is instructed to accept the judicially noticed fact as conclusive.³⁵¹ Judicial notice will therefore not be suitable in the American system if a source has an incentive to skew, misrepresent or omit facts to suit some ulterior motive.³⁵²

The bias, if present, has to be relevant to the litigation at hand before it will influence the decision whether or not to take judicial notice. Also, where the possible bias will be to the detriment of the party that seeks to introduce a fact via judicial notice, the bias may be safely ignored.³⁵³ This concept can also be found in the South African evidentiary principles, such as where previous consistent statements are admissible if it is to the detriment of the party that made the previous consistent statement.

The South African position is different than the one in America, as judicially noticed facts may be refuted.³⁵⁴ Facts from biased sources should, however, be treated with circumspection where a court is asked to take judicial notice thereof.

4.4.2.3 Motivation to ensure accuracy

The next step in the framework is to examine what the source's motivation is to ensure the accuracy of its website. The main motivation for websites to ensure the accuracy of their content is monetary in nature. Websites are usually at least partially dependant

350 Bellin and Ferguson 2014 *NULR* 1169.

351 Rule 201(f) *Federal Rules of Evidence*, 1975.

352 Bellin and Ferguson 2014 *NULR* 1169.

353 Bellin and Ferguson 2014 *NULR* 1170.

354 Schmidt and Rademeyer *Law of Evidence* 6-7.

on advertising revenue which in turn is driven by the number of page views.³⁵⁵ Websites are tested by their visitors and if the content on the website cannot be trusted that site's visitors will go elsewhere which would lead to a decline in the website's revenue.³⁵⁶

Although this incentive does not guarantee that the information is infallible, it does serve as an indication that the source may be one whose "accuracy cannot be reasonably questioned".³⁵⁷

4.4.2.4 Other factors

Other factors may also be considered in order to persuade a court that the source for the facts of which judicial notice should be taken is trustworthy. The fact that previous courts have taken judicial notice of that source's facts, corroboration from outside sources (whether online or otherwise) and internal inconsistencies may all be of persuasive value either for or against taking judicial notice.³⁵⁸

4.4.3 *Application of the Bellin-Ferguson framework with regard to social media evidence*

Although previous decisions of other courts of law regarding facts are not binding in terms of the principle of *stare decisis*³⁵⁹ it would appear from recent South African case law³⁶⁰ that with social media evidence the High Court has taken judicial notice of the decisions in other divisions regarding the basics of how social media platforms function.³⁶¹ It is submitted that the basics of how social media platforms function are readily ascertainable enough; are not subject to reasonable dispute; and consequently that courts may take judicial notice thereof.

355 Wilson 2011 "8 Steps to developing ad revenue from your website" <http://webmarketingtoday.com/articles/wilson-ad-revenue-4/> [date of use 26 August 2015].

356 Bellin and Ferguson 2014 *NULR* 1170-1171.

357 Bellin and Ferguson 2014 *NULR* 1171.

358 Bellin and Ferguson 2014 *NULR* 1172.

359 *ABSA Bank t/a Volkskas Bank v Retief* 1999 3 SA 322 (NC).

360 *RKM v RLB* case no: 10175/2013 unreported case in the Kwazulu-Natal Division of the High Court. See Erlank 2014 *JQR* Aug-Oct 2014 for a discussion of the facts and legal principles.

361 Erlank 2014 *JQR* Aug-Oct 2014 and page 21 above.

The approach already taken by courts with regard to the very basic characteristics and functionality of Facebook may in future be extended to other general aspects of social media. One example is privacy settings.

The effect of privacy settings on sites like Facebook and Myspace are to restrict the number of people who may view content posted by the user.³⁶² This may be relevant to determine aspects such as publication during a defamation action. Whenever a user posts something on Facebook he/she has a choice of four default settings:

- Public: This would mean that there is no privacy restriction on that post and it will be visible to anyone on the internet.
- Friends: When this option is picked only other accounts on Facebook with whom the user has connected as a "friend" will be able to view the post. Depending on the other settings on the user's profile this visibility may be further extended to "friends of friends" which would mean that people that are connected to the user's friend may also view the post, although they may not have a connection with the user themselves.
- Only me: This option restricts visibility of the post so that only the user himself/herself can view the post.
- Custom: With this option the user may choose to have the post visible to specific people only, or to restrict certain people or lists of people from seeing the content.³⁶³

This type of information is readily available on the website itself, and a cursory internet search will yield the required information. It is submitted that courts can, and should, take judicial notice of the basic functionality of social media websites and services (and its effect) where it is relevant, by ascertaining for itself what those functionalities are. This will save valuable court time that will not be required in "rehashing the basics".³⁶⁴ Taking judicial notice in this way will also be in line with the framework proposed by Bellin and Ferguson:

362 Uncel 2011 *Jurimetrics* 49-50.

363 Facebook.com 2015 *What others see about you* <https://www.facebook.com/about/basics/what-others-see-about-you/posts/> [date of use 20 August 2015].

364 Erlank 2014 *JQR* Aug-Oct 2014.

- The social media site itself is in all probability the most knowledgeable with regard to how that social media site functions.
- The social media site has the monetary motivation to ensure that its information is accurate as users will probably head elsewhere if the information about the functioning of the social media site is inaccurate.
- The social media site will be free from relative bias.

Judicial notice should, however, be limited to generalities and facts that cannot be reasonably disputed. If, for example, it is relevant which privacy setting was applied in the specific case before the court, it has to be determined by what evidence is presented to the court and it would not be proper to take judicial notice of what functions were actually used by the parties concerned. It would, however, be perfectly proper for the court to take judicial notice of the general functionality and effect of privacy settings of the relevant social media website.

4.5 Conclusion

Social media evidence should be presented to the court in a way most practical for the court and the litigants. In the majority of cases printouts or transcripts of the social media evidence will be the best form in which to present the evidence to the court, but in other cases (such as video or audio evidence) modern technology should be capable of presenting the evidence to a court.

The rules regarding discovery as well as the definitions used by the rules of the High Court and the Magistrate's Court which is sufficient to cover social media evidence, will be applicable to social media evidence. Consequently the mechanisms established by the rules of court which may call on the opposing party to accept the authenticity of social media evidence may also be used in appropriate circumstances.

Oral testimony may be required to establish the relevance and authenticity of social media evidence also as a requirement in terms of the exclusionary rules. Oral testimony may also be utilised to attack or shore up the credibility of social media evidence.

It is further submitted that the doctrine of judicial notice should be used by courts in order to familiarise themselves with the basic functionality of social media platforms. In

this regard the source-centred approach advocated by Bellin and Ferguson³⁶⁵ is supported.

5 The probative value of social media evidence

The proper time for the court to evaluate the probative value of the evidence is at the end of the proceedings after all relevant evidence has been presented.³⁶⁶ The court should also take into account all the admitted evidence when reaching its conclusion.³⁶⁷ It is during the evaluation of the probative value of the evidence presented that a court should take into account the reliability of the evidence; the credibility of the witnesses tendering the evidence; and the likelihood of the truth of a litigant's version when considering the evidence as a whole.

When evaluating the weight of evidence, the court may need to draw inferences from secondary facts, certain presumptions may be applicable and the credibility of witnesses and other evidence need to be evaluated. The evidence as a whole is then measured against the requisite standard of proof in order to determine the successful litigant.

The credibility of evidence has to be determined on a case-by-case basis, taking into account the entirety of the evidence presented, which may also include the court's own observations with regard to the demeanour of the witness.³⁶⁸

Although the weighing of evidence should not be confused with the requirements of admissibility, it is submitted that the function performed by the court when weighing the evidence is similar to the function performed when determining relevance and should consist of a common sense approach blended with legal experience.

5.1 Inferences

When evaluating the probative value of evidence, the court will draw inferences from the entire body of evidence which tend to prove or disprove the facts in issue. A distinction must be drawn between criminal and civil matters, because the different

365 Bellin and Ferguson 2014 *NULR* 1137-1182.

366 *S v Baleka*(3) 1986 4 SA 1005 at 1022E.

367 *S v Van Aswegen* 2001 2 SACR 97 (SCA) at 101A.

368 Schmidt and Rademeyer *Law of Evidence* 3-30.

burdens of proof applicable in each instance affect the rules relating to the proper drawing of inferences.³⁶⁹

According to Schmidt and Zeffertt,³⁷⁰ with reference to *R v Blom*,³⁷¹ there are two rules in criminal cases that flow logically from the state's burden of proof:

- (a) The inference sought to be drawn must be consistent with all the proved facts.
- (b) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn.

In civil cases only the first rule is applicable and the second is adjusted to reflect the civil burden of proof.³⁷² These rules were developed to prevent errors in reasoning when evaluating the weight of circumstantial evidence³⁷³ and have been applied consistently by both criminal and civil courts.

These rules are criticised by Zeffertt and Paizes³⁷⁴ as being too vague and not compatible with the actual line of reasoning utilised by South African courts. From their discussion on the topic it appears that a number of disparate (but interrelated) facts regarded as a whole may strengthen the inference to the required standard of proof (beyond a reasonable doubt in the case under discussion) even though the underlying facts are no more than probable when seen in isolation.

Although Schmidt and Rademeyer³⁷⁵ are of the view that the drawing of inferences is only necessary where circumstantial evidence is presented to prove the relevant fact, Zeffertt and Paizes³⁷⁶ are of the opinion that inferences must of necessity always be drawn in order to determine the ultimate issues, even where direct evidence is presented. They distinguish between two tiers of inferential reasoning:

- The first tier relates to the credibility and reliability of the evidence presented and is done in all cases where evidence is led, as the relative

369 Schmidt and Zeffertt "Evidence" 577.

370 Schmidt and Zeffertt "Evidence" 577.

371 *R v Blom* 1939 AD 188 at 202-203.

372 Schmidt and Zeffertt "Evidence" 577. The inference sought to be drawn must be more probable than any other conflicting inference.

373 Zeffertt and Paizes *Essential Evidence* 24.

374 Zeffertt and Paizes *Essential Evidence* 27-28.

375 Schmidt and Rademeyer *Law of Evidence* 3-27.

376 Zeffertt and Paizes *Essential Evidence* 23.

credibility and reliability of conflicting evidence should always be weighed against each other to ascertain which evidence is to be believed.

- The second tier arises even where the truth of the evidence is assumed (or proven), and requires the court to draw inferences from indirect or circumstantial evidence in order to determine the ultimate issue.

The risk of error in the first tier of inferential reasoning only relates to the truthfulness and accuracy of the evidence itself, whereas the second tier of inferential reasoning may have additional errors where the process of reasoning is flawed.³⁷⁷ The rules set out in *R v Blom*, and the process advocated by Zeffertt and Paizes set out below, aim to combat errors in reasoning.

According to Zeffertt and Paizes³⁷⁸ evidence regarded as a whole must be measured against the required standard of proof in order to determine whether a litigant was successful in his/her case and that rules of the kind set forth in *R v Blom* are not necessary as:

... free reign must be given to all sorts of techniques with a view to creating flexible, non-mechanical standards for the proof of each intermediate fact, standards that may, in view of the entire factual matrix of a given case, vary from fact to fact as well as from case to case, depending on the theory of proof one chooses as well as the circumstances in which that theory is deployed.

The ultimate determination to be made is whether the party bearing the onus have discharged it. It is submitted that a common sense approach, taking into account all the admitted evidence, is preferable.

It is important not to confuse an inference with an assumption.³⁷⁹ An inference is drawn from objectively proven facts and must be consistent with all the accepted facts before it may be drawn, whereas an assumption is based on conjecture and guesswork.³⁸⁰

Social media evidence has to be evaluated along with all other admitted evidence and inferences may, in appropriate circumstances, be drawn from it. Whether it will be

377 Zeffertt and Paizes *Essential Evidence* 23-24.

378 Zeffertt and Paizes *Essential Evidence* 31.

379 Schmidt and Rademeyer *Law of Evidence* 3-26.

380 *S v Naik* 1969 2 SA 231 (N) and *Caswell v Powell Duffryn Associated Collieries Ltd* 1939 All ER 722.

appropriate to draw the inference that a party wishes to draw has to be determined on a case-by-case basis by taking into account the entire factual matrix of that case.

Although properly authenticating social media evidence³⁸¹ will be essential in order to render it admissible, the authenticating evidence presented will have an important secondary role to play when determining the probative value of the social media evidence.³⁸²

Evidence presented to authenticate may also serve as corroboration of the evidence it is authenticating and thereby affect the reliability of the social media evidence. If the person who authenticates the social media evidence also testifies to the accuracy and reliability of the evidence presented in court (in the sense that the evidence presented is a true reflection of the social media evidence as found on the internet) this will strengthen the probative value of the social media evidence. It is submitted that this is in keeping with the approach set out in *S v Baleka(1)*.

5.1.1 An example of drawing inferences from social media evidence

The phenomenon of "revenge pornography"³⁸³ recently became a major problem, even to the point where entire websites were dedicated to the posting of revenge porn.³⁸⁴ Australia's opposition party has also recently proposed to criminalise the publishing of revenge porn.³⁸⁵

The following may serve as a hypothetical example of where inferences may be drawn from social media evidence in a case where revenge porn has been published on social media: A plaintiff approaches a court and seeks damages on the basis of defamation, as the defendant had allegedly published sexually explicit pictures of her on Facebook. The following facts are proven during the course of the trial:

381 See discussion in paragraph 3.3 on p 40-44 above.

382 See *Ndlovu v Minister of Correctional Services* 2006 4 All SA 165 at 175.

383 Revenge pornography is where a person (the perpetrator) posts sexually explicit images of another person online without the latter's consent. This usually happens when a romantic relationship ends and one party seeks to humiliate the other. Barret 2015 <http://www.telegraph.co.uk/news/uknews/law-and-order/11531954/What-is-the-law-on-revenge-porn.html> [date of use 3 September 2015].

384 The most famous example of such a website was IsAnyoneUp.com which was shut down on 19 April 2012 after the owner sold the domain to an anti-bullying website. Hill 2012 <http://www.forbes.com/sites/kashmirhill/2012/04/19/isanyoneup-is-now-permanently-down/>.

385 Keany 2015 <http://www.abc.net.au/news/2015-09-03/labor-mps-propose-private-members-bill-banning-revenge-porn/6747764>.

- The plaintiff and the defendant had been in a romantic relationship. The relationship was broken off by the plaintiff a week prior to the date on which the picture was posted on Facebook.
- The plaintiff took the explicit picture herself.
- The plaintiff sent the picture to the defendant via WhatsApp when they were still in a relationship. A transcription of the WhatsApp message is produced in court and the original is shown via an overhead projector. The message shows two blue "tick" marks which indicated that the defendant not only received the picture but also viewed it on WhatsApp.
- The plaintiff testified that she sent the picture only to the defendant and to no other person.
- The plaintiff and two of her friends (who are also connected with her on Facebook) testified that they had seen the picture on the plaintiff's Facebook wall, as the picture was "tagged"³⁸⁶ with the plaintiff's name and the plaintiff could be clearly identified from the picture as it showed her face as well. A printout of the picture as posted on Facebook is produced in court as documentary evidence. It is clear from the printout that the picture is of the plaintiff, that it was posted on Facebook and that the plaintiff's name appears above the picture.
- The plaintiff testifies that the user that posted the explicit picture was only registered under the name "Got YOU" with a picture of a grinning cartoon face and no personal details. This can also be seen on the printout of the Facebook post.
- A mutual friend of the plaintiff and the defendant testified that the defendant had told him, on the same day that the picture was posted, that he would "ruin" the plaintiff.

386 Tagging someone on Facebook displays the name of the person who is tagged above the picture or other content posted on Facebook and also appears on the user's Facebook wall. The person's name is a hyperlink that links back to that person's Facebook profile. See also Roos and Slabbert 2014 *PELJ* at 2855.

- The Facebook post of the picture and the profile that posted the picture were both deleted from Facebook on the same day the summons was served on the defendant.

The defendant denied that he posted the picture on Facebook. He testified that he does not know who posted the picture. He testified that he had not sent the picture to anyone. The defendant presented no further evidence.

The court is asked to draw the inference that it was in fact the defendant that posted the picture on Facebook. The court needs to examine whether the inference is consistent with all of the proven facts:

- The fact that the plaintiff and the defendant was in a romantic relationship explains why the picture was sent to the defendant by the plaintiff. The plaintiff breaking off the relationship gives the defendant a motive.
- The hypothesis that the defendant had a motive to post the picture is strengthened by the testimony of their mutual friend that the defendant stated that he would "ruin" the plaintiff.
- The defendant received the picture from the plaintiff on WhatsApp. He consequently had the means to post the picture. The plaintiff also testified that the only person who had the picture (other than herself) was the defendant. It therefore makes it unlikely that anyone else would have had the picture in order to post it on Facebook.
- The defendant's denial that he posted the picture is not corroborated by any other evidence (whether other testimony, real evidence or documentary evidence).

The inference that the court is asked to draw may also be strengthened by other reasonable inferences:

- It can reasonably be inferred from the alias used by the person who posted the picture, the content of the picture itself and the fact that it was posted on such a public forum as Facebook, that it was done by a person with a motive to injure the plaintiff.

- It can further be inferred that that person knows the plaintiff, as it will be unlikely that someone not familiar with the plaintiff would post something like that.
- Although the deletion of the picture and the profile from Facebook on the same day as service of the summons may be coincidental, it will be reasonable to infer that this is not the case when seen against the backdrop of all the evidence presented and may strengthen the inference that it was in fact the defendant that posted the picture on Facebook.

In this example it can therefore be reasonably inferred, on a balance of probabilities, that the defendant was the person who posted the picture of the plaintiff on Facebook.

5.2 Presumptions

Presumptions may also be applicable when determining the weight of evidence. One must distinguish between irrebuttable presumptions of law, rebuttable presumptions of law and presumptions of fact.³⁸⁷

According to Schmidt and Rademeyer³⁸⁸ the distinction between presumptions of fact and presumptions of law lie within the consequences attached to the operation thereof. Where a presumption of law finds application, the court is obliged to make the prescribed assumption, but with a presumption of fact the court draws an inference from certain established facts and has a judicial discretion.³⁸⁹

Irrebuttable presumptions of law are found in substantive law and not the law of evidence,³⁹⁰ and will not be discussed here. Presumptions of fact are not legal rules *per se*. It refers to inferences drawn from facts but it does not compel a court to apply the presumption, whereas rebuttable presumptions of law do compel a court to accept the proven fact until evidence in rebuttal is adduced.³⁹¹ These presumptions will be discussed below.

5.2.1 Rebuttable presumptions of law

387 Schmidt and Rademeyer *Law of Evidence* 5-4; Zeffertt and Paizes *Essential Evidence* 55-56; *Tregea v Godart* 1939 AD 16.

388 Schmidt and Rademeyer *Law of Evidence* 5-4.

389 Schmidt and Rademeyer *Law of Evidence* 5-5 and 5-20.

390 *Scagell and others v Attorney-General of the Western Cape and others* 1997 2 SA 368 (CC) at par 30.

391 Schmidt and Rademeyer *Law of Evidence* 5-19 to 5-20.

Although there are a number of different presumptions of law such as the presumptions relating to paternity, marriage, capacity and innocence³⁹² the only presumption of law which may find application where social media evidence is concerned is found in Section 15(4) of the ECTA:

A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, admissible in evidence against any person **and rebuttable proof of the facts contained in such record, copy, printout or extract.**³⁹³

A *data message* is defined in the ECTA as:

data generated, sent, received or stored by electronic means and includes –
(a) voice, where the voice is used in an automated transaction; and
(b) a stored record.

Data is defined as "electronic representations of information in any form".³⁹⁴

Social media evidence will satisfy the definition of *data* as well as *data message*. From the outset it must be noted that this presumption will only find application where social media evidence was made within the ordinary course of business. In *Ndlovu v Minister of Safety and Security*³⁹⁵ the court interpreted Section 15(4) of the ECTA and identified two different types of documents to which the presumption may apply:

- Data messages that were made in the ordinary course of business and that do not require certification.
- Copies, printouts or extracts from the data message which does require certification that it is correct.

According to Collier³⁹⁶ the section may also be interpreted in such a way that certification will be required for both types of documents. It is submitted that, from a

392 Schmidt and Rademeyer *Law of Evidence* 5-6 to 5-17.

393 S15(4) of the ECTA, own emphasis.

394 S1 of the ECTA.

395 *Ndlovu v Minister of Correctional Services* 2006 4 All SA 165 (W).

396 Collier D 2005 JBL 8-9.

practical standpoint, evidence brought in terms of Section 15(4) will in most cases require certification as the form in which the *data message* is presented in court will of necessity be a copy, printout or extract in order to render it perceptible to the court.

Because Section 15(4) creates a rebuttable presumption, courts should require strict adherence to the requirements set out in the legislative provision³⁹⁷ and it is therefore submitted that certification by a person in the service of the person who made the data message should be done in all cases where a party seeks to introduce evidence in terms of Section 15(4) of the ECTA.

If social media evidence was made within the ordinary course of business by a person who seeks to introduce it into evidence, such evidence will be admissible and will also be rebuttable proof of the facts contained therein, subject to compliance with the formalities set out in section 15(4) of the ECTA.

The enactment of section 15(4) has been criticised as well. Hofman³⁹⁸ identifies six areas of difficulty raised by section 15(4):

- Firstly he argues that the provision "in the ordinary course of business" is much wider than the previous exception which only applied to business records. This would mean that any data message, including e-mails and even internal memoranda, will be able to serve as rebuttable proof of the facts contained therein.
- Secondly he criticises the presumption created that any data message certified in terms of this sub-section will serve as rebuttable proof of the facts stated in the data message. He further argues that the presumption as it applied to banking records³⁹⁹ was at least defensible as the banking sector is highly regulated. The mere fact that a person is running a business does not mean that the data messages created by that person or business are accurate or even that it is honest.
- Thirdly, the certification required in terms of the ECTA is a less rigorous requirement than the affidavit required for the banking record exception, and the ECTA does not require that the person doing the certification has to state that he had control over the data messages. This could create further doubts as to the

397 Schmidt and Zeffertt "Evidence" 470-476.

398 Hofman 2006 SAJCJ 267-268.

399 Section 236 of the CPA.

accuracy of any data message because there will exist the possibility of interference by unknown third parties where the data messages are accessible by other people.

- Fourthly, if the person who wishes to use this type of evidence does not control the computer system Hofman is of the view that it would be problematic to obtain the necessary certificate.
- Fifthly, he states that the wide range of evidence to which this sub-section may be applied will inundate courts in excess documentary evidence.
- Lastly the presumption created may not pass constitutional muster as it is possible that it would create a so-called "reverse onus" which the accused would need to rebut.

It is submitted that the fifth difficulty raised by Hofman is without merit. Courts should first and foremost be concerned with the pursuit of truth. The principles regarding legal relevance are more than sufficient to exclude superfluous evidentiary material as legally irrelevant.⁴⁰⁰

The most problematic issues raised by Hofman is that courts may be enjoined to accept inaccurate or false evidence as rebuttable proof just because a person managed to comply with the provisions of sub-section 15(4) of the ECTA, and the possibility of a "reverse onus".

Although it may be argued that the fact that it is a rebuttable presumption presents a safeguard against the admission of false or inaccurate evidence, this will still unfairly burden a litigant who would need to lead evidence to refute facts that was only admitted because the legislator circumvented the other rules of evidence specifically designed to prevent the admission of doubtful or inaccurate evidence.

On the other hand it may be immensely helpful to assist litigants in admitting evidence which is *prima facie* reliable. It would waste precious time and resources to require a party to lead the necessary foundation evidence to establish the admissibility of

400 See the discussion in par 3.1 on pp 18-27 above.

documentary evidence where the parties are relying on those same facts when conducting their day-to-day affairs.

This reasoning is evident from the court's judgment in the *MTN Service Provider* case where Claassen J remarked, in response to an argument that the documentary evidence admitted in terms of Section 15(4) of the ECTA constituted inadmissible hearsay, that:

... it would, in my view, be a travesty of justice if the computer generated documentation evidencing a long-standing contractual relationship between the plaintiff and the first defendant ... should be rejected merely because of the hearsay rule. In my view, this case is *par excellence* the type of case intended by the Legislature to pass muster for purposes of facilitating proof of facts by way of data messages in terms of the ECT Act.⁴⁰¹

Whether the same reasoning could be applied in a criminal case, where this may impact the constitutional rights of the accused, still remains to be seen.

It is submitted that the requirements of legal relevance should be used by courts to examine the foundation laid by the party seeking to introduce evidence in terms of Section 15(4) of the ECTA. The principles surrounding the reliability of sources discussed in paragraph 4.4.2 ⁴⁰² may be used in this regard, as it would tend to show the reliability of the evidence to be admitted in terms of Section 15(4) of the ECTA. Parties should also focus on the reliability of the source during cross-examination and not be content merely to attack the evidence in argument.

5.2.2 Rebuttable presumptions of fact

The classification of presumptions of fact is somewhat arbitrary⁴⁰³ and whether courts will apply existing presumptions of fact to social media evidence, or even create new ones, will be determined over time. It should be borne in mind that a court will always have the discretion, to be exercised judicially, as to whether or not to apply a presumption of fact.⁴⁰⁴

401 *MTN Service Provider (Pty) Ltd v LA Consortium & Vending CC* 2009 JOL 23394 (W) at p 20.

402 See paragraph 4.4.2 on p71-74 above.

403 Schmidt and Rademeyer *Law of Evidence* 5-20.

404 Schmidt and Rademeyer *Law of Evidence* 5-20.

The following presumptions of fact may find application where social media evidence is concerned, although this list is not exhaustive and it may even develop further over time as courts become more familiar with social media evidence.

5.2.2.1 Continuance

Where a state of affairs is proven to have existed at one time, it may be presumed that it continued to exist.⁴⁰⁵ Whether this presumption will find application in a specific case, and what the strength of the inference should be, should be determined by taking into account the specific facts of each particular case.

This presumption may, for example, find application to prove that a person who connected with certain people on social media continued to have contact with those people. It is again stressed that the presumption should be applied only where it is appropriate, in the circumstances of the case, bearing in mind all the evidence.

5.2.2.2 Regularity of instruments and appliances

This presumption applies where it is presumed that an instrument or appliance that usually acts in a certain way also acted in such a way *in casu*.⁴⁰⁶ It is submitted that this presumption can safely be extended to social media evidence, failing evidence to the contrary. Once a litigant proves that evidence occurred on a social media platform, the court may assume that the platform functioned in the way it normally does. It may, however, be necessary for a party to lead evidence as to how a social media platform functions in order to familiarise the court with it, until such time as courts are prepared to take judicial notice of the functioning of social media platforms.⁴⁰⁷

5.2.3 Possible future presumptions of fact

Due to the novelty of social media evidence, courts have to develop presumptions of fact over time, which should deal with specific problems encountered in practice. Most presumptions of fact are based on a rationale of "normality", meaning that it is presumed that where the basic facts necessary for a presumption of fact to apply is established, the normal consequences in fact followed.⁴⁰⁸

405 Schmidt and Rademeyer *Law of Evidence* 5-20 to 5-21.

406 Schmidt and Rademeyer *Law of Evidence* 5-25.

407 For a detailed discussion of the doctrine of judicial notice see par 4.4 on pp 65-73 above.

408 Schmidt and Rademeyer *Law of Evidence* 5-20.

It is submitted that there may very well be room for a presumption of authorship. Where the identity of the person behind a social media profile can be readily ascertained or established by means of other admissible evidence, it can be safely presumed that the natural person is in fact the person who made a particular post on that social media profile. Personal social media profiles are usually protected by passwords and can only be accessed by the creator of the profile. This presumption should not, however, be extended to presume that a person "tagged" in another person's post is a co-author thereof.

In *Isparta v Richter*⁴⁰⁹ the plaintiff sued for damages caused by defamatory statements published on Facebook by the first defendant. The plaintiff and the second defendant had been married and after their divorce the second and first defendants were married to each other. The comments that constituted the defamatory material were published by the first defendant and the second defendant was only "tagged" in the posts by the first defendant. As the court explains:

A user may "tag" another user to any postings placed on his or her wall. The name of the tagged user will then appear at the end of the user's message as "with . . . (tagged user's name)". The message would also appear on the wall of the tagged person. The tagged person's consent is not required, but he or she may remove his or her name from the message.⁴¹⁰

From the quote it is clear that the post may be connected to a person's Facebook profile by tagging, without the tagged person doing anything. The court held the first and second defendants jointly and severally liable for the damages occasioned by the defamatory posts on Facebook. It is unclear on what basis the second defendant was held liable, as the court found that the posts were actually made by the first defendant and the second defendant was only tagged in the first defendant's posts. It is submitted that this decision is wrong in this regard, as it would appear that the second defendant was held liable solely on the basis that he did not remove the tag on the defamatory posts.

5.3 *The provisions of Section 15 of the ECTA applicable to probative value*

409 *Isparta v Richter* 2013 6 SA 529 (GNP).

410 *Isparta v Richter* 2013 6 SA 529 (GNP) at par 7.

Because of the problems experienced in the past by courts dealing with evidence from new technological sources, the provisions of Section 15(2) and (3) of the ECTA paves the way for the use of electronic evidence:

- (2) Information in the form of a data message must be given due evidential weight.
- (3) In assessing the evidential weight of a data message, regard must be had to –
 - (a) the reliability of the manner in which the data message was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the data message was maintained;
 - (c) the manner in which its originator was identified; and
 - (d) any other relevant factor.⁴¹¹

Collier⁴¹² notes that the court's assessment of the evidentiary weight of the electronic evidence in *Ndlovu v Minister of Correctional Services*⁴¹³ was fairly basic but also that it was probably only what was required in the circumstances of the case.

When evaluating the probative value of social media evidence the court should take into account the three factors specified in section 15(3)(a), (b) and (c) as well as any other relevant factors. The specific facts required for a court to make the necessary assessment will depend on the circumstances of the case. It would seem advisable for lawyers to present sufficient evidence to enable a court to make the necessary assessment.

From the judgment in *MTN Service Provider (Pty) Ltd v LA Consortium & Vending CC*⁴¹⁴ it is clear that the court did evaluate the facts proven by the plaintiff, which was uncontroverted, against the requirements of Section 15(3) and found that the evidence passed muster. From the judgment it appeared that the plaintiff led evidence:

- that the Oracle computer system used by the plaintiff was generally reliable and efficient;

⁴¹¹ S 15(2) and (3) of the ECTA.

⁴¹² Collier 2005 *JBL* 8.

⁴¹³ *Ndlovu v Minister of Correctional Services* 2006 4 All SA 165 (W).

⁴¹⁴ *MTN Service Provider (Pty) Ltd v LA Consortium & Vending CC* 2009 JOL 23394 (W) 19-20.

- the data was captured by the plaintiff's employees in the ordinary course of business;
- the extracts and printouts used by the plaintiff was certified by officers in its employ in terms of Section 15(4) of the ECTA;
- the heads of department ultimately responsible for the accuracy of the captured data testified to that effect, although they were not personally responsible for the data capturing (the court appeared to have admitted this evidence by interpreting Section 15(4) as an exception to the hearsay rule, although admission in terms of Section 34 of the CPEA would also have been possible); and
- that background information was provided to the court to enable it to understand how the Oracle system functioned.

The defendant in the *MTN Service Provider* case did not lead any evidence to refute the plaintiff's case, but nevertheless presented legal argument based on the law of evidence as it was applied to more traditional forms of evidence. These arguments were firmly rejected by the court and it may serve as an indication that South African courts are becoming more willing to entertain the newer forms of evidence in terms of the ECTA, as long as the requirements of Section 15 are met.

5.4 Conclusion

The probative value of social media evidence, once it is properly admitted, should be evaluated along with all the other evidence presented in the case. It may also serve as a basis from which inferences may be drawn. The proposal by Zeffertt and Paizes that the drawing of inferences should not be confined to a mechanical two-step approach as set out in *R v Blom*, but rather be extended to a more holistic approach in appropriate circumstances by taking into account the entire body of proven facts and adjusting the process of reasoning accordingly, is supported.

The most important presumption of law that will be applicable to social media evidence in the appropriate circumstances, is the presumption created by Section 15(4) of the ECTA. This section creates a rebuttable presumption that the contents of a data message, properly certified, stands as rebuttable proof of the facts contained therein if it was made by a person "in the ordinary course of business". Whether this presumption

will pass constitutional muster for use in criminal cases has yet to be determined, but it can possibly create a "reverse onus" in criminal matters, the constitutionality of which would have to be examined on the basis of Section 36 of the *Constitution of the Republic of South Africa, 1996*.

It is further submitted that rebuttable presumptions of fact may find application when evaluating the probative value of social media evidence, most notably a presumption of continuance⁴¹⁵ and a presumption of regularity.⁴¹⁶ It is also suggested that there may be room for a presumption of authorship, which would presume that a person, who has been identified as the owner of a particular social media profile, was in fact the person who made the posts contained on that profile.

6 Conclusion and recommendations

In order for courts to make proper use of social media evidence it will be imperative that they form a proper understanding of how social media networks function. This appears to be the approach already taken in cases where social media evidence was part of the *facta probanda*⁴¹⁷ which is commendable.

In chapter 2 the nature of social media evidence was examined and it became clear that it can take a number of different forms, all of which can be classified as either documentary or real evidence. The type of class it should be received in will be determined by the purpose test: if the evidence is tendered to prove that the contents thereof is true, it should be received as documentary evidence; if it is tendered to prove something other than the contents being true, it should be dealt with as real evidence.

With regards to the admissibility of social media evidence, it will firstly have to meet the requirement of relevance. This evaluation should be done by weighing the potential probative value of the evidence against the potential prejudice the admission may cause. If the court have to examine a profusion of side issues (such as the technical reliability of the social media platform or insisting on the original evidence) this may

415 That a person who communicated on social media continued to do so as long as the profile was not changed.

416 I.e. that the social media platform functioned in the same manner *in casu* that it normally does.

417 *Heroldt v Wills* 2013 2 SA 530 (GSJ); *Dutch Reformed Church Vergesig v Sooknunan t/a Glory Divine World Ministries* 2012 3 All SA 322 (GSJ).

have the effect that the social media evidence will be rejected for not being sufficiently legally relevant.

When the social media evidence is presented as indirect evidence of a fact in issue; credibility evidence; or as an admissibility requirement for other evidence, the competing interests of probative value and prejudice have to be weighed against each other in order to determine whether or not the social media evidence is sufficiently legally relevant for admission. This is unlikely to be the case where the social media evidence consists of the *facta probanda* in the case, as its degree of relevance in such instance will trump any possible prejudice that may flow from its admission and it will consequently always be legally relevant.

The exclusionary rules against the admission of hearsay, character and similar fact evidence, previous consistent statements and informal admissions are the rules that are most likely to have an impact on the admission of social media evidence. It is submitted that the current exclusionary rules should be sufficient to regulate the admission of social media evidence, although it is possible that new exceptions to the exclusionary rules will be developed over time.

It is further recommended that authenticating social media evidence, which is documentary in nature, should be more important than the mechanical application of the originality rule. It is imperative that the authentication of social media evidence should not be confused with the reliability or probative value of that evidence. The originality rule have also been watered down further by the enactment of Section 14 of the ECTA, and this supports the submission that courts should rather ensure that social media evidence is properly authenticated than insisting on "original" social media evidence. This should be sufficient to ensure that doubtful evidence is excluded or can at least be tested by the other evidentiary mechanisms such as cross-examination.

Courts should not take an overly technical approach to the admission of social media evidence unless there are compelling reasons to do so in the specific case where the issue is raised. Mere aspersions against the reliability of social media evidence should not necessitate the court to discount social media evidence completely. Only in cases where a party disputes the reliability of the social media evidence, and those allegations are backed up by other relevant evidence (whether from expert witnesses

or otherwise), should the court examine the underlying technical foundation of social media evidence.

Social media evidence should be presented to the court in a way most practical for the court and the litigants. In the majority of cases printouts or transcripts of the social media evidence will be the best form in which to present the evidence to the court, but in other cases (such as video or audio evidence) modern technology should be capable of presenting the evidence to a court.

The rules regarding discovery will be applicable to social media evidence as well, as the definitions used by the rules of the High Court and the Magistrate's Court are sufficient to cover social media evidence. Consequently the mechanisms established by the rules of court, which may call on the opposing party to accept the authenticity of social media evidence, may also be used in appropriate circumstances.

Oral testimony may be required to establish the relevance and authenticity of social media evidence and also as a requirement in terms of the exclusionary rules. Testimony, whether oral or in documentary form, may also be utilised to attack or shore up the credibility of social media evidence.

It is further submitted that the doctrine of judicial notice should be used by courts in order to familiarise themselves with the basic functionality of social media platforms. In this regard the source-centred approach advocated by Bellin and Ferguson⁴¹⁸ is supported.

The probative value of social media evidence, once it is properly admitted, should be evaluated along with all the other evidence presented in the case. It may also serve as a basis from which inferences may be drawn in accordance with the process of reasoning advocated by Zeffertt and Paizes⁴¹⁹ and discussed in paragraph 5.1.

With regard to presumptions, the most important presumption of law that will be applicable to social media evidence is the presumption created by Section 15(4) of the ECTA. Whether this presumption will pass constitutional muster for use in criminal cases has yet to be determined, but it can possibly create a "reverse onus" in criminal

418 Bellin and Ferguson 2014 *NULR* 1137-1182.

419 Zeffertt and Paizes *Essential Evidence* 31.

matters, the constitutionality of which would have to be examined on the basis of Section 36 of the *Constitution of the Republic of South Africa, 1996*.

It is further submitted that rebuttable presumptions of fact may find application when evaluating the probative value of social media evidence, most notably a presumption of continuance and a presumption of regularity. It is also suggested that there may be room for a presumption of authorship, which would presume that a person, who has been identified as the owner of a particular social media profile, was in fact the person who made the posts contained on that profile.

The existing rules of evidence may have to be adjusted for specific problems encountered in practice, but this needs to be done over time on a case-by-case basis. As matters currently stand, social media evidence will in principle be admissible in terms of the common law rules of evidence read with the provisions set out in Sections 14 and 15 of the ECTA.

Social media evidence should be presented to the court in a form that will enable the court to observe the evidence, and social media evidence will still be subject to the rules of relevance and authenticity, as well as the other exclusionary rules of evidence, before it may be admitted. Once it is properly admitted, its probative value should be examined together with the entire body of admitted evidence in order to enable the court to come to a just conclusion.

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