

SOUTH AFRICAN LAW COMMISSION

Project 6

Review of the Law of Evidence

Report

on the

admissibility in civil proceedings of evidence
generated by computers

April 1982

To the Honouable H.J. Coetsee, M.P., Minister of Justice

I am pleased to submit in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on the admissibility in civil proceedings of evidence generated by computers.

P.J. Rabie

Chairman

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 79 of 1973).

The members of the Commission are -

The Honourable P.J. Rabie, DMS, Judge of Appeal, (Chairman)

The Honourable G. Viljoen, Judge of Appeal, (Vice-Chairman)

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ADMISSIBILITY OF COMPUTER GENERATED EVIDENCE

1. INTRODUCTION

1.1 The decision of the Appellate Division of the Supreme Court of South Africa in Narlis v South Africa Bank of Athens Limited 1976 2 SA 573 (A) aroused considerable concern among bankers and other computer users as regards the admissibility in evidence of computer-generated evidence. In this decision Holmes J A came to the conclusion that computerised records are not admissible under section 34 of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965), because this section regulates the admissibility of statements made by persons in documents. A computer is not a person and a computer print-out can therefore not be said to be a document containing a statement made by a person. Attention was drawn to the fact that in the United Kingdom it was found necessary to regulate by statute the admissibility of evidence generated by computers. The South African legislature was urged to consider the enactment of similar legislation here.

1.2 As a result of this decision the Clearing Bankers Association of South Africa requested the Commission to investigate the need for specific legislation regulating the admissibility in civil proceedings of computer-generated evidence. This request was acceded to. During July 1978 the Commission wrote to a number of persons and bodies inviting them to indicate the nature and extent of the problems they were experiencing as a result of the Narlis case and to suggest solutions to these problems. Only a small number of banks and the above-mentioned Association responded. In general it was suggested that legislation cast in the mould of section 5 of the English Evidence Act of 1968 (c 64) should be introduced here.

1.3 In January 1980 the Commission received from the said Association a report compiled on its behalf by the Honourable Mr Justice J.M. Didcott of the Natal Provincial Division of the

Supreme Court of South Africa. From the report it appears that Mr Justice Didcott had been requested by the Association to investigate legislation here and overseas dealing with the admissibility in civil proceedings of computer-generated evidence and, having done so, to make suggestions to the Commission for similar legislation in the Republic. The proposed legislation accompanied the report.

1.4 A supplementary report and a further draft Bill were received during March 1980 from Mr Justice Didcott himself. This draft Bill was widely circulated by the Commission for comment among various persons and bodies. The comments received were all made available to Mr Justice Didcott, who in turn commented on them. He also attended a meeting of the Commission during July 1980, when the representations it had received were discussed, together with the detailed provisions of the draft Bill. As a result of this a third draft was prepared. The Commission decided that the Bill should be published in the Government Gazette. This was done. Not much comment was received but such as was received was favourable on the whole.

2. NEED FOR REFORM

2.1 The advent of the computer poses new and exciting challenges for law reform. The use of computers in the business community, the public sector and other spheres of society is widespread and is constantly on the increase, both as regards the number of computers used and as regards the activities and capacity of computers. Computers and associated equipment are used because they increase efficiency and decrease costs. They are here to stay; indeed, we are on the threshold of dramatic developments as regards computers and their use.

2.2 The law must keep abreast of developments and must recognise the need for reform. The courts must become familiar with the realities of contemporary business practices. From the study of the matter it appears that South Africa has lagged behind in that the rules of evidence do not provide adequately for the

admissibility of computerised records. The Commission is of the opinion that the admissibility in evidence of such records ought to be regulated specifically by legislation.

3. THE EXTENT OF THE REFORM THAT IS NECESSARY

3.1 The Commission examined the possibility of amending section 34 of Act 25 of 1965 so as to accommodate the admissibility of computerised records. The conclusion reached was, however, that a simple amendment of this nature would not solve all the problems related to the proof of computerised records.

3.2 Section 34 regulates the admissibility of documentary hearsay evidence. Its entire scheme, a rather complicated one, is geared to accommodating statements made by persons and by them alone. It has other features too, highly unsuitable to its accommodation of computerised records. For instance, it prescribes personal knowledge of the matters with which an authorised statement deals, and it puts beyond the pale most statements prepared for the purposes of litigation. Computer operators seldom have personal knowledge of matters in which they are engaged, and many computer print-outs must necessarily be produced for use in litigation. Section 34 also adopts the general rule that the maker of a statement must be called as a witness if available. This condition seriously limits the usefulness of this provision for computerised records. It is also significant that section 1 of the English Evidence Act of 1938(1 & 2 Geo VI c 28), of which section 34 is virtually a carbon copy, was found to be neither responsive nor adaptable to the demands of the computer age that ensued. The English Evidence Act of 1968 had to be specially devised for the admissibility of computerised records.

3.3 This approach, where specific provision is made for computer-generated evidence, leaving out other business records, has been adopted by many jurisdictions. The Commission is in agreement with this approach. Before giving reasons for this, it is necessary to mention another approach followed by some countries.

3.4 Briefly, these countries treat the question of computerised records not as a topic on its own but merely as part of a larger subject, i.e. either the law of evidence as a whole or the branch of it concerned with documentary evidence, particularly what is generally called business records. To put it in a nutshell: their approach is to deal with business records as a whole, whether produced by a computer or by any other means. The advantages of such general legislation are obvious. Such legislation is simple and capable of broad and flexible interpretation.

3.5 There is, however, another side to the coin, namely that there is a basic disparity between human and electronic output. It would appear that the advocates of general legislation have lost sight of this fundamental point. A moment's thought will reveal many differences between ordinary records and those produced by computers. They need not detain us here: they are many and for the law of evidence they are consequential. In this regard Mr Justice Didcott says:

"The fundamental point ... is that computerised records are not just another species of records, to be treated as if they were. They come from their own distinctive mould. To lump them together with conventional documents, and to legislate simultaneously for both, is to ask for trouble. Two results can be expected. The first is a series of provisions inappropriate to, and sometimes unworkable in respect of one category or the other. The second is an enactment avoiding that danger by terminology so elaborate that its interpretation becomes a nightmare for everybody... Much better ... is to recognise that one and the same statutory pattern will not do for human and electronic output; to leave conventional documents more or less to their traditional devices, which have worked well on the whole; and to cater separately for computerised records by legislation that focuses directly, sharply and clearly on them."

3.6 The Commission endorses this statement. It is, therefore, recommended that specific provision be made for

computerised records.

4. SOME FEATURES OF THE BILL

4.1 At the outset it must be mentioned that the Bill applies to civil proceedings only. A number of those who commented on the matter have urged that the proposed legislation should govern criminal as well as civil proceedings.

4.2 In the first place it must be pointed out that the feasibility of such a step was not specifically investigated. The wisdom of such extension has consequently not really been demonstrated by proper investigation, consultation and deliberation.

4.3 The Commission has, however, given the matter some thought and has doubts about the desirability of applying the provisions of the Bill in their present form to criminal proceedings. It is common knowledge that most defendants in criminal proceedings are unrepresented. Furthermore, many accused persons are illiterate or unsophisticated. Unrepresented accused persons would be less likely to be able to determine whether or not to oppose the admission of computer-generated evidence and, what is more, our courts are understandably, and rightly, reluctant to admit in evidence admissions made by such persons. The consequences of criminal proceedings are far more serious than those of civil proceedings because the liberty of the individual may be at stake. Then one has the problem that criminal procedure does not provide for the discovery and inspection of documents. Our courts have repeatedly stressed the importance of discovery proceedings. These proceedings are likely to be even more important to a litigant in a civil case against whom computerised records are used. It also seems to the Commission that the reception of computer print-outs in criminal proceedings may need stronger safeguards and stricter conditions than those provided for in the Bill.

4.4 Finally, the Commission is of the opinion that it would

be advisable to defer the extension of the proposed provisions to criminal proceedings until they have been properly evaluated and thrashed out in civil proceedings.

4.5 The contents of all the provisions of the Bill need not be discussed in detail. The Bill does, however, have some features that require comment.

4.6 Clause 2 is a simple provision which provides for the admissibility of an authenticated computer print-out as defined, on its production as evidence of any fact recorded in it of which direct oral evidence would be admissible. All the emphasis is on admissibility, thus following the contemporary tendency to distinguish clearly between the admissibility of evidence and matters relating to the assessment of its probative value. Clause 4 deals with the factors to be considered in determining the value to be given to a computer print-out admissible under clause 2.

4.7 The first part of clause 4 does not impose strict and elaborate rules regarding the assessment of the probative value of computerised records. The Commission has noted that some statutes here and overseas prescribe to the court the view it should take of the evidence before it, or the circumstances in which it should take that view. Some even go so far as to elevate computerised evidence on its production in court to prima facie proof of its contents. The Commission has been urged by some of those who commented on the matter to follow suit.

4.8 The Commission is, however, firmly convinced that it is unwise to legislate for the cogency of evidence as well as its admissibility. The cogency of evidence is a question of fact which depends on common sense, logic and experience. It cannot be determined by rigid rules. The clause under discussion takes the view that there is no rule more workable than that each piece of evidence should have the value the court considers it deserves in all the circumstances of the case, whatever these may be.

4.9 As regards the suggestion that computer print-outs should be elevated to prima facie proof of their contents, Mr Justice Didcott's views, with which the Commission agrees, are the following:

"I remain implacably opposed to the suggestion... those jurisdictions which have attached the extra value of prima facie proof to computerised records have found it imperative to redress the balance by constructing a much more intricate barrier of safeguards than the draft contains or needs. The result has been the sort of legislation the English have, complex, cumbersome, and generating so many fresh problems that they are highly dissatisfied with it... I am convinced that the key to simplicity, or relative simplicity at any rate, to flexibility and to workability is [the] clause as it now stands."

4.10 Although the Commission recommends simple measures regarding the admissibility of computerised records and the assessment of their probative value, it must be made clear that the Commission does not envisage legislation devoid of any safeguards. The Commission is well aware of the fact that computers are the object of deep public suspicion. What is more, computers do make mistakes and they are fallible. Then one also has the problem of deliberate falsification. Some statutes of foreign jurisdictions have gone to great lengths to guard against such dangers. In the Commission's opinion these attempts have resulted in complicated legislation that gives rise to difficulties of implementation. Moreover, it is doubtful whether they attain the object of eliminating the dangers of falsification of such records. It must be borne in mind that these dangers also apply to conventional records. In the Commission's opinion this is in any event not a matter that ought to be regulated by the law of evidence.

4.11 The safeguards provided for in clause 3 are designed to give some guarantee as to the authenticity and accuracy of computerised records, and also to protect those against whom such evidence may be tendered. They are uncomplicated and, in the

Commission's view, workable.

4.12 It will be noticed that in terms of clause 3(6) of the Bill, computer print-outs emanating from public institutions, as defined in clause 1(1)(vii), are treated differently from those of ordinary computer users. The proposed provision is akin to section 28 of Act 25 of 1965, which provides for a special procedure for the proof of entries in bankers' books. It is suggested that Governmental agencies and some others could be afforded similar privileges. The justification for this provision is that the institutions in question are large concerns having records all over the country. They could find it very inconvenient to comply with all the requirements of clause 3 of the Bill. On the other hand, their nature is such that they are unlikely to attempt fraud on the public. This can, of course, be said of many other large concerns not falling within the definition of public institution; indeed, representations were made to the Commission for the exemption provided for in clause 3(6) to be extended to other computer users. However, the Commission feels that the line must be drawn somewhere and that the safeguards provided for in subclauses (3), (4) and (5) of clause 3 are necessary in respect of the ordinary class of computer user.

1.13 In clause 5 of the Bill provision is made for a severe penalty for the making of a false or misleading statement in an affidavit intended to be an authenticating affidavit. It will be noticed that a deponent is required to satisfy himself by the necessary inquiries and investigations of the truth of his statements in order to escape criminal sanction. This provision is intended to discourage deponents from making careless statements in affidavits intended to be used for the purpose of authenticating computer print-outs. It is hoped that this provision, together with the safeguards provided for in clause 3, will provide the necessary protection to litigants.

5. ACKNOWLEDGEMENT

8;¼ In conclusion the Commission acknowledge with

gratitude the invaluable contribution made by Mr Justice J.M.Didcott in the present matter. His assistance throughout the process of research, consultation and deliberation was of great value to the Commission; he was in fact the author of the draft Bill.

B I L L

To provide for the admissibility in civil proceedings of evidence generated by computers; and for matters connected therewith

To be introduced by the Minister of Justice

BE IT ENACTED by the State President and the House of Assembly of the Republic of South Africa as follows:

Definitions. 1. (1) In this Act, unless the context otherwise indicates -

(i) "authenticated computer print-out" means a computer print-out accompanied by the authenticating affidavit which relates to it and, whenever section 3 so requires, by the supplementary affidavit which relates to such authenticating affidavit or the supplementary affidavits which do so; (ii)

(ii) "authenticating affidavit" means an affidavit which purports and appears to authenticate a computer print-out in compliance with section 3; (iii)

(iii) "computer" means any device or apparatus, whether commonly called a computer or not, which by electronic, electro-mechanical, mechanical or any other means is capable of receiving or absorbing data and instructions supplied to it, of processing such data according to mathematical or logical rules and in compliance with such instructions, of storing such data before or after such processing, and of producing information derived from such data as a result of such processing; (vi)

(iv) "computer print-out" means the documentary form in which information is produced by a computer or a copy or reproduction of it, and includes, whenever any information needs to be transcribed, translated or interpreted after its production by the computer in order that it may take such form and be intelligible to the court, a transcription, translation or interpretation of such information which is calculated to have that effect; (vii)

(v) "information" includes any information expressed in or conveyed by letters, figures, characters, symbols, marks,

perforations, patterns, pictures,
diagrams, sounds or any other visible,
audible or perceptible signals; (iv)

(vi) "processing" includes treatment by
calculation, compilation, arrangement,
sorting, comparison, analysis, synthesis,
classification, selection, summarising
and consolidation; (viii)

(vii) "public institution" means any Government
department, any provincial administration
or local authority, or any financial
institution as defined in section 1 of
the Inspection of Financial Institutions
Act, 1962 (Act 68 of 1962); (v)

(viii) "supplementary affidavit" means an
affidavit which purports and appears to
supplement an authenticating affidavit in
compliance with section 3. (i)

(2) Whenever separate devices or
apparatuses have been operated in combination
or sequence to perform the functions of a
computer, as described in subsection (1)
(iii), such combination or sequence of devices
or apparatuses shall be regarded for the
purposes of this Act as a single computer.

Admissibility of
computer print-
outs.

2. In any civil proceedings an authenticated computer print-out shall be admissible on its production as evidence of any fact recorded in it of which direct oral evidence would be admissible.

Authentication
of computer
print-outs.

3. (1) An authenticating affidavit shall -

- (a) identify the computer print-out in question and confirm that it is a computer print-out as defined in this Act which has been produced by a computer as likewise defined;
- (b) identify such copy, reproduction, transcription, translation or interpretation of information produced by the computer as the computer print-out may comprise or contain, and confirm that it is a true copy, reproduction, transcription, translation or interpretation of such information;
- (c) describe in general terms the nature, extent and sources of the data and instructions supplied to the computer, and the purpose and effect of the processing of the data by the computer;

(d) certify that the computer was -

(i) correctly and completely supplied with data and instructions appropriate to and sufficient for the purpose for which the information recorded in the computer print-out was produced;

(ii) unaffected in its operation by any malfunction, interference, disturbance or interruption which might have had a bearing on such information or its reliability;

(e) certify that no reason exists to doubt or suspect the truth or reliability of any information recorded in or result reflected by the computer print-out.

(2) It shall suffice for the purposes of subsection (1) if the description required by paragraph (c) and the certifications required by paragraphs (d) and (e) are given to the best of the knowledge and belief of the deponent to the authenticating affidavit.

(3) The deponent to an authenticating

ting affidavit shall be some person who is qualified to give the testimony it contains by reason of -

- (a) his knowledge and experience of computers and of the particular system by which the computer in question was operated at all relevant times; and
- (b) his examination of all relevant records and facts which are to be had concerning the operation of the computer and the data and instructions supplied to it.

(4) The records and facts examined by the deponent to an authenticating affidavit in order to qualify himself for the testimony it contains shall -

- (a) be verified in such affidavit by him if, at the time when he so examined them, he had control of or access to them in the ordinary course of his business, employment, duties or activities; or
- (b) if he did not have such control or access, be verified in a supplementary affidavit by some other person who, at such time, had control of or access to

them in the ordinary course of his business, employment, duties or activities.

(5) Records and facts shall be sufficiently verified for the purposes of subsection (4) if -

- (a) the affidavit verifying them testifies that, to the best of the deponent's knowledge and belief, they comprise all the relevant records and facts which are to be had concerning the operation of the computer in question and the data and instructions supplied to it; and
- (b) in the event provided for in subsection (4)(b), the supplementary affidavit establishes that all such records and facts were made available to the deponent to the authenticating affidavit for his examination.

(6) The provisions of subsections (3), (4) and (5) shall not apply to a computer print-out of any public institution which -

- (a) has been produced in the ordinary and regular course of the public institution's business or activities from data

and instructions supplied to the computer in the ordinary and regular course of such business or activities;

- (b) is accompanied by an authenticating affidavit deposed to by an official or employee of the public institution who is qualified to and does certify that it was so produced.

(7) An authenticating affidavit shall be supplemented by -

- (a) such further affidavits as are necessary for substantial compliance with subsections (1) to (6) when that is not achieved without them;
- (b) any additional affidavits the circumstances may require.

Probative
value of
computer
print-outs.

4. (1) An authenticated computer print-out shall have the probative value which the court in all the circumstances of the case attaches to it.

(2) In order to assess the probative value of an authenticated computer print-out, the court may -

- (a) take account of anything contained in the authenticating affidavit or a supplementary affidavit;
- (b) on the application of any party to the proceedings require the deponent to the authenticating affidavit or a supplementary affidavit or any other person to testify orally on any topic relevant to such question, whether or not such affidavit covered it.

Penalties for false or misleading statements.

5. Any person deposing to an affidavit intended as an authenticating or supplementary affidavit who gives testimony in it which is false or misleading in any material respect shall be -

- (a) guilty of an offence, unless he proves that he gave such testimony honestly believing it to be true and having made such enquiries and undertaken such investigations as were possible and reasonably necessary in order to satisfy himself of its truth;

(b) liable on conviction to a fine not exceeding R4 000, or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment.

Short title
and date of
commencement.

6. This Act shall be called the Computer Evidence Act, 19.., and shall come into operation on a date fixed by the State President by proclamation in the Gazette.