9 Online dispute resolution: A Ferrari pulled by donkeys?

Considering access to court in an increasingly online age

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Abstract

The heading of the chapter proposes a disconnect between technology and available resources and, thus, anticipates the conclusion that is reached, namely that South Africa's notorious socio-economic, service delivery and governance problems should be a warning against the hasty adoption of advanced online litigation systems found in other jurisdictions. A more pragmatic solution of incremental reform, rather than revolutionary reform, is suggested. The chapter discusses the compatibility of technology-based reform seen in the context of the normative constitutional values in South Africa, more particularly the right of access to justice. The starting point is to note the response of South African courts to COVID-19 lockdown restrictions. Next, consideration is given to changes in the South African litigation landscape pre-dating the pandemic, which evidence a willingness to step away from the traditional adversarial mind-set and, thus, lays the basis for reform of this country's civil litigation structures. Reforms predating the pandemic include CaseLines, court-annexed alternative dispute resolution (ADR), and the commercial court. With this base line established, consideration is given to what lies ahead, by referring to reforms found in other more progressive jurisdictions, such as the systems of online dispute resolution that are operational in England, Canada and Utah. It is suggested that these jurisdictions have the advantage of better resources (including financial, technology

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and human resources) and further, that they do not face the same crippling socio-economic and governance difficulties as lawmakers do in South Africa. The final paragraphs consider the importance of keeping reform in line with the constitution. A complete break with the entrenched adversarial mind-set can only be effected by a new set of civil procedure rules. However, in the interim and in order to maintain the momentum of reform—which was propelled forward by covid—incremental steps that follow a roadmap set by reforms found in other jurisdictions offer a more pragmatic solution.

1 Introduction

When an experimental rule dealing with case management was introduced in the Cape provincial division of the high court (as it was formerly known, now the Western Cape division) in 1997,[1] one commentator likened the process to a Ferrari being towed by a team of donkeys, as no engine had been fitted.[2] The rule in question was lengthy and complex, and was never extended to any of the other provinces. In the Western Cape, the case management experiment ground to a halt in 2001.[3] The demise of the rule has since been attributed to the non-existing infrastructure, including computer hardware and software among others, as well as the lack of skilled personnel.[4] Griesel, thus, argues that the failure of the rule lay not with the content of the rule itself, but with the way in which the rule was implemented.[5] The lesson to be learnt from this failed experiment and its relevance to the topic of leveraging technology as a response to COVID-19 in order to benefit society, is to avoid reform for reform's sake. In the altered litigation landscape brought about by COVID-19, it is tempting to import digital technologies from other jurisdictions, such as the continent, but it goes without saying that the socio-economic and political landscapes in those jurisdictions differ vastly to that found in South Africa, and this weighs against the wholesale adoption of foreign systems.

1 High Court Rule 37 deals with pre-trial conferences. In response to the general discontent with the efficacy of this rule, a pilot Rule 37A was introduced and this was the first time that South African courts experimented with case management, albeit in a rudimentary form; see Friedman "Case management in South Africa" 1997 *Consultus* 40 41 and Harms *Civil Procedure in the Supreme Court* (1998) 250.
2 Griesel "Cape Rule 37A—What went wrong?" 2001 *De Rebus* 8.
3 Rule 37A was repealed by GN373 of 30 April 2001.
4 Erasmus "Case management: The demise of Cape Rule 37A" 2001 *De Rebus* 39. The complexity of the rule may also added to its unpopularity.
5 Erasmus (n 4).

This chapter discusses the compatibility of technology-based reform seen in the context of the normative constitutional values in South Africa, more particularly the right of access to justice. In order to set the scene, the discussion commences by looking at how South African courts responded to COVID-19 lockdown restrictions. The focus then turns to the changes in the litigation mind-set that had already taken place prior to the pandemic, which show an awareness of the need for reform. These reforms include CaseLines, court-annexed alternative dispute resolution (ADR), and the commercial court. In order to assess what lies ahead, a look is then taken at reforms seen in other jurisdictions, such as England's system of online dispute resolution (ODR). The concluding paragraphs consider the need for incremental reform and the importance of keeping reform in line with the Constitution.

2 The courts' response to COVID-19

Firstly, some background to this discussion is necessary as it will clarify the expedited need for reform. Due to the rising COVID-19 cases in the country, a national state of disaster was declared in South Africa on 15 March 2020, which brought about lockdowns of varying tiers and intensities. At the time of writing, the state of disaster is still in effect and an adjusted level lockdown is still in force. As a result of enforced social distancing and regulations against public gatherings, courts had to find alternative ways of continuing with the business of the court. Within days, the chief justice responded by restricting court access to persons with a material interest in a case.[6] Only such persons could (and at the time of writing are still) permitted to enter a court room,

6 Disaster Management Act: Directives issued by the Chief Justice to prevent and curb the spread of Coronavirus COVID-19, GG 43117, GeN 187, 20 March 2020; media statement delivered by the minister of police and minister of justice and correctional services on the occasion of the implementation of the COVID-19 Disaster Management Regulations, Friday 20 March 2020 at GCIS Pretoria (online) at https://www.justice.gov.za/m_speeches/2020/20200320-Covid-19-JointMinisterialMediaBriefing.pdf (13-09-2021); directions to address, prevent and combat the spread of Coronavirus COVID-19 in all courts, court houses and justice service points in the Republic of South Africa, GG 43709, GoN 73, 3 Feb 2021, 11 Sep 2020, (applicable during level 2 of lockdown); directions issued in terms of regulation 4(2) of the regulations made under the Disaster Management Act, 2002, GG 44133, RG 11232. GoN 73, 3 Feb 2021 (applicable to adjusted level 3 of the lockdown); directions: measures to address, prevent and combat spread of Coronavirus COVID-19 in all courts, court precincts and justice service points, GG

subject to the safety measures and physical distancing requirements, with non-essential visitors only allowed into the court precinct with the permission of the head of court.[7] Where possible, proceedings are conducted online, as regulations stipulated that audio-visual links may be used in proceedings if the presiding officer deemed it appropriate and if it will prevent unreasonable delay, save costs or be convenient and make it unnecessary for the person to appear in person in the court room.[8] In an effort for courts to function optimally, a priority roll was introduced, which is still complied with.[9] In addition, the judges president of the various high court divisions implemented special arrangements to address COVID-19 implications for litigation in their courts, for instance, in Gauteng, the judge president issued a practice directive that only the urgent court could hear matters,[10] and even this court had to operate by means of teleconferencing/videoconferencing or other electronic means.[11] Parties could only physically appear where

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44868, RG 1131, GoN 632 16 Jul 2021 (applicable to adjusted level 4 of the lockdown).

7 Persons with a material interest are "litigants, accused persons, legal practitioners, witnesses, or persons who may be needed to provide support to the litigant, accused persons and witnesses including family members and persons accompanying children, victims of domestic violence or sexual offences and persons with disabilities and members of the media"; see par 2 of the March directions; par 4 of the Feb directions and par 5 of the July directions.

8 par 3 of the March directions; par 5 of the Feb directions and par 14 of the July directions (n 6).

9 paras 4–6 of the Feb directions mention that the priority roll relates to detainees, including children. paras 15–17 of the July directions (n 8) embroiders on cases that are placed on the priority roll and includes cases where accused persons are charged with sexual offences, gender-based violence and femicide, serious contact crimes or serious violent crimes, corruptions or contravention of COVID-19 regulations, cases that are trial-ready, cases that are to be enrolled for sentence following conviction, partly heard cases, cases that may be considered suitable for alternative dispute resolution and any other cases that the presiding officer deems necessary to be included on the priority roll.

10 All matters enrolled for the period 27 March to 17 April 2020 were ipso facto removed from the roll and re-enrolled later in the year.

11 Judge President's Practice Directive—Special Arrangements to Address COVID-19 Implications for all Litigation in the Pretoria and Johannesburg High Courts, 25 March 2020 (online) at https://www.judiciary.org.za/images/Directives/Directives_April_2020/High_Court_of_South_Africa/Gauteng_Division/Judge_Presidents_Directive_Special_Arrangements_to_Address_COVID-19_Implications_for_All_Litigation_in_the_Pretoria_and_Johannesburg_High_Courts.pdf (13-09-2021).

it was impossible to arrange online proceedings and issuing of new process had to take place via e-mail.

3 Pre-pandemic reforms

3.1 CaseLines

The South African civil justice system was not totally without resources at the onset of the pandemic. Fortuitously, a digital/electronic filing system called CaseLines had freshly been piloted in the Gauteng Division. Although operational only in a rudimentary and experimental form, it nevertheless enabled electronic document filing and case presentation and, thus, facilitated the prompt switch to online litigation which happened almost overnight.[12] In terms of the Special Arrangements to Address COVID-19 directive, all papers and communications had to take place via CaseLines and only where this could not be done, or where delivery could not take place via e-mail, could physical documents be delivered. In order to aid the understanding of the reader, a brief discussion of the method of electronically uploading and filing pleadings and other documents in terms of CaseLines is provided in the following paragraphs.

It is the duty of the registrar to create an electronic case on the CaseLines system at the outset of the matter, as soon as summons has been issued. The registrar provides access to the legal representatives involved in the matter by "inviting" them to the case. The legal representatives, in turn, invite counsel to the case, obviously in those matters where counsel is briefed. Within two court days of a case being created, the plaintiff in a trial action or applicant in motion proceedings must upload the case record or other court documents into the electronic file. The responsibility to upload pleadings and other relevant documents lies with the party responsible for each particular pleading or document in line with the rules of court, with the exception of urgent cases. The registrar or secretary of the senior judge will invite the judge to the case when the judge is allocated.

12 Judge President's Practice Directive 1 of 2020—Implementation of the CaseLines System in the Gauteng Division of the High Court—Pretoria and Johannesburg, (online) at https://www.judiciary.org.za/index.php/judiciary/directives/high-court-of-south-africa/gauteng-division-of-the-high-court (13-09-2021). There are two high courts in the Gauteng Division, namely the Gauteng Division in Pretoria and the Gauteng Local Division in Johannesburg. The full implementation of the CaseLines digital/electronic system in Gauteng took effect on 27 Jan 2020.

CaseLines applies to opposed and unopposed motions, motion interlocutory applications, ordinary civil trials, divorce actions, case management conferences, default judgments in terms of rule 31(5), appeals, rule 43 applications, summary judgment applications and applications for leave to appeal (this is not a full list). The aim is to eventually allow no hardcopy pleadings and other relevant documents on all cases designated for handling through the CaseLines system and created on the system. The exception is where the party is unrepresented.

3.2 Court-annexed mediation

Another area of reform introduced prior to the pandemic, is court-annexed ADR. Although not technology based, ADR's foothold in South African civil court proceedings aids this discussion, as evidence of a change in adversarial mind-set. Amendments to the court rules and practice guidelines introduced by the various courts make it possible for litigants to consider alternative methods of problem solving. It is noteworthy that these changes have been introduced in order to increase access to justice. Court-annexed mediation was implemented in order to give effect to section 34 of the Constitution and also to bring into effect the resolution of the access to justice conference held in July 2011 under the leadership of the chief justice towards achieving delivery of accessible quality justice for all.[13] In the magistrates' courts, a new chapter 2 was added to the MCR containing the new rules 70 to 87 which deal with the voluntary submission of civil disputes to mediation in selected courts. The rules came into effect on 1 December 2014.[14] The rules only apply to a selected number of courts as designated by the minister by publication in the gazette.[15] Uniform rule 41A introduces mediation as a dispute resolution system in the high courts.[16] The mediation contemplated in the high court differs from

13 MCR r 70. The list of courts that offer court-annexed mediation is set out on the website of the department of justice and correctional services which can be accessed at www.justice.gov.za/mediation/mediation.html (05-08-2019). The Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991 attempted to introduce mediation in magistrates' courts before but this act was never implemented. See Wiese *Alternative Dispute Resolution in South Africa* (2016) 89.

14 G37448 RG 10151 GoN, 18 March 2014.

15 The list of courts may be found on the website of the department of justice.

16 De Vos and Broodryk "Fundamental procedural rights of civil litigants in Australia and South Africa: Is there cause for concern 2019 *Journal of South African Law* 426 425.

that launched in the magistrates' court as it cannot be employed before litigation is instituted. The main features of the new rule 41A require the parties, when issuing a summons or application or delivering a plea or answering affidavit, to indicate: whether they consider mediation as a possibility; to deliver a joint minute recording their agreement to refer the dispute to mediation; the suspension of time limits to deliver pleadings while mediation is in progress; the procedure when there are multiple parties involved in litigation and some parties participate in ADR while others do not; the admissibility and confidentiality of documents; a joint minute relating to the outcome of mediation proceedings; and the costs of mediation proceedings.[17]

In this milieu, it is significant to see that the chief justice's various directives in response to COVID-19 give priority status to matters which are suitable to alternative dispute resolution and which can be finalised in that manner. It seems to be a confirmation that there is a drive to direct matters, which are capable of being settled by means of ADR, away from courts in order to alleviate the current levels of congestion on court rolls. The directive reminds parties to a civil dispute that they may consider alternative dispute resolution mechanisms and if they intend doing so, they must follow the procedures set out in the court rules.[18] Parties using ADR may use the services of a judge who is no longer in active service or a mediator who is appointed in terms of the rules.[19] A suitable person must be designated to assist parties who choose to resolve their dispute by means of ADR. Jurisdictions globally are increasingly employing ADR to alleviate the pressure on court rolls. As will be seen from the discussion below, certain overseas jurisdictions employ online dispute resolution (ODR). In addition, ADR is being employed to resolve disputes more economically.

3.3 The commercial court

Yet another example of reform introduced before the pandemic that shows the willingness of the legislature to deviate from conventional court procedures, is the commercial court. This court has been has been operational in Gauteng since October 2018 and has introduced

17 De Vos and Broodryk (n 16).

18 par 7 of the Feb Directive and paras 24–28 of the Directives (n 6). In the magistrates' court, ch 2 of the rules sets out court-annexed mediation and in the high court rule 41A deals with the referral of matters to alternative dispute resolution.

19 par 27 of the Chief Justice's directives (n 6).

a simplified form of litigation in respect of commercial matters.[20] The commercial court is administered as part of the high court and a "commercial court case" is defined very widely as "ordinarily a substantial case that has as its foundation a broadly commercial transaction or commercial relationship" (examples of such matters set out in schedule 1 to the commercial court practice directives).[21] The aims of the commercial court are "to promote efficient conduct of litigation in the High Court and to resolve disputes quickly, cheaply, fairly and with legal acuity" and matters in this court are dealt with in line with "broad principles of fairness, efficiency and cost-effectiveness".[22] Thus, although the commercial court steps away from conventional court procedure, it aims to increase access to justice, rather than diluting it.

Procedure in the commercial court has been pared down. For instance, the initiating process for having a matter heard in the commercial court requires only a letter to be sent to the judge

20 The commercial court practice directive was issued by Mlambo JP, the judge president of the Gauteng Division of the high court, on 3 October 2018 and was effective immediately. The commercial court is a specialist court first envisioned by judge CF Eloff, the then judge president of the Transvaal Provincial Division of the supreme court in 1996 (as it was then known—now the Gauteng Division, Pretoria), but which never got off the ground. Judge Eloff was acquainted with the idea from the London commercial court and established a committee to consider a similar court in South Africa. This committee was in favour of the establishment of such a court and, recognising that it would take too long to change the rules of court in parliament, a practice directive was issued in 1996 whereby all litigants in a pending action could apply to the judge president of Transvaal for their case to be designated as a commercial case; see practice note 1 of 1996: commercial court practice direction (commercial court PD) and Eloff "The Johannesburg Commercial Court" October 1993 *Consultus* 115.

21 Commercial court PD schedule 1. The list set out in schedule 1 serves as a guideline only and is not a closed list. The list consists of the following: the export and import of goods; the carriage of goods by land, sea, air or pipeline; the exploitation of oil and gas reserves or other natural resources that do not involve administrative law; insurance and reinsurance; banking and financial services; the operation of markets and exchanges; the purchase and sale of commodities; medical scheme matters; commercial matters arising out of business rescue and insolvency cases; all commercial matters affecting companies arising out of the Companies Act 71 of 2008 and its interpretation; arbitration; delictual cases that take place in a commercial context, for example unlawful competition cases; generally, appropriate contractual matters; and intellectual property cases.

22 Commercial court PD schedule (n 21) 1.1 and 4.1.

president.[23] Parties file statements of case, as opposed to the exchange of pleadings.[24] Should the parties not agree to a timetable to bring the matter to trial, the judge will determine the timetable.[25] All matters are subject to case management, but the management procedure is very informal with only two case management conferences envisaged. No request for further particulars may be made and no general discovery is required in the commercial court, although the judge in charge of case management may permit the "targeted disclosure of documents".[26] The managing judge determines the time of the case management conferences, the dates for filing expert reports and joint minutes, and the need for a meeting with the experts if issues need to be narrowed.[27] If the parties intend relying on expert evidence, the experts must convene a meeting, file their expert reports and produce a joint minute setting out the issues in agreement and disagreement and the reasons for the disagreement.[28] The simplified procedure of the commercial court is aimed at bringing commercial matters, which have increasingly been resolved by means of ADR, back to the courts.

4 Looking ahead: Reforms taking place in other jurisdictions

4.1 England

Having considered such reforms as have taken place in South Africa, it is now necessary to look further afield to see what the future holds. The ODR system found in England shows one way forward, as it provides for online dispute resolution for small claims without the involvement of legal practitioners. ODR came about after an investigation by Lord Justice Briggs, as he then was, into the civil courts structures in England. Lord Briggs identified five main weaknesses in the civil court system in his final report of July 2016, namely: lack of adequate access

23 See (n 21) 2.1. Any party may apply for a matter to be allocated as a commercial court case by delivering a letter to the judge president, setting out: (a) a broad and uncontroversial description of the case; and (b) why the case is a commercial case or should be considered such, warranting treatment under the commercial court directives. The judge president will determine whether the case should be allocated as a commercial court case and will inform the parties in writing of the outcome; Ibid 2.5 and 2.6.
24 See (n 21) 4.3–4.4.
25 See (n 21) 3.3.
26 See (n 21) 4.5.
27 See (n 21).
28 See (n 21) 5.5.

to courts; inefficiencies due to the "tyranny of paper"; unacceptable delays; under-investment in civil justice, and inadequate enforcement of judgments.[29] Significantly, Lord Briggs proposed the establishment of the online court for low value claims to enable litigants to resolve their disputes online, without the need for legal representatives.[30] The online court is now part of an extensive reform programme for the civil and criminal justice system in the HM courts and tribunals service.[31] The main distinguishing feature of the online court is the desire to limit the need for lawyers. The term "online solutions court" may be a misnomer, as the entity envisioned is not a court in the traditional sense, but is an asynchronous online end-to-end procedure where one stage builds on the other in a symbiotic process. There is no virtual trial simultaneously attended by all parties and presided over by an adjudicator. The procedure is based on a three tier system suggested by Susskind, advisor on technology to the chief justices in England, in 2015.[32] Susskind's three tiers are: a) assisting users to classify and categorise their problem and to be aware of their rights and available solutions; b) facilitating the dispute by communicating through the internet with facilitators who would assess statements and papers; and c) judgment of the matter to be done by judges who would receive the papers electronically and communicate their judgment in the same fashion.[33] Lord Briggs added two further tiers, notably: a) alerting users to ADR (both at the outset of the process and in tier two when facilitators can assist parties in choosing the appropriate form of ADR); and b) determining whether there is a dispute valid in law.

29 Commons Library Briefing 15 March 2017 https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-briefing-Prison-and-Courts-Bill.pdf (10-07-2018) 41.

30 Briggs "Civil Courts Structure Review—Interim Report (December 2015) at https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf and Civil Courts Structure Review—Final Report (July 2016) at https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf (05-07-2020).

31 Koo "The role of the English courts in alternative dispute resolution" 2018 *Legal Studies* 666-683 666-667.

32 Susskind chaired the Justice Council's Online Dispute Resolution Advisory Group and brought out a report called the "Online Dispute Resolution for Low Value Claims" published in 2015.

33 Commons Library Briefing 15 March 2017 at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-briefing-Prison-and-Courts-Bill.pdf (10-07-2018) 42.

Sorabji calls the online court a "multi-door court house" and he highlights the most notable features of the online court.[34] First, it is designed to operate without lawyers, and second, adjudication is not the primary aim of the procedure. It, thus, aims to create the first English multi-door court, with adjudication available as the last stage of the process. Sorabji instructs that this is not a new idea, and refers to Sander's proposal of a multi-door courthouse or comprehensive justice centre, which encompasses diverting a number of matters from adjudication if possible, and if not, providing various processes by which the remaining disputes can be resolved.[35] Although Sander did not provide exact processes, he envisaged a screening clerk who would identify the appropriate dispute resolution method for each claim, with the added benefit that initial allocation would not preclude claimants from moving between dispute resolution processes as desired. Sorabji points out that the online court "replicates Sander's under-developed appreciation that there should be an increased focus on preventative law by incorporating dispute resolution methods into the court's process".[36] Further, the online court's facilitator replicates Sander's screening clerk and in addition, the provision of a choice of online dispute resolution mechanisms are replicated. A matter may even go directly to adjudication, bypassing other dispute resolution methods, if it involves a novel legal issue or it is not suitable for online procedures due to complexity. Sorabji concludes that the online court is in effect a multi-door courthouse, albeit that it is a subject-specific, low financial jurisdictional threshold tribunal that will predominantly be conducted online.[37] Sorabji spotlights the innovation of this court, which lies in its movement away from the usual model of adjudication. Sorabji notes:

> "The [online court] thus represents the first attempt to move English civil justice from a structural perspective—which is to say in terms of court and procedural design—beyond what could be described as the adjudicative paradigm: one that understands the court's role as being to manage claims to a trial on their

34 Sorabji "The Online Solutions Court—a multi-door court house for the 21st Century" 2017 *Civil Justice Quarterly* 86. Sorabji is a senior teaching fellow at the faculty of laws, University College London.

35 Sorabji (n 34) 91; see also Sander "A dialogue between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the evolution of the multi-door courthouse" 2008 *University of St Thomas Law Journal* 665 670.

36 Sorabji (n 34) 92.

37 See (n 34) 98.

> substantive merits. While it is true to say that since the Woolf Reforms ... there has been an increased emphasis on the idea that the primary aim of process should be to facilitate settlement, and that procedure should be managed to resolution, howsoever that is achieved, rather than trial and adjudication, that has not previously been embedded in the structure of either a civil court or civil process. The [online court] takes that step."[38]

4.2 Canada

ODR is getting a foothold in progressive court systems. In Canada, for example, there is the civil resolution tribunal located in British Columbia which was established by the Civil Resolution Tribunal Act (2012). The tribunal initially had jurisdiction over small claims and strata property (condominium) cases, but its jurisdiction has since been expanded to include certain motor vehicle accident and other specified disputes. Salter and Thompson elucidate the nature of ODR by explaining that the process involves an end-to-end design, with each step building on the other in symbiosis.[39] They point out that this differs from a procedure that grafts a single dispute resolution step into an adversarial court process. The authors explain as follows:

> "Steps like mediation may augment, but do not transform, traditional public justice processes. The add-on approach lacks the benefits of gradually escalating intensity and resources. It also lacks the seamlessness of an end-to-end system. For example, using current public justice processes, the parties would begin by framing their disputes adversarially in their pleadings, setting out explicitly contrasting rights-based positions, bolstered by legal arguments demonstrating why they should triumph over every opponent. If mediation is then offered as an add-on process, the parties would have to pivot from the adversarial approach and engage in an internet-based negotiation aimed at identifying common ground and possible concessions. It is unrealistic to expect parties to detach quickly from the initial adversarial, rights-based position when they are suddenly in an added-on mediation. Yet the current civil justice

38 See (n 34).

39 Salter and Thompson "Public-centered civil justice redesign: a case study of the British Columbia Civil Resolution Tribunal" 2016 *McGill Disp Resol* 113 117.

> system drives parties to adopt and document deeply entrenched positions before any collaborative step is taken."[40]

Salter and Thompson argue that the courtroom should not be seen as the primary forum for dispute resolution and they quote Briggs' statement that "[t]he common law legal system was designed by legal actors, for legal actors".[41] In contrast, ODR is designed with the end user in mind, namely the public. It is premised upon proportionality, namely that a matter should consume no more than its fair share of resources. ODR does not impose a static regime at the outset, but allows the matter to grow through the phases. These phases are self-help, direct negotiation, facilitation and finally, adjudication. Each phase is designed to encourage resolution of the dispute, in whole or in part, with minimum costs and effort.[42] The adjudicative phase that is envisaged is also innovative, as it is a mixture of an inquisitorial and adversarial process, where parties can make arguments and submit evidence, but the end result is a binding decision. Salter and Thompson refer to the civil resolution tribunal as a prime example of a new model of public civil justice that should replace historical systems.

4.3 Utah

Yet another example of a system embracing ODR is seen in Utah's online dispute resolution programme, a pilot project recently launched in that jurisdiction. Justice Himonas spoke in March 2018 of the benefits of ODR and this project in particular, in an address wherein he ventilated access to justice issues for unrepresented litigants. Himonas highlights the benefits of ODR, which include the removal of jurisdictional barriers, as well as the ability of parties to communicate asynchronously or in real time and further, the fairness that is inherent in the provision of expert systems and a facilitator to all parties.[43] The system is limited to claims with a monetary value not exceeding $11 000. Simplified, the model involves the following process: firstly, education and evaluation (for which self-help resources are made available); next, providing a meaningful settlement opportunity (at this stage the facilitator is key); and lastly, if the parties cannot come to a resolution, the matter can be adjudicated. The aim is to resolve disputes within a six week timeframe.

40 See (n 39) 118.
41 See (n 39); Briggs (n 30).
42 Salter and Thompson (n 39) 127.
43 See (n 39) 881.

4.4 Singapore

Moving away from ODR, it is instructive to look at an example of a jurisdiction that employs a number of systems to ensure an efficient civil justice system—Singapore. Foo, Chua and Ng, writing on the models and measures in the Singaporean civil justice system[44] confirm that reform in that jurisdiction came about as a result of incremental steps driven by the judiciary, rather than as result of one "Big Bang" event.[45] The authors identify the following categories: diversionary, facilitative, monitoring and dispositive.[46] Firstly, diversionary systems refer to ways in which matters can be diverted from legislation, by using ADR and pre-action protocols.[47] Secondly, facilitative systems denote the supporting infrastructure that enables litigation to proceed smoothly.[48] Singapore has, for instance, appointed more adjudicators and has further appointed judicial commissioners who are appointed for fixed terms and who perform the functions of a judge. They have also provided their administrative staff with the necessary skills and training to operate as case management officers. Another facilitative system is the use of technology. Thirdly, monitoring consists of systems to ensure that certain key performance indicators, such as lifespan of cases, clearance rates and waiting periods are managed.[49] The key component here is the use of pre-trial conferences. Fourthly, dispositive measures refer to the concept of automatic discontinuance of an action due to want of prosecution.[50] Looking to the future, the authors refer to the value that can be added by the field of management science, where efficiency and productivity is key, and they cite as an example, the Supreme Court's "Customer Service" initiative.[51] Lastly, the authors highlight the need for co-operation amongst different jurisdictions as "[n]o single Judiciary has a monopoly on good case management ideas".[52] The message to be gleaned from these authors is that Singapore has been very successful in turning their troubled

44 Foo, Chua and NG "Civil case management in Singapore: Of models, measures and justice" 2014 *ASEAN Law Journal* 1–34 Research Collection School of Law, at https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4210&context=sol_research (04-02-2020).
45 See (n 44) 13 and 18.
46 See (n 44) 13.
47 See (n 44) 13–15.
48 See (n 44) 15–20.
49 See (n 44) 20–23.
50 See (n 44) 24.
51 See (n 44) 25–26.
52 See (n 44) 27.

system around into an efficient one, by placing reliance on a number of systems and in the future, they will look to management science to complement these systems.

5 The future of procedural reform in South Africa

5.1 South Africa's receptivity for reform

The innovative procedures discussed above are redefining the role of courts and are paving the way for alternative means of dispute resolution to play a significant part in increased access to justice for all parties, even those without the financial resources to appoint legal representatives. In terms of these procedures, there is no "pre-trial phase", as the trial has been removed as the ultimate aim of dispute resolution. The trial is simply another door that a litigant may wish to open, should other methods of resolution have failed. Having regard to Griesel's analogy of the Ferrari pulled by the donkeys, it must be considered whether the South African civil justice system is able to support technological advances such as an ODR system. At the outset, it is submitted that the perennial socio-economic difficulties faced by a major part of the population in South Africa again militates against such a notion. Many people do not have access to the internet, or to suitable devices for connectivity. It is suggested that it would be inappropriate at this juncture to divert funds into the establishment of an ODR platform, when the real courtrooms are desperately in need of funding.

5.2 The need for reform to be constitutionally compliant

The fact that South Africa is a constitutional democracy renders it inconceivable for reform to manifest in any guise other than one that is compatible with the Constitution.[53] Any legislation that is

53 The Constitution of the Republic of South Africa, 1996 is the *lex fundamentalis* of the country and any law or conduct that is inconsistent with it is invalid, while the obligations imposed by it must be fulfilled; s 2 of the constitution; Currie and De Waal *The Bill of Rights Handbook* (2013) 8–9. The authors confirm that any law or conduct that is in conflict with the Constitution will not have the force of law. In order to give effect to a right in terms of the Bill of Rights our courts must apply or, if necessary, develop the common law; see s 8 of the Constitution. Ch 2 of the Constitution sets out the Bill of Rights which is the cornerstone of democracy in South Africa. The Bill of Rights applies to all law and binds the legislature, the executive the judiciary and all organs of state.

inconsistent with the Constitution is "objectively invalid".[54] The interim constitution of South Africa styled itself as a "historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights"[55] and, as such, it facilitated the country's transition from apartheid to democracy.[56] It is imperative that any reform in South Africa must be linked to the constitution, taking cognisance of the fact that the Constitution continues to operate as a bridge between the present and the future. The Constitution ensures a number of fundamental rights, including the right of access to court, and although this is a fundamental right, no fundamental right is absolute or automatically trumps other fundamental rights. The careful balancing of competing rights in terms of constitutional norms, inevitably results in the limitation of one or more of those rights. It is submitted that there are no jurisdictions that offer an unfettered access to justice and that ultimately considerations of proportionality come into play. One would, for instance, not go to court to adjudicate a dispute of R1000, regardless of the fundamental right to do so. The consideration of proportionality refers to both the weighing up of conflicting rights, and the measure of the amount of resources that is appropriate to allocate to a single claim.

5.3 Providing a roadmap for reform

Theophilopoulos lists the following principles of the Anglo-American adversarial system of civil procedure: all persons must have equal and effective access to an independent and impartial judiciary, with reasonable costs and a reasonable duration of litigation; parties must have an equal opportunity to present their cases to court (known as the *audi et alteram partem* principle); the parties are in control of the decision to institute or defend an action and to determine the scope

54 *Fereirra v Levin*; *Vryenhoek v Powell* 1996 1 SA 984 (CC); 1996 1 BCLR 1 (CC) par 27.

55 Constitution of the Republic of South Africa Act 200 of 1993.

56 See Phillip "In love with SA's Constitution" Mail and Guardian (24 Feb 2012) at https://mg.co.za/article/2012-02-24-in-love-with-sas-constitution/ (04-02-2021) where mention is made of the fact that the erstwhile American supreme court justice Ruth Bader Ginsburg called the Constitution one of the finest in the world and a model for other countries to follow; see also Bilchitz "Can fundamental rights bridge the divide between ideal justice and the South African reality?" inaugural lecture at the University of Johannesburg on 15-10-2015 at https://www.uj.ac.za/faculties/law/Documents/Fundamental%20Rights%20as%20Bridging%20Concepts%2025.pdf (04-02-2021).

of the dispute, as well as the evidence to be placed before the court; there must be opportunity for direct oral communication between the parties, although some types of evidentiary material may be in writing; the main proceedings must take place in public; the court has to consider the evidentiary material objectively and on rational grounds; the court must give a reasoned and legally motivated judgment and the decision of the court is final and binding, with provision for appeal or review in specific circumstances.[57]

Embedding technological processes in the civil justice system while still adhering to the above principles does not seem out of reach. Courts already rely on court rules in order to operate and these rules prescribe the steps that a litigant must take in order to enforce a claim. Court rules create certainty in procedures and facilitate access to court,[58] but "rules are made for courts and not that the courts are established for rules".[59] On par with this reasoning, technology must not be seen as a means in itself, but as a tool that can be utilised to attain justice. Courts have the inherent power to protect and regulate their own processes and to develop the common law, taking into account the interests of justice.[60] The guarantee of access to courts does not include the right to choose the method of approaching and placing a dispute before a particular court, as the "determination of the process to be followed when litigants approach courts is left in the hands of the courts".[61]

Premised on the submission that the "blue sky" vision of a fully reformed procedural system for South African civil courts is not yet feasible, best practice dictates that a road map be devised upon which future reforms may be built incrementally. If one likens the procedural system to a vehicle in need of repair, the objective is to keep the vehicle on the road and moving, whilst that repair is being effected. Phased

57 Theophilopoulos *Fundamental Civil* Procedure (2020) 2–4, see also De Vos "Civil procedural law and the Constitution of 1996: An appraisal of procedural guarantees in civil proceedings" 1997 *Journal of South African Law* 444.

58 *Mukkadam v Pioneer Foods* 2013 5 SA 89 (CC) par 31.

59 Ibid; see also the earlier matter of *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions: Zuma v National Director of Public Prosecutions* 2009 3 BCLR 309 (CC) par 62 where the court with reference to s 172 of the Constitution stated that s 34 exists so that parties whose rights have been violated are not barred by procedural, legal or other obstacles from obtaining relief from the courts; De Vos and Broodryk (n 16) 627–639.

60 s 173 of the constitution; the *Mukkadam* case (n 58) par 33.

61 See (n 58) par 1.

improvements will refine and add to the existing system and will start a snowballing pattern of reforms leading to an ultimate overhaul of procedural law. This recommendation is made upon the premise that there is indeed a demand for change, due to the defects in current court procedures that make litigation too slow, complex and expensive for the majority of South African citizens seeking legal redress. This assumption of dysfunction is validated by court judgments expressing extreme disapprobation and censure about the way litigation is currently being conducted in South African courts. In South Africa, there is a dearth of empirical studies in the field of procedural law, in contrast to global studies carried out in countries such as United Kingdom, Hong Kong and Australia which have devoted significant resources and time to interdisciplinary studies based on quantitative data. These countries have access to digital and electronic systems that are employed to collect data from various sources such as courts, legal representatives, firms, legal professional councils, academic institutions and litigants. They also have access to the skilled man-power, such as experts needed to conduct the necessary data analysis. Compared to these jurisdictions, South Africa is still taking baby steps in the arena of civil procedural reform. The CaseLines system will be hopefully prove to be a useful data repository for purposes of future quantitative analysis of the judicial system.

5.4 Access for all: The courts as a public resource

It is essential to mention that South African courts are a public resource and this resource is limited. In terms of section 34, the state has an obligation to provide working courts for the adjudication of disputes.[62] The section dictates that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and

62 Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 450. The authors instruct that s 34 encompasses a right of equality in civil proceedings, a right of information concerning the opposition's case and the hearing, a right to be heard and to adduce evidence; a right of persons who are not parties to the proceedings not to be affected by adverse orders and a right for reasons for a court's decision; in support they rely on *De Beer v North Central Local Council and South Central Council* 2001 11 BCLR 1109 (CC) par 10, 11 and 13; *Geuking v President of RSA* 2004 9 BCLR 895 (CC); *Mphaphele v First National Bank of SA Ltd* 1999 3 BCLR 253 (CC); and *Besserglik v Minister of Trade, Industry and Tourism* 1996 6 BCLR 745 (CC).

impartial tribunal or forum".[63] Thus, the right to a fair trial applies to everybody, both plaintiff and defendant, as well as other parties who are not before the court. Processes to ensure that parties before the court do not take up more than their share of court resources, therefore, augment access to justice. Further, when considering the right to a fair trial, one should not look at every individual step of a trial, but should consider the action as a whole. The right of access to court lays the foundation for an orderly society and facilitates the resolution of disputes, obviating the need for self-help.[64]

In *S v Jaipal*[65] the constitutional court pointed out that for the state to respect, promote and fulfil its duty to ensure free access to courts, resources are required.[66] In addition to ensuring that the courts are independent, impartial, dignified, accessible, and effective, the state has to ensure that there are buildings with court rooms, offices and libraries, recording facilities and security measures, as well as adequately-trained and salaried judicial officers, prosecutors, interpreters and administrative staff.[67] The court acknowledged that few countries in the world can boast with unlimited or even sufficient resources, but had to concede that South Africa is particularly constrained in terms of resources, as it is dealing with transformation, the eradication of poverty and inequality.[68] However, the court cautioned that limited resources will not be an excuse for poor court

63 The constitutional court has in numerous cases affirmed the importance of the right of access to courts in our law, for instance *De Lange v Smuts* 1998 3 SA 785 (CC); *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC); *First National Bank of South Africa Ltd v Land Bank and Agricultural Bank of South Africa* 2000 3 SA 626 (CC); *Sheard v Land Bank and Agricultural Bank of South Africa* 2000 3 SA 626 (CC); *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 SA 1109 (CC); *Lufuno Mphaphuli v Andrews* 2009 4 SA 529 (CC) par 199–218; *Twee Jonge Gezellen (Pty) Ltd v Land And Agricultural Development Bank of South Africa t/a The Land Bank* 2011 2 SA 1 (CC); *Member of the Executive Council for Health, Gauteng v Lushaba* 2017 1 SA 106 (CC); *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 6 SA 596 (CC); and *Liesching v S* 2016 6 SA 596.

64 the *Chief Lesapo* case (n 63) par 22. Rautenbach and Venter (n 62) 477, however, note that although the courts often state that the main purpose of s 34 is to secure good order by guarding against self-help, s 34 is an individual right that protects individual conduct and interests, like all the other rights, and it does not exist primarily for the sake of community interests.

65 2005 4 SA 581 (CC).

66 the *Jaipal* case (n 65) par 54–55.

67 See (n 65).

68 See (n 65) par 56.

work and that "reasonable, careful and creative measures, born out of a consciousness of the values and requirements of [the] Constitution" must be applied.[69] The state has taken legislative steps to promote access to justice, for instance by the creation of the CCMA, the small claims courts, the maintenance courts, rental housing tribunals, the national credit regulator and national consumer tribunal, the national consumer commission, the companies tribunal, and the takeover regulation panel.[70]

In the *Twee Jonge Gezellen* case, the constitutional court noted that "the right embodied in s 34 is a right to a fair public hearing, not a right to a trial."[71] Further, many procedures that are "the daily stuff of court business" are decided on affidavit, and never go to trial.[72] These are significant pronouncements in the context of this discussion as it signifies that courts have always had the authority to determine the process by which parties enforce their right of access to court. In pursuance of this line of reasoning, it is submitted that the right to have disputes resolved by "fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum" is not confined to a court in the traditional sense.

6 Conclusion

COVID-19 caused a surge in technology-based procedures in South African courts, as courts were forced to assimilate online procedures at short notice. It is suggested that the momentum of this swell be maintained and that incremental procedural reform should traverse along a path that will culminate in new civil procedure rules. The South African civil justice system must break with the entrenched adversarial mind-set and ultimately only a completely new set of rules will effect such a change. In the interim, the benefits of technology can be exploited to make justice more accessible. Innovative examples from England, Canada, Utah and Singapore were mentioned. It is not suggested that these examples be imported wholescale into South Africa, but that it must remain a priority to maintain and expand upon electronic services. Ultimately, the services provided by the current small claims court may migrate to an online procedure akin to ODR, but this will only be feasible if everyone has access to internet services. Regrettably, it is not possible to postulate when this will be a reality.

69 See (n 65). The court noted that a failure to provide a fair trial is as dangerous as cancelling an election due to a lack of facilities.
70 Currie and De Waal (n 53) 714–715.
71 the *Twee Jonge Gezellen* case (n 63) par 38.
72 Ibid.