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HAVE YOU SEEN *JOAN IS AWFUL*? AI LESSONS FOR LAWYERS FROM AN UNLIKELY SOURCE

What is turning out to be one of my favorite TV shows, *Black Mirror* had an episode that finally convinced me to write about Artificial Intelligence (AI) and its impact on the legal profession. I had been dreading writing since last year because of the uncertainties AI would cast on my beloved profession. I am not sure if my learned colleagues have the time to sit down and enjoy a dystopian TV show on Netflix and that makes *Black Mirror* an unlikely source. But what is clear is that a legal professional must be able to draw lessons from all aspects of life and use all resources at his/her disposal, including TV shows. This would give meaning to the requirement of rendering legal services to the best of your knowledge and abilities.

The episode of reference is titled '*Joan is Awful*' and it tells the tale of a woman named *Joan*, whose life is turned into a real-time TV series streamed on a fictional Netflix-like service, Streamberry. *Joan* is an active user of Streamberry and her life is turned into an AI-generated TV series because she accepted (on page 53 par. 12 of the terms and conditions) to have her life turned into a romanticized drama. The character of *Joan* in the Streamberry series is in turn interpreted by Salma Hayek (a movie celebrity) whose image is also exploited by the generative AI of the streaming company. Streamberry makes use of a proprietary quantum computer to convert *Joan*'s data (captured through her smartphone and other IoT solutions) into the artificial audiovisual work of her life (https://www.linkedin.com/pulse/black-mirrors-joan-awful-describes-world-ip-privacy-ai-di-maggio/).

The show documents *Joan*'s life, including her missteps and poor decisions, all in real time, leading to her life crumbling around her. The twist? The TV show is entirely computer-generated, using a digital likeness of actress Salma Hayek to play *Joan*. The show is created by a powerful algorithm that tracks *Joan*'s life through her phone and turns it into a TV series for public consumption. The algorithm is so advanced that it can create shows much faster than traditional television production, leading to an "infinite content creator" that can spawn entire multiverses for entertainment purposes (https://www.linkedin.com/pulse/how-netflixs-joan-awful-addresses-current-challenges-generative-eiba/).

The interesting part is when *Joan* seeks legal advice from Skillane Legal (a Law Firm). For obvious reasons, *Joan* was enraged after the show streamed her likeness and personal behavior on TV. And rightfully so! She felt wronged. And like so many of us, she took that frustration to a lawyer and asked for her options. Here's what Joan's lawyer said:

'Well, I've checked it over, and I have to say that actually, legally, the Streamberry Corporation can do this . . . And you assigned them the right to exploit all of that . . . All of that would have popped up on your phone or whatever when you first signed up to Streamberry. And you clicked "accept." . . . [Y]ou did accept it, and so they're in the clear.' (https://contractnerds.com/joans-lawyer-is-awful-observations-from-a-real-life-contracts-lawyer/).

There have been many takes on the legal challenges exposed by this episode in various jurisdictions, ranging from contract law issues, human rights, privacy, IP law, and generally the absence of law on AI. In Namibia, all the above issues, and more, would be relevant and would most certainly spell nightmares to our legal system. Just like *Joan*, clients would return home frustrated that their lawyer couldn't help them, and probably resort to drastic, self-help measures. Thus, in volume 35 (https://consultfasz.com/why-i-do-what-i-do-a-calling-to-promote-law-and-access-to-justice/), I stated the following in relation to the need to do more with respect to promoting law and access to justice:

'… what we do now will determine whether people will trust us as legal professionals over Artificial Intelligence (AI) or technology. It will determine whether people will opt for what is already on the internet over what you can tell them by word of mouth… to those who are willingly or unwillingly folding arms, the indictment has been served.'

The indictment has indeed been served via this Netflix show. I am afraid the return will be that of non-service for most legal professionals due to a culture of sticking only to what they know. But I will be the bearer of bad news that, if my learned colleagues have not caught onto the AI wind of change, the courts most certainly have, and so have a few legal practitioners who argued the matters I refer to below. This is evidenced by three judgments where the High Court of Namibia had to decide whether to allow evidence to be given via video link as the rules of court do not provide for leading evidence via video link. Remarkably, the High Court is divided on how, when, and who should allow such, and we are yet to see an appeal to the Supreme Court. The High Court is, however, *ad idem* on the technological advancements of the day and equally recognizes the need to catch up, in the interest of the administration of justice. This epiphany applies to the entire legal profession and justice system for the following reasons as extracted from case law:

Sibeya J was the first to recognize technological advancements in ***National Fishing Corporation (Pty) Ltd v African Selection Fishing (Namibia) (Pty) Ltd & Others*** (HC-MD-CIV-ACT-OTH-2021/01143) [2022] NAHCMD 580

(21 October 2022), where the applicant, Mr. Maren de Klerk who is said to be in South Africa, brought an application to lead evidence via video link on grounds that it is unsafe for him to attend court in Namibia in person. The learned Judge set the tone as follows:

> "[1] Court processes should not remain ancient but should embrace the change of time and adapt to the prevailing living conditions of the people. Technology evolves all the time and should not be rebuked as constituting a hindrance to attain justice. Courts should not resist change that may result in swift, cost effectiveness and convenience to the parties and to the court in order to deliver justice.
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> [2] Where technology can enhance the speedy delivery of justice, while being fair to the parties, without compromising on the purpose of the court, such technology should be embraced. Courts should be reminded of their purpose, namely: to do justice, enhance social order, resolve disputes, maintain the rule of law and ensure due process of the law.
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> [38] …The doors of the courtroom should, however, not be shut to key witnesses who find themselves to be geographically beyond the jurisdiction of the court. In view of the purpose of the courts, being to deliver justice, it is incumbent on the courts to ensure not only that justice is delivered to those in physical court attendance but also to ensure that persons have access to justice. This includes enforcing a person's right to a fair trial which encompasses the right to call witnesses wherever they may be located.
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> [39] The fact that the statutes, rules of the court and the common law do not make provision for the trial court to receive evidence during the trial via video link, should not be a barrier to so receive such evidence via the said video link where, on application, good cause is shown that it is in interests of justice to grant such order and further that another party will not be unfairly prejudiced thereby. The application to adduce evidence via video link should not be had for the mere asking. Courts should, therefore, scrutinise the application on the basis of the surrounding facts in order to determine whether or not it will be in the interests of justice to grant the order sought.
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> [40] I harbour no doubt that video link is a modern process within which audio and visual communication with a person in another place or country is possible. It, therefore, does not come as a surprise that our statutes do not make provision for courts to hear evidence adduced via video conference, as most of the statutes may have been promulgated prior to the discovery of video link.
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> [41] The law must evolve in order to cater for the ever-changing circumstances of the people. The law cannot be static lest it becomes redundant and worthless.

[42] Courts should adapt to modern technology within the sphere that they operate for as long as it is in the interests of justice to do so and that any other party will not be unfairly prejudiced in the process. Where the rules are lacking, this court can invoke its inherent jurisdiction to act in the interests of justice in order to ensure that persons have access to justice and that their rights to a fair trial are preserved.

[43] It would constitute counter constitutionalism for the court, after finding that it has the necessary jurisdiction to deal with the matter, to decline to exercise its jurisdiction on account of the process not being provided for in the rules of court. Lest we forget, the rules are made for the court and not the court for rules.

[44] A few challenges with hearing evidence via video link comes to mind and the list is by no means exhaustive. Lack of basic infrastructure, including well-functioning computers, uninterrupted internet and electricity connections to ensure smooth recoding of evidence are but a few…

[46] Hearing evidence via video link allows the witness to be viewed in person at the same time and same manner by the parties, the judge and the public that are in attendance in court. The court can observe witnesses who testify via video link and be able to make credibility findings. The witness who testifies via video link will be as good as present in court save that he or she cannot be touched.

[47] With the existence of modern technology, it will be a travesty of justice where a party shows on application that it will be in the interests of justice that its key witness who is beyond the jurisdiction of the court, is able and willing to testify via video link but cannot, for good reason, be in court attendance, should not be permitted to so testify. This may weaken or destroy such party's case and surely, that cannot be in the interests of justice. Furthermore, it could serve to violate the right to a fair trial envisaged in Art 12(1)(a) and (d).

[48] In view of the foregoing discussion, findings and conclusions, I hold that, although not provided for in the rules of court, statutes or common law, this court can, in an appropriate case, on application by a party who has established that it is in the interests of justice that the evidence of a key witness who is outside the jurisdiction of the court, and where good reasons are advanced for the non-attendance in court of such witness and where the other party will not be unfairly prejudiced, permit such evidence to be heard via video link. This, in my view, is what the interests dictate.

Conclusion

[72] In the present day and age where it is inevitable to depend on technology in daily activities, courts being no exception, there is a need to develop the laws in order to be relevant and keep up

with modernisation. With adequate laws and procedures in place, recording of evidence through video link where necessary, will smoothen the process which is bound to be time and cost effective while ensuring access to justice and enforcing the right to a fair trial. In my view, the hour has come to properly regulate the recording of evidence through video link during the trial in appropriate cases."

Ueitele J had the second opportunity to consider the issue in ***Moongo v Moongo*** (HC-MD-CIV-ACT-OTH-2019-02608) [2023] NAHCMD 521 (22 August 2023) where an applicant sought leave to give evidence at trial from Liverpool in the United Kingdom because she was unable to travel to Namibia. In a departure from Sibeya J's reasoning above, the learned Ueitele J discussed the issue along the lines of the principle of separation of powers – whether he could, in the absence of a rule, statutory provision, and common law principle, allow her to testify by video link and stated the following:

"[30] This court is obliged to consider Ms Moongo's application in the light of the Constitution. The court's task is to give meaning to the Constitution and, where possible, to do so in ways which are consistent with its underlying purposes and are not detrimental to effective government. The issue raised in the present case (namely how far the court can reform the law) is, however, of fundamental importance. The question concerns the powers of the Judiciary and how it is required to function under the Constitution. It is thus of crucial importance in the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme.

[39] For the reasons that I have outlined in the preceding paragraphs I have come to the conclusion that, Justice Sibeya's conclusion that despite the absence of a statutory provision or a common law principle a person may testify by video link, is more than what Professor Friedmann termed, 'making interstitial law, filling gaps in the statutory and decisional rules'.

[40] The change in the law which Ms Moongo asks this court to endorse in this case would constitute a major revision of the long-standing principles governing the appearance of parties before in court. I hold the firm view that the circumstances in Namibian law in which video-link evidence may be properly permitted is major and its ramifications complex. The courts must therefore proceed with great caution.

[41] The circumstances in which to admit video-link evidence must be duly-considered and constitutionally-mandated legislation as opposed to *ad-hoc* decision-making by individual Judges must be followed. I hold the further view that to, in the absence of statutory provisions, admit video linked evidence is tantamount to bypass the constitutionally-required process of amending statutes and rules of court under the guise of regulating its own process. I equally have come to the conclusion that to, in the absence of legislative provision, admit or allow video linked evidence overlooks and undermines the doctrine of separation of powers.

[42] As I indicated the ramifications for the introduction of such rule (to receive evidence by video link) are complex. The introduction thus requires a thorough investigation, considerations of resource-allocation issues may need to be considered and determined by those persons constitutionally-mandated to do so, before the question of when, if at all, and in what circumstances and subject to what requirements, video-link evidence might be permitted. The Constitution identifies the functionary who must, when the necessity arises to modernize the courts procedure, initiate that process.

[43] In light of the reasons that I have set out, the findings that I have made and conclusions that I have reached in the preceding paragraphs, it is with a heavy heart that I refuse the application."

Most recently, Schimming-Chase J also had a go at the issue in ***Wilmington Savings Fund Society FSB v Prime Paradise International Limited*** [2023] NAHCMD NC 558 (8 September 2023) where an Iranian national due to testify in an admiralty action set down for trial in Namibia could not travel due to health issue and therefore requested that he testifies via video link. Justice Schimming-Chase, in my view, struck a balance between the two judgments above when she stated the following:

'[34] …The main principle elucidated in these two matters was that oral testimony in civil proceedings should ordinarily be given in person, however with the advancement of technology, there is a possibility for direct evidence to be taken from a witness in another country and for cross-examination to take place whilst the witness is visible to all…

[39] In the Namibian courts, two cases have dealt with the issue. In *National Fishing Corporation (Pty) Ltd v African Selection Fishing (Namibia) (Pty) Ltd & Others,* Sibeya J dealt with an application for leave to lead evidence via video link from a fugitive from justice apparently resident in South Africa who averred that it would be unsafe for him to come to Namibia to testify…

[42] In contrast, Ueitele J, as recently as August 2023 penned a judgment on the issue of leading evidence by video link. He set out his reasons for his respectful disagreement with the judgment of Sibeya J in *Moongo v Moongo*…

[44] In consideration of the two diverging judgments, let me make it clear that <u>I am in respectful agreement with the principle that technology has advanced to such an extent that the receipt of evidence via video link should be welcomed in our courts</u>. However, I do not believe that the receipt of evidence via video link is simply a matter of procedure only. It also involves a consideration of the jurisdiction of this court. By way of example, for the court to have jurisdiction to make an appropriate

order in the event of perjury being committed by the witness, or the witness simply refusing from the remote location to answer questions.

[45] I am of the view that in order to cater for the above scenario and put a safe guard that the witness will adhere to the rules of court, such witness should be allowed to testify via video link from a country which has an extradition treaty with our country or a country that is duly designated in terms of the Extradition Act 11 of 1996. This will ensure that although such witness may be beyond the geographical jurisdiction of the court, he or she is not beyond the long arm of the law of the land where trial takes place."

In all the cases above, and to borrow the language employed by Ueitele J, the applications for leave to testify via video link were denied *with a heavy heart*, but, at the same time, the courts were, as per Schimming-Chase J, *in agreement with the principle that technology has advanced to such an extent that the receipt of evidence via video link should be welcomed in our courts*. It is indeed true, as per Sibeya J, that *court processes should not remain ancient but should embrace the change of time and adapt to the prevailing living conditions of the people. Technology evolves all the time and should not be rebuked as constituting a hindrance to attaining justice. Courts should not resist change that may result in swift, cost-effectiveness, and convenience to the parties and to the court in order to deliver justice. Where technology can enhance the speedy delivery of justice, while being fair to the parties, without compromising on the purpose of the court, such technology should be embraced. Courts should be reminded of their purpose, namely: to do justice, enhance social order, resolve disputes, maintain the rule of law, and ensure due process of the law.*

The duty that now lies on the courts to recognize and embrace technology as lucidly formulated in the three judgments discussed above applies to legal practitioners as officers of the court, and to legal professionals in general in their provision of legal services to people. Technology and AI are here and they will only get more innovative, smarter, and relevant to our day-to-day lives. So, it is not surprising that litigants have already started claiming the use of technology in the courtroom, only to find that Namibian law does not provide for it. It will also not be surprising if legal disputes, like the one in *Joan is Awful*, are already developing in the background, and very soon, clients will be looking for legal assistance in that regard, only to find lawyers who are not competent to deal with their novel legal problems. Will you, as a legal professional, be able to assist them to the best of your knowledge and abilities if you are far behind the ever-changing technology? I leave that question for you to answer. But while at it, remember that competence is a standard expected of a legal practitioner and lack thereof may constitute negligence. I wish to refer to the warning given by Sibeya J in *Namibian Electrical Services CC v PD Theron & Associates* (HC-MD-CIV-ACT-CON-2018/04238) [2022] NAHCMD 486 (16 September 2022) that:

"[1] Before I dwell into the genesis of the dispute giving rise to this judgment, I deem it imperative to sound a word of caution to newly admitted legal practitioners practicing as such and that is: once a

legal practitioner undertakes the representation of a client, it becomes his or her obligation to exercise proper care to safeguard the client's interest. When a legal practitioner accepts instructions in a matter with which he or she is unfamiliar, the legal practitioner is under a legal and ethical obligation to study the necessary papers and authorities in order to make himself or herself competent in the subject. If a legal practitioner totally lacks the required knowledge and skill to carry out the instructions, such legal practitioner is duty-bound to sincerely inform the client that the instructions are beyond his or her capabilities, whereafter the client may approach another legal practitioner with knowledge and skill on the subject.

[2] With that said, I adopt the Disciplinary Rules of the American Bar Association which state that "a lawyer shall not handle a legal matter without preparation adequate in the circumstances".

[3] Where a legal practitioner proceeds with a matter where he or she is at sea on what is required, he or she may be liable for negligent conduct."

Therefore, there are many risks inherent in remaining behind the technology wave, ranging from losing clients to breaching professional standards. It is incumbent on legal professionals to recognize and embrace technology in its current form and be ready to change with it in order to be relevant. This is what FASZ Legal Consultancy is advocating for and we welcome progressive minds to join us as we transform the profession.

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