

Short notes on:

THE USE OF ELECTRONIC SIGNATURES FOR E-COMMERCE

Introduction

Originally, seals were affixed to documents as a means of authenticating the content within documents. Thereafter, signatures were attached to documents for this purpose. We are currently in the electronic age, where large numbers of electronic documents are created. The conundrum then becomes how to authenticate electronic documents that cannot have anything affixed to them? However, times have changed, and more flexibility has been granted to signatures that may be transposed to authenticate electronic documents due to the doctrine of *functional equivalence*. The use of an electronic signature is perceived as simplistic because of how signatures are used on paper form. However, there is legislation around electronic signatures influenced by international norms and requirements.¹ The law regulating electronic signatures in South Africa is known as the Electronic Communication and Transaction Act² (hereinafter referred to as ECTA). The act and case law are pertinent in understanding the definition and use of and electronic signature.

Definition of electronic signature according to South African law

The current definition of electronic signature in schedule II chapter I of the ECTA is known as data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature. Currently, the ECTA has a two-pronged approach that distinguishes between simple electronic signatures (hereinafter referred to as “SES”) and advanced electronic signatures (hereinafter referred to as “AES”). A simple electronic signature is a signature that is not advanced or qualified, meaning it does not offer a high level or threshold of security in its use. Contrary to popular belief, they are widely used as they are more suitable for convenience and rapid transactions needed for business transactions. The AES provisions require certification and authentication by a third-party service provider involving the use of biometrics. Section 37 of the ECT Act had not accredited a single service provider until 2011. However, this changed with the accreditation of LAW Trusted Third Party Services (Pty) Ltd (LAWtrust) in 2011 and the South African Post Office in 2013³. When a trusted third party issues an electronic signature, it is clothed with certain evidential advantages not provided to simple electronic signatures.

¹The Electronic Communication and Transactions Act is influenced by United Nations Commission on International Trade Law (UNCITRAL) 6 model on electronic signatures of 1996, and the model law of 2001

² 25 Of 2002

³ Eiselen, S ‘Fiddling with the ECT Act – Electronic Signatures’ (2014) 17(6) Potchefstroom Electronic Law Journal 2815

Recent precedent set in case law on the use of electronic signatures

There has not been much case law dealing with ECTA's provisions on e-signatures.⁴ However, the limited and recent case law on SES and AES may provide guidance and set a precedent for future business uses of electronic signatures.

(a) Recent case law on Simple Electronic Signatures

In the 2015 case of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*⁵ the agreement provided that specific clauses might only be cancelled in writing and signed by the parties. The Supreme Court of Appeal (SCA) held that the type-written names of the parties at the end of email correspondence between the parties constituted an electronic signature as envisaged in section 13(3)⁶ of the ECTA and thus deemed the contract to be validly cancelled.

*Absa Bank Ltd v Le Roux*⁷ affirms Section 15(4) of the ECTA, which further stresses that a data message, such as an electronic signature, produced in any legal proceedings is admissible evidence and is rebuttable proof of the facts contained therein. This would mean that once a data message is produced in legal proceedings, it is presumed to be factually accurate.

(b) Recent case law on Advance Electronic signatures

In the recent 2020 case of *Massbuild v Tikon*⁸ an electronic signature was appended by the first defendant's financial manager who was granted the requisite authority to bind the second defendant. The court had to decide on the type of signature required for a contract or suretyship embodied in a data message. The court held that section 6 of the General Amendment Act of 1956 has not been amended to specify the type of signature required for a contract of suretyship. It followed that where the suretyship is embodied in a data message, the signature must meet the requirements for an AES, as stipulated in section 13(1) of the ECTA.

⁴ Supra note 3 page 2805

⁵ 8 2015 (2) SA 118 (SCA)

⁶ (3) ECTA 13 (3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if- (a) a method is used to identify the person and to indicate the person's approval of the information communicated: and (b) Having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

⁷ 2014 (1) SA 475 (WCC)

⁸ *Massbuild (Pty) Ltd t/a Builders Express, Builders Warehouse and Builders Trade Depot v Tikon Construction CC and another* [2020] JOL 48548 (GJ)

Conclusion

Theoretically, using an AES would be beneficial to any business as it has a higher degree of security and can reduce the risk or prevent any fraudulent use of signatures. However, acquiring an AES requires more in terms of finances and administrative hurdles. The SESs are commonly used but possess a lower security threshold. During the pandemic, many transactions are being concluded online; it would be in a business's best interest to invest in acquiring an AES, especially for electronic documents that are of utmost importance in concluding agreements. Nonetheless, where it is not economically viable for a business to attain an AES, it is of importance to be aware fraudulent signatories that are used in the business's name and to inform the public and clients of such use. For more legal advice regarding tech law contact SchoemanLaw today.