

Electronic Contracts and the Sale of Immovable Property

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INTRODUCTION

With the expansion of e-commerce and the growing use of digital technology in the business world, the Electronic Communications and Transactions Act 25 of 2002 (ECTA) enacted in 2002, has made it easier than ever to facilitate electronic communications and transactions online, via e-mail, SMS, and even Facebook and WhatsApp.

This article will highlight the important considerations to keep in mind before an agreement reached electronically or by any means other than being written down and signed will be legally binding on the parties to it.

Note: Agreements for the sale immovable property are specifically excluded in the ECTA from being concluded electronically and accordingly must be signed by hand by the parties. The legal basis for this is more fully set out below.

ESSENTIAL REQUIREMENTS OF ALL CONTRACTS

Electronic contracts entered into online, or agreements concluded through data messages such as SMS or WhatsApp are only valid if they meet the common law requirements (essentialia) of contracts, which are: -

- a valid offer and acceptance;
- there must be consensus between the parties that they have the intention to enter into and conclude the agreement;
- both parties must have contractual capacity (i.e. must be over the age of 18 and be of sound mind);
- The content of the agreement must be specific and have clear, definitive terms;
- The agreement must be legal and lawful;
- The obligations imposed on the parties must be capable of performance.

In terms of section 12 of ECTA, the lawful requirement that documents or Information must be "in writing" is met if these documents or Information are in the form of a data message; and accessible in a manner usable for subsequent reference.

Where all of these requirements are present whether it is communicated as a data message online, through an exchange of e-mails, SMS texts, WhatsApp or Facebook messages, a valid agreement is deemed to have been concluded and will be legally binding and enforceable. It is thus possible, in terms of ECTA for a contract to be concluded, varied and cancelled by means of an e-mail, SMS or WhatsApp.

ELECTRONIC/DIGITAL SIGNATURES

There may be formal requirements imposed by statute or by the parties to a transaction themselves that the terms be recorded in writing and duly signed. Where this is the case, and for example where it may be practically impossible to obtain multiple original handwritten signatures on the same document, this requirement can generally be satisfied through electronic signatures. Section 13 of ECTA provides for 2 categories of electronic signatures to be used:

Standard Electronic Signatures, which include any digital or scanned signatures and suffice for most purposes; and

Advanced Electronic Signatures, which are digital signatures created with a digital certificate from an accredited Authentication Service Provider.

The Supreme Court of Appeal in a recent case (*Spring Forest v Willberry (Pty) Ltd before the Supreme Court of Appeal (SCA) in 2015*) noted that "The courts in South Africa have always adopted a pragmatic approach to signatures rather than a formalistic approach and the primary consideration is not whether the signature is literally pen on paper, but rather if the method of signature has fulfilled the function of authenticating the identity of the signatory".

It also held that the names of the parties at the foot of their respective emails were intended to serve as signatures, constituted "data" which was logically associated with the data in the body of the emails, and identified the parties, thus concluding a valid agreement.

EXCEPTIONS

There are, however, exceptions where agreements may NOT be concluded electronically. These exceptions, contained in Section 4(4) of ECTA are:

- agreements for the sale of immovable property;
- long-term leases of land exceeding 20 years;
- signing of a will; and
- bills of exchange (such as a cheque).

In other words, agreements for the sale of immovable property as provided for in the Alienation of Land Act are excluded from the scope of ECTA and as such the electronic signature provisions (including the advanced signature provisions) will not apply to the signature provisions contained in the Alienation of Land Act.

Section 2(1) of the Alienation of Land Act provides that no sale of land will be of any force and effect unless it is contained in a written deed of alienation signed by the parties or their agents (under the parties' written authority).

An offer to purchase or agreement for the sale for immovable property are examples of such a deed of alienation. A verbal contract for the sale of immovable property is similarly unenforceable.

Consequently, one can validly conclude a contract of sale for a car electronically, but when it comes to the selling and purchasing of immovable property, the agreement must be reduced to writing and physically signed by hand and in pen by the parties.

Parties may still communicate terms of their agreements via email, WhatsApp or SMS. Execution of the Offer to Purchase shall, however, only be enforceable and valid once the agreement is signed by hand by both of the parties or their authorised agents. Therefore, a signature, for purposes of this transaction must be the act of physically signing by hand and does not include by way of data message.

VARIATIONS AND AMENDMENTS TO EXISTING CONTRACTS CAN BE CONCLUDED ELECTRONICALLY

The Alienation of Land Act does not regulate the amendments, variations or cancellations of agreements for the sale of immovable property and it may be argued that ECTA and more specifically Section 13 thereof may be deemed to be applicable to variations, amendments or cancellations associated with such agreements (as the exclusions relates to the validity of such agreements only).

Typical agreements of sale of immovable property will contain a non-variation clause, providing that *“no amendment to, variation or consensual cancellation*

of the agreement will be effective unless it is in writing and signed by the parties concerned”.

Variations and amendments to the Agreement of Sale is usually dealt with by way of an Addendum which is signed by the Parties.

However, as a result of the interpretation and application of Section 13 of ECTA (in that the provisions of ECTA remain applicable to such variations and amendments) the proposals and counter-proposals exchanged between the parties by email correspondence, WhatsApp's or SMS may become binding on the parties once a proposal or counter proposal has been accepted, even if the parties have a non-variation clause in place in their contract.

It is therefore recommended that offers to purchase avoid standard non-variation clauses and specifically exclude electronic forms of acceptance or variation as defined in the ECTA to avoid a situation where the parties have unknowingly concluded an agreement by innocent correspondence over WhatsApp. i.e. the variation clause will specifically require an addendum in paper-based form actually signed by the parties.

CONCLUSION

Contracts for the sale of immovable property must be physically signed by the parties whereas other contracts not specifically excluded from ECTA can be concluded via WhatsApp and email etc, as can variations to immovable property sale agreements.



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