

The Enforceability of Agreements Concluded and Signed Electronically

By **Aleksandra Marek** (Candidate Attorney),
checked by **Nadia Krause** (Senior Associate)

28 March 2025

INTRODUCTION

Constant technological advancements have transformed the way in which individuals go about their daily lives, including the way they conclude agreements with others. This bears the question as to whether an electronic agreement has the same legal effect of a physical agreement, printed and signed in wet ink by parties or whether it is still insufficient to bind parties.

ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT

The point of departure in considering electronic agreements is the Electronic Communications and Transactions Act (“**ECTA**”) which provides the bridge between traditional thinking and technological inclusion. Section 22 of ECTA states that an agreement is not without legal force simply because such an agreement was concluded (either partially or wholly) by means of a data message. Therefore, an electronic agreement will be afforded the same legal effect as a traditional agreement, in that it will be considered as binding on both the parties upon conclusion.

In terms of the signature requirement, which forms part of the standard requirements for the conclusion of most modern agreements, ECTA provides for its applicability to electronic agreements in two ways. Firstly, section 13(1) of ECTA provides that when a signature is required by law but does not specifically provide for which type of signature, then an advanced electronic signature, being a signature approved by an accreditation authority, must be used in the data message which according to section 1 of ECTA pertains to “[...]data generated, sent, received or stored by electronic means[...].” Secondly, section 13(3) further states that where an electronic signature is required by self-imposition of the contracting parties, but there has not been an agreement between the two parties as to which type of signature to use, the agreement shall be considered binding if:

1. The method used is capable of identifying the contracting party and providing an indication of their acceptance to the communication; and

2. The method used was considered as suitable and reliable for the purpose of the communication in light of the circumstances.

Furthermore, section 13(2) of ECTA provides that an electronic signature is not without legal force due to the mere fact that its form is electronic.

CASE LAW

In *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*¹, the issue of whether the typewritten names of the parties (as provided for at the end of an email) was able to satisfy the signature requirement and whether the email cancellation was binding on the parties in circumstances where the written agreement stipulated that the cancellation of the agreement would not be effective unless reduced to writing and signed by both parties.

In the matter, the Appellant, Spring Forest Trading 599 CC, was unable to meet their payment obligations under the lease agreement with the Respondent, Wilberry (Pty) Ltd t/a Ecowash. The parties exchanged emails discussing possible solutions. During one such email, the Respondent presented the Appellant with four possible options, one of which being to cancel the agreement. The Respondent confirmed that the Appellant could “cancel the agreement and walk away” and that should this option be selected, that there would be no further claim or legal action from either side. The Appellant was further required to return all the equipment and make payment of all arrear rental. The Appellant duly accepted option 2 and confirmed as much via email correspondence to this effect.

However, the Respondent proceeded to deny that the agreement had been validly cancelled due to the non-variation clause included in the agreement, which stated that there cannot be any cancellation of the agreement unless it was reduced to writing and signed by both parties.

The High Court of South Africa, Kwa-Zulu Natal Division, Durban, ruled in favour of the Respondent finding that the email correspondence exchanged between the

parties amounted to a mere negotiation and not an intentional cancellation of the agreement. Additionally, it was stated that common law must be used to interpret ECTA which, when considering section 13(1) of ECTA, includes the parties respecting the formalities and conditions of their agreement. It was further stated that ECTA did not apply as the parties never stated that the lease agreement could be cancelled via email. As such, the emails were in conflict with the non-variation clauses in the lease agreement and the cancellation therein were invalid.

The matter was taken on appeal to the Supreme Court of Appeal ("SCA"), where the court clarified the differences of the signatures provided for in terms of sections 13(1) and 13(3) of ECTA as well as its application to the email. It held that section 13(1) (requiring an advanced electronic signature) only applies where a signature is required by law – not when it is merely agreed upon by an agreement. Since the agreement itself imposed the signature requirement, it fell under section 13(3), which allows for any method that identifies the parties and that indicates their approval. The SCA found that the email correspondence exchanged between the parties indeed met the requirements as set out in section 13(3).

Additionally, the SCA held that the typed names at the bottom of the emails qualified as 'electronic signature' under section 13(3) of the ECTA, as the correspondence was logically connected and intended to confirm the cancellation of the agreement. In light of the aforesaid, the SCA found that the email correspondence exchanged between the parties indeed met the requirements as set out in section 13(3).

Therefore, the SCA found that the cancellation of the lease agreement satisfied the non-variation clause as it was reduced to writing within the email and that the typed names written at the footer of the emails of the parties were sufficient in satisfying the requirements of an electronic signature as per section 13(3) of ECTA. As a result, the cancellation of the lease agreement by the Appellant was legally binding.

¹*Spring Forest Trading v Wilberry (Pty) Ltd t/a Ecowash and Another (725/13) [2014] ZASCA 178; 2015 (2) SA 118 (SCA) (21 November 2014)*



Nadia Krause
(Senior Associate)



Aleksandra Marek
(Candidate Attorney)