

DISPUTES

Electronic signatures: recent developments

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What is an electronic signature, and when will it be valid in place of a handwritten signature? These questions appeared to have been answered by the SCA in *Spring Forest*^[1], but recent case law has introduced an element of uncertainty.

To recap, the section 13 ("Signature") of the Electronic Communications and Transactions Act^[2] (ECTA) provides as follows:

(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(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.

Spring Forest clarified that "required by law" in section 13(1) means required by statute, and does not extend to a signature requirement imposed by agreement between the parties – in which case an "ordinary" electronic signature, as opposed to an advanced electronic signature, would suffice. Further, the typewritten names of the parties at the foot of their e-mails, which were used to identify them, complied with the definition of "electronic signature" and fulfilled the function of a signature, i.e. to authenticate identity. Thus, where a contract requires a written and signed document for a valid agreement to vary, an exchange of e-mails (which constitutes writing in terms of ECTA) with the parties' typewritten names at the bottom would comply with the requirements of section 13(3) and would suffice.

In *Global and Local Investments Advisors (Pty) Ltd v Fouche*^[3], a mandate by Mr Fouche to his financial services provider (FSP) required his signature for a valid instruction and made no mention of an electronic signature. Mr Fouche's e-mail account was hacked, and fraudulent instructions with the typed words "Regards, Nick" and "Thanks, Nick" at the end were sent to the FSP, resulting in the FSP paying out some of Mr Fouche's funds to the fraudster. In an action to recover damages from the FSP, the SCA held on appeal that since the parties had not agreed to accept an electronic signature as contemplated in section 13(3), the position was that a signature in the ordinary course, i.e. in manuscript form, was required, even if transmitted electronically. Hence, the FSP's appeal failed. *Spring Forest* was distinguished on the basis that the authority of the persons who had actually written and sent the e-mails had not been in issue in *Spring Forest*, as it was in the present case. In *Spring Forest*, there was no dispute regarding the reliability of the e-mails, accuracy of the information communicated or the identities of the persons who appended their names to the e-mails, whereas in the present case the e-mails were in fact fraudulent.

In *Borcherds and another v Duxbury and others*^[4], the High Court confirmed that a manuscript signature in electronic form would meet the requirements of a signature for the purposes of the Alienation of Land Act^[5] (ALA), even though ECTA does not apply to the ALA. This confirms that a manuscript signature in electronic form has come to acquire the status of an ordinary handwritten signature.

Global and Local is however problematic for other reasons. Firstly, where a contract requires a signature but does not specify the type of signature, the default position is that an electronic signature is indeed compliant. This, in my view, is the clear effect of section 13(2). Furthermore, *Spring Forest* confirmed the position by necessary implication if not explicitly, in finding that section 13(3) applies in any

instance where the parties require a signature (not necessarily an electronic signature) but do not specify the type of electronic signature that is required^[6]. This renders an electronic signature presumptively equivalent to an ordinary signature, except in instances subject to section 13(1) (i.e. where the signature is required by statute).

Secondly, the fact that the signatures in *Global and Local* were fraudulent while the signatures in *Spring Forest* were not, is not a coherent basis for distinguishing *Spring Forest*. The question is what the formal requirements for a valid signature are. The parties need to be able to look at the signature, see whether it complies with the formal requirements, and rely on it in good faith if it does. If those requirements can change depending on whether the signature later turns out to have been fraudulent, then a party receiving a signed document cannot know up-front whether it is formally compliant and cannot rely on it. This undermines the need for certainty.

The court in *Global and Local* ought therefore to have followed *Spring Forest* and held that the FSP was entitled to rely on Mr Fouche's typed name at the end of the relevant e-mail as constituting his signature – unless (and this was not covered in the judgment, so it is impossible to comment) it was clear from the contract that the parties intended the signature to provide a higher than usual degree of authentication, such as for example if it provided for a sample signature that could be checked against the signature on any mandate ostensibly received from Mr Fouche, which would have implied that a manuscript signature was required.

Nevertheless, in light of *Global and Local*, parties entering into a contract that requires a signature for any purpose should be alert to specify whether or not an electronic signature will be compliant. If so, then it would be pragmatic also to specify what form of electronic signature will be acceptable, i.e. whether a manuscript electronic signature is required or a typed version will suffice.

[1] *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and another* 2015 (2) SA 118 (SCA)

[2] Act 25 of 2002

[3] 2021 (1) SA 371 (SCA)

[4] 2021 (1) SA 410 (ECP)

[5] Act 68 of 1981

[6] At paragraph 28.

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