

Ruling in favour of the Digital Age: Local and foreign courts give a thumbs up to electronic agreements and signatures

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and Karabo Kekana, Candidate Attorney

Recently a Canadian court decided that a thumbs up emoji constituted an electronic signature and resulted in a binding and enforceable sale agreement. In RSA, a court held that a credit agreement entered into and signed electronically was enforceable despite the consumer's arguments to the contrary. Digital agreements – of various types – have become the norm rather than the exception. This article discusses these recent cases in the context of a digitalised world and what this means for contracting parties.

Our digital world

Modern society is firmly embedded in the digital age. The rapid advancements in the use of artificial intelligence is evidence of this.[1] This has various practical implications for businesses and individuals alike – including in contracting practices, where an increasing number of agreements are being negotiated and concluded electronically, replacing traditional paper-based contracting. The benefit with such agreements is that parties are able to negotiate and conclude agreements remotely and with relative ease. However electronic contracting poses risks relating to contractual certainty and security.

The Canadian approach: *South Wester Terminal Ltd. v Achter Land & Cattle Ltd. ("SWT")*[2]

The recent *SWT* decision in Canada concerned a summary judgment application brought by South Wester Terminal Ltd. ("**SWT**") against Achter Land & Cattle Ltd ("**Achter**"). SWT and Achter had an ongoing business relationship where Achter sold flax to SWT who in turn on sells it to third parties. SWT alleged that a sale agreement for flax had been entered into as a representative of SWT had signed a sale agreement with a wet ink signature and sent a photo of it to a representative of Achter with a text message which read: "*please confirm flax contract*". The Achter representative responded by text with a thumbs up (👍) emoji. Achter never delivered the flax, and SWT alleged that the agreement had been breached and sought damages.[3]

The Canadian court considered whether the agreement was concluded in writing and signed by both parties: these being requirements of the Canadian laws that applied to the contract in question.[4]

The court held that the thumbs up emoji constituted an electronic signature and thus met the legal requirement for the agreement to be signed. In making its determination the court considered that the thumbs up emoji originated from Achter's representative and his unique cell phone number and that there was no issue as regards the authenticity of the text message containing the thumbs up emoji.[5]

The court considered that there was a pattern between the parties that the SWT representative would text Achter a photo of a contract and ask him to confirm a contract. Achter had previously replied with "*looks good*", "*ok*" or "*yup*" and had always proceeded to deliver the flax as agreed to per text.[6] The court held that an objective bystander would conclude that the parties had entered into an agreement in the same manner that they had previously done and therefore held the contract to be enforceable.[7]

ECTA and the NCA: what the legislators have to say

In South Africa the use of electronic agreements and signatures are governed by the Electronic Communication and Transactions Act[8] ("**ECTA**") which applies to electronic transactions and data messages (information sent, received, generated or stored by electronic means).

[9] ECTA allows other Acts, such as the National Credit Act[10] ("**NCA**"), to have their own provisions and requirements for data messages (including electronic agreements).

ECTA governs the use of "*electronic signatures*" and distinguishes between two types –

- an "**Electronic Signature**" which comprises data intended by the user to be a signature. Examples include a digitally drawn signature, a scanned image of a signature or a digital signature produced by an application ("**Ordinary Electronic Signature**"); and
- an "**Advanced Electronic Signature**" which is an electronic signature which results from a process which has been accredited by the South African Accreditation Authority (or SAAA).[11] A person has to go through a face to face authentication process to make use of an Advanced Electronic Signature, they are therefore much less common than Ordinary Electronic Signatures.[12]

ECTA provides that where a law specifically requires the signature of a person and that law does not specify the type of signature, an Advanced Electronic Signature rather than an Ordinary Electronic Signature must be used. Where the parties have not agreed to a specific type of electronic signature (and the law does not require one) an Ordinary Electronic Signature may be used and the method used must be reliable and identify the signatory.[13]

Section 2(3) of the NCA provides that where the NCA requires a document to be signed by a party to a credit agreement, an Ordinary Electronic Signature or Advanced Electronic Signature may be used but where an Ordinary Electronic Signature is used it must be applied by each party in the physical presence of the other. Nowhere in the NCA or its regulations[14] is it said that a credit agreement has to be signed. On the one hand, the regulations contain a form which small credit agreements must comply with, requiring a signature;[15] on the other hand, the regulations also permit other types of credit agreements which do not require a signature, namely telephonic and electronic agreements[16] It is thus a grey area whether the NCA actually requires a credit agreement to be signed to be valid but in practice credit providers tend to err on the side of caution by requiring some form of signature for written credit agreements, whether it be wet ink or electronic.

***Firststrand Bank Limited t/a Wesbank v Govender ("Govender")*: [17] what the court said**

In *Govender* a consumer defaulted on payments in terms of an instalment sale agreement for a car. The consumer's defence to the credit provider's claim for payment was that he never signed the "**I-contract**" in question and that the agreement (entered into and signed electronically) was invalid and unenforceable as it failed to comply with ECTA's electronic signature requirements. How the contracting process works is that following a consumer selecting a vehicle at a dealership, they register their details and receive a one-time pin ("**OTP**") which the consumer enters to allow them to access and sign the I-contract electronically. The credit provider's watermark stamp on each page evidenced that the consumer signed the contract electronically. The consumer is also required to produce their identity documents to verify their identity.[18] This signature process does not constitute an Advanced Electronic Signature but rather an Ordinary Electronic Signature.

The court in *Govender* held that the ECTA settled any uncertainty relating to electronic agreements and that data messages and electronic signatures were equivalent to any paper form signature, and that the primary question was whether the requirements for a valid agreement had been met.[19] The court stated that the I-contract entered into was a valid and enforceable contract based on the evidence presented by the parties.[20]

The court in *Govender* did not specifically deal with the NCA's requirements for face to face authentication of an Ordinary Electronic Signature, nevertheless there is an argument to be made that those requirements would have been met given that the consumer was authenticated in person when the identity documents were provided to the credit provider. Furthermore, the High Court has previously accepted a signature to an I-contract credit agreement as valid for purposes of the NCA.[21]

Risky business: the downside of electronic agreements and signatures

The *Govender* case highlights that although Ordinary Electronic Signatures are convenient and efficient, there are security and authenticity risks associated with them. It can be difficult to verify whether an Ordinary Electronic Signature is genuine or forged and they are also vulnerable to hacking, leading to the possibility of fraud and identity theft. However, the risk with using Ordinary Electronic Signatures depends on the type of electronic signature mechanism employed, with some forms of electronic signatures being more secure and therefore more reliable than others.

The use of smart contracts

A smart contract is a self-executing protocol stored on a blockchain. Smart contracts are transparent, verifiable and immutable given that they cannot be tampered with: once a smart contract has been deployed on the blockchain, it cannot be changed. They therefore increase efficiency, trust and security in the contracting process. Further, the code of the contract can be audited by anyone, promoting transparency.

Smart contracts are recognised as electronic agreements in terms of ECTA. Although the signatures generally applied to a smart contract would constitute an Ordinary Electronic Signature (and not an Advanced Electronic Signature), given the security which the blockchain mechanism provides and the auditability of the process, the contract and electronic signature would offer more security than other forms of Ordinary Electronic Signatures. The process also promotes certainty of contracting.

Conclusion: where to from here?

The *Govender* decision reaffirms our Courts' approach to accepting electronic agreements and signatures, indicating that our courts are not willing to invalidate electronic acts purely on the basis that they are electronic and not paper based. The *SWT* decision indicates the risk of using informal electronic channels to negotiate contracts. Businesses and consumers alike should ensure that they use electronic contracting and signature mechanisms that are sufficiently secure and robust to provide the requisite legal certainty and security. Businesses could consider ensuring enhanced security and authentication by using smart contracts in appropriate applications.

Footnotes

[1] See the LegalWerks article by the co-author, Preeta Bhagattjee, on [Generative AI and its risks](#)

[2] 2023 SKKB 116 (heard by the court of the King's Bench for Saskatchewan, a province in Canada).

[3] See paragraph 15 of the judgment for a summary of the facts.

[4] *The Sales of Goods Act*, RSC 1978, c S-1 (in terms of section 6(1) which provided that the Act applied to contracts of sale for \$50 upwards) and *The Electronic Information and Documents Act, 2000, SS 2000, c E-7.222* were held by the court to be applicable to the flax sale contract.

[5] *SWT*, paragraphs 60 to 64.

[6] *SWT*, paragraph 21.

[7] *SWT*, paragraph 36.

[8] No 25 of 2002.

[9] ECTA, section 1.

[10] No 34 of 2005.

[11] Currently only LawTrust and the South African Post Office are accredited.

[12] See section 1 of the ECTA for these definitions.

[13] See section 13 of the ECTA.

[14] *GNR.489 of 31 May 2006: Regulations made in terms of the National Credit Act, 2005* (the "regulations")

[15] Small credit agreements must comply with Form 20.2 which requires a signature (regulation 30(2) of the NCA regulations).

[16] The regulations provide that transcripts are sufficient in this regard provided that the consumer is supplied with a copy (see regulation 30(3) of the NCA regulations for small credit agreements and regulation 31(4) for large and intermediate credit agreements).

[17] (2021/25131) [2023] ZAGPJHC 610 1 June 2023. (Note that the neutral citation refers to "Govendor" and not "Govender", we use the latter spelling in this article in line with the spelling used in the judgment).

[18] See paragraphs 10 to 12 of the judgment for a description of the process.

[19] *Govender*, paragraphs 24 to 27.

[20] *Govender*, paragraph 32.

[21] See also the decision of *First Rand Bank t/a Wesbank v Molamugae* (24558/2016) [2018] ZAGPPHC 762 (26 February 2018) where the court held that an I-contract for an instalment sale agreement had been validly entered into and signed electronically with reference to the NCA's requirements.



Preeta Bhagattjee

Head of Technology & Innovation

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Armand Swart

Director

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