



E-Commerce: Legal recognition “in writing”

Living in the 20th century most people are focused on efficiency and effectiveness. Getting things done swiftly and promptly. That’s why handwritten letters are replaced by green messages and e-mail notifications. The postman has been retrenched because there is a new guy on the block called Wi-Fi. The internet allows us to conclude agreements and communicate with other people in other provinces and even abroad, instantly. Doing business and concluding contracts has never been easier. The internet has taken the business world to a whole new level.

With that said, a lot of questions and uncertainty arose. Did South African Law keep up with all the technological changes? Can a WhatsApp voice message or an e-mail agreement be seen as a legally binding contract and fulfil the requirement of writing?

When you are dealing with contracts, there are usually formalities that need attention. These formalities are known as writing and signatures. This article will only focus on the writing formality. A contract can only exist when there is consensus between parties. The written component gives certainty to the contracting parties and it serve as proof thereof. The signature component plays a valuable role in authentication, identification and acts as a consent mechanism. Formalities are therefore very important to protect yourself against future disputes about the validity of the agreement.¹

The point of departure with regards to formality requirements in our law is that no formalities are required for a legally binding contract. An agreement can therefore be concluded anywhere and in any way. There are exceptions in certain circumstances where formalities must be complied with, such as when legislation requires it i.e. the

¹ DP van der Merwe, A Roos, T Pistorius, GTS Eiselen & SS Nel *Information and Communications Technology Law* 2nd ed (2016) 174-176.

Alienation of Land² or when certain conditions are imposed by the contracting parties themselves.

The Electronic Communication and Transaction Act (“ECTA”)³ regulates the formal requirements by way of electronic data messages. Section 12 of ECTA regulates the requirements of writing:

“Writing

A requirement in law that a document or information must be in writing is met if the document or information is-

- (a) In the form of a data message; and*
- (b) Accessible in a manner usable for subsequent reference.”*

It is apparent that there are two requirements to fulfil the formality of writing according to ECTA. Firstly subsection (a) refers to a “data message”⁴, this word has been defined widely in ECTA, and it has been broken down to the word “data”⁵. The first requirement is met where the agreement is in any electronic form and the data is generated, sent, received or stored electronically. The second requirement that needs to be met is set out in subsection (b). It must be possible to store or save the agreement electronically and retrieve it for reference at a later stage. This subsection gives parties the necessary security that a written or printout agreement will always be on record.

The purpose of section 12 of ECTA is that the agreement is presented in an electronic way, complies with the definition of a data message and the specific data is retrievable in any way so that it could be referred to in the future. As seen in the two requirements, something as simple as a message/voice note sent by way of e-mail/WhatsApp, or a recording of a conversation that concludes an agreement, can be seen as fulfilling the formality of writing.

The main objective of ECTA is the principle of functional equivalence and therefore any person can comply with the formality requirements by following ECTA’s guidelines. This bears the meaning that electronic data is treated the same as any other means that may be used before the digital age.

² Act 68 of 1981.

³ Act 25 of 2002.

⁴ Data generated, sent, received or stored by electronic means and includes- (a) voice, where the voice is used in an automated transaction; and (b) a stored record.

⁵ Electronic representations of information in any form.

Herman Janse van Rensburg

Candidate Attorney at Malan Lourens Viljoen Inc.

This article is a general information sheet and should not be used or relied on as legal or other professional advice. No liability can be accepted for any errors or omissions nor for any loss or damage arising from reliance upon any information herein. Always contact your legal adviser for specific and detailed advice.