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Contract Law

A modern variation

The tools of the modern businessperson have evolved in the last two decades. From writing letters and sending them by post, facsimile or delivery; today, most messages, letters and documents are sent via email; goods and services are sold and purchased online; customers and contractors interact with one another via e-mail and other electronic and digital means.

Tucker

In *Spring Forest Trading v Wilberry* (725/13) 2014 ZASCA 178 (21 November 2014), the Supreme Court of Appeal had occasion to decide how modern exchanges (particularly e-mails) impact on non-variation clauses.

Background

In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* [1964] 4 All SA 520 (A) *(Shifren),* the then Appellate Division held that where a contract had been concluded, and a non-variation clause included, a variation or cancellation of such a contract outside of the requirements contained within the non-variation clause is null and void and not binding on the parties to the contract.

A typical non-variation clause looks more or less like this:

'No addition to, variation, or agreed cancellation of this agreement or any of the annexures or schedules hereto shall be of any force or effect unless reduced to writing and signed by or on behalf of all the parties.'

Therefore, the requirements spoken of earlier are:

- that the variation or cancellation must be in writing; and
- such must be signed by all parties to the contract.

The objective and effect of a non-variation clause (read in line with Shifren) is to protect the parties against casual or informal (usually verbal or oral) amendments or cancellations of the contract–to create certainty and prevent future disputes.

Facts in *Spring Forest* matter

The parties in this case were Spring Forest Trading 599 CC and Wilberry (Proprietary) Limited t/a Ecowash and Another.

Wilberry was the owner of an "Ecowash system" operated from one of its "mobile dispensing units" (MDUs). The business involved washing vehicles in the parking lots of various locations. Spring Forest and Wilberry concluded a written contract (master agreement), in terms of which Wilberry appointed Spring Forest as its operating agent, giving it the rights to promote, operate and rent out MDUs to others. The contract contained a typical non-variation clause.

Thereafter, the parties concluded four subsidiary rental contracts, all of which were subject to the terms and conditions of the master agreement. The rental contracts allowed Spring Forest to lease Wilberry's MDUs at four locations and also contained non-variation clauses.

Spring Forest was not able to meet its obligations in terms of the rental contracts and, therefore, the parties met in order to determine how to proceed. Wilberry's representatives put forward four proposals to Spring Forest. They decided to consider these proposals and revert after the meeting.

After the meeting, one of Spring Forest's representatives sent an e-mail to Wilberry's representative confirming the four proposals detailed in the meeting, the most important of which was point 2, wherein it was suggested to "'*cancel the agreement and walk away*".

What ensued was a series of e-mails sent to and from the representatives of both parties clarifying and negotiating the details of the point; importantly including the payment of arrear rental and return of equipment. Thereafter, Spring Forest complied with the terms negotiated but continued to operate the car washing business at the locations contained in the rental agreements. It concluded a new contract with another entity to operate at these locations and relied on the cancellation of the agreements to do so.

Wilberry denied that the contracts were legally cancelled.

Judgement

The court decided that a legal requirement for an agreement to be in writing (subject to the exceptions mentioned earlier) is satisfied if it is in the form of a data message; including an e-mail. There was no dispute that the e-mails met the "*in writing*" requirement.

However, the real dispute in this matter was whether or not the representatives' names, placed at the foot of the e-mails, constituted "*signatures*" as contemplated by ss13(1) and (3) of the ECT Act (25 of 2002).

Section 13 reads:

" (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 signatures used.

(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 the data message if –

(a) the method is used to identify the person and to indicate the person's approval of information communicated; and

(b) having regard to all the relevant circumstances at the time, the method used was as reliable as was appropriate for the purposes for which the information was communicated."

The court held that the Act distinguishes between instances where the law requires a signature and those in which the parties to the transaction impose the signature obligation upon themselves. Where signatures are required by law, and the law does
not specify the type of signature to be used, s13(1) states that this requirement is met only by using an "*advanced electronic signature*". Where, however, the parties require a signature but they have not detailed the kind of electronic signature that must be used, the requirement is met if a method is used to recognise the person and to demonstrate the person's sanction of the information contained in the data message; and considering the circumstances when the method was used, it was appropriately reliable for the objectives for which the information was relayed.

Wilberry argued that s13(1) should be interpreted not only to include formalities required by statute but should also include instances where the parties to a contract impose their own requirements on the agreement (as in this matter). Consequently, because the parties required their signatures for the contracts to be cancelled, the requirement could only be satisfied by the use of an "*advanced electronic signature*" as contemplated in s13(1).

The court was of the view that this argument had no merit for two reasons:

1. The non-variation clauses were agreed upon by the parties – they were not imposed upon the parties by any law; and

2. When consideration is given to the objective for which an advanced electronic signature is required, it is clear that it does not apply to private agreements between parties. The court elaborated on "*advanced electronic signatures*" stating that they are signatures resulting from an accreditation procedure. In terms of s1 and s37 of the Act, complex and strict criteria are applicable for the accreditation of authentication products and services to which electronic signatures relate. The court held that there is no suggestion that either of the parties' businesses deal in products and services to which agreements or contracts that require advanced electronic signatures as envisaged in the Act. Further, to impose onerous requirements and criteria for accreditation upon the parties in this case would have a detrimental effect on electronic transactions. It would also be detrimental to the obligations of the courts, when interpreting the Act, to recognise and accommodate electronic transactions and data messages in the application of any statutory law or the common law. In addition, it could render s13(3) redundant. In the court's view, s13(1) did not apply in the circumstances of this case but s13(3) did.
   Wilberry argued further that even if s13(3) applies to private agreements, it does not assist Spring Forest. Wilberry advanced three grounds to support this submission:

1. The e-mails do not and cannot constitute a separate electronic transaction because they relate to the oral negotiations about the written contracts.
2. Even if they do constitute a separate electronic transaction, the parties did not require an "electronic signature" as envisaged in the section.
3. There was no reliable method used, whereby the parties were identified and indicated their approval of information communicated in the e-mails. The court responded: With regard to point 1, all negotiations between the parties were reduced to writing in the form of e-mails and constituted an agreement to cancel the written contracts. Section 22(1) of the Act states emphatically that "an agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages." Therefore, the e-mails do constitute a separate electronic transaction. The court dealt with the second ground by detailing how the courts approach signature requirements. The court stated that generally, a signature is "a person's name written in a distinctive way as a form of identification." Additionally, in the days before electronic communication, the courts were willing to accept any mark made by a person in order to attest a document, or identifying it as his action, to be a valid signature.
   They went even further and accepted a mark made by a magistrate on behalf of a witness, who merely symbolically touched a magistrate's pen. (Putter v Provincial Insurance Co Ltd & Another 1963 (3) SA 145 (W)) Therefore, the approach of the courts relative to signatures has been pragmatic and flexible and not formalistic. They look to whether the method of the signature used complies with the function of a signature – that is to authenticate the identity of the signature – rather than insist on the form of the signature used. Contrasting an "electronic signature" with an "advanced electronic signature", the court asserted that as long as the "data" in an e-mail is intended by the user to serve as a signature and is logically connected with other data in the e-mail, the requirement for an electronic signature is satisfied. The court held that Wilberry's submission on ground 2 was a misreading of the section: the parties did require a signature to cancel the agreement but they cancelled the agreement by e-mail and did not specify the type of electronic signature that was required – hence, s13(3) applies. The court affirmed that the typewritten names of the parties at the foot of the e-mails, which were used to identify the users, constituted "data", that was logically associated with the data in the body of the emails, as envisaged in the definition of an "electronic signature".

They had the effect of authenticating the information contained in the e-mails and, therefore, satisfied the requirement of "signed" in terms of the non-variation clause. Relative to ground 3, the court held that there was no dispute relating to the dependability of the e-mails, the correctness of the information transmitted or the identities of the persons who added the names to the e-mails. On the contrary, they clearly and unambiguously revealed an object/purpose by the parties to cancel the agreements. It held that it is contrary to Wilberry's own actions, including that it responded to questions by e-mail itself, to now rely on the non-variation clause to escape the consequences of its own commitments made at the earlier meeting and later confirmed by e-mail and cannot be acceptable.

Analysis and comments

It is clear from this judgement that e-mails will be taken as complying with the "*in writing*" requirement; and placing names at the foot of such emails will be accepted as "*signatures*" required in terms of non-variation clauses to vary or cancel contracts. Non-variation clauses are now in line with modern business practices, that is the use of e-mail and electronic signatures to do business, including concluding deals and varying and cancelling already concluded contracts.

I recommend all businesspersons and attorneys' advise clients to take heed of this judgement and to be aware that concluding contracts and amending and cancelling such agreements, by e-mail and including their name/s at the foot of such an e-mail, will be accepted by the courts as in line with their non-variation clauses (if included in the agreement). Therefore, they cannot later rely on the notion that what was contained in the e-mail was merely "*negotiation*".

Furthermore, businesspersons who have others concluding agreements on their behalf would be wise to inform these individuals of the implications of this judgement.

If clients and attorneys wish to impose a heightened restriction on the type of signature that will be required, it is advised that it is include in a non-variation clause that only an "*advanced electronic signature*" will be acceptable as an electronic

signature in terms of the clause and hence the agreement. This will require accreditation of the electronic signature by an Accreditation Authority before being accepted thereby providing greater protection. Those wishing to pursue this route must comply with s37 – s41 of the Act.

I believe it is also important to consider s12 read with the definition of "*data message*" in section 1:

"12. 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.

"data message" means data generated, sent, received or stored by electronic means..."

I would argue that, taking into account these provisions, other electronic means such as SMS, Whatsapp messages, Facebook messages and the like, could also be caught by provisions of the Act when read in line with this judgement.

Potentially, an agreement could be varied or cancelled using these electronic means, because:

- they would comply with the definition of a "*data message*";
- be accessible in a manner usable for subsequent reference (stored on a smart phone), hence complying with the "*in writing*" requirement of the non-variation clause; and
- comply with s13(3) and this judgement: that merely the name at the foot of the "*data message*" (SMS, Whatsapp message, Facebook message etc) would suffice to meet the signature requirement of the non-variation clause.

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See also "*ECTA and non-variation clauses*" p20 without prejudice August 2014.

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