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Electronic Signature Laws & Regulations - South Africa



Overview

The use of electronic signatures and certificate-based digital signatures is common in South Africa. However, as a general rule, no special formalities are required for the conclusion of an enforceable contract and most contracts are not required to be in written form or signed. Thus, the contracting parties are responsible for determining the formalities that will be used, including whether a contract will be executed with electronic signatures.

Section 13 of the Electronic Communications and Transactions Act 25 of 2002, as amended (ECTA) regulates the use of electronic signatures in South Africa. Additionally, the Accreditation Regulations issued under ECTA regulate the accreditation of authentication products and services in support of advanced electronic signatures.

ECTA distinguishes between the following types of signatures:

1. Electronic signature – contains data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature. An electronic signature can take various forms, including a typed name in electronic format (e.g. in an email), clicking on the sign button on a website, a manuscript signature (e.g. signed on a tablet computer) or a scanned manuscript signature transformed into digital format.

2. Advanced electronic signature – a signature that has been accredited in accordance with section 37 of the ECTA (i.e. from a process that has been accredited by the Director General of the Department of Communications acting as the South African Accreditation Authority (“SAAA”).



For all situations where a document is signed by an electronic signature, and where law does not prohibit the document from being signed electronically, the electronic signature will have the same presumption of enforceability as a handwritten signature.

Where an electronic signature is required by the parties to an electronic transaction and the parties have not specified that an advanced

electronic signature is to be used, such requirement is met in relation to a data message if:

1. a method is used to identify the person and to indicate the person's approval of the information communicated; and
2. 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.

It is normal practice for persons to use electronic signatures in their standard form, unless the law specifically prohibits the use of electronic signatures generally or the law prescribes that an advanced electronic signature is required for the execution of an agreement.

An advanced electronic signature is required in the following circumstances:

- the parties to an electronic transaction have agreed that the type of electronic signature that will be used is an advanced electronic signature;
- the signature of a person is required by law and such law does not specify the type of signature (only in relation to a data message);
- the law requires a signature, statement or document to be notarized, acknowledged, verified or made under oath (if electronic signature/data message is elected);
- the law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form (if electronic signature/data message is elected); and
- where a seal is required by law to be affixed to a document and such law does not prescribe the method or form by which such document may be sealed by electronic means.

Accordingly, there are certain documents that should only be signed by an advanced electronic signature when contracting electronically (e.g. suretyship agreements; franchise agreements; and documents to be signed by a commissioner of oaths).

In cases where an advanced electronic signature is required the electronic signature shall be created with a digital certificate issued by an accredited service provider who has confirmed in relation to its service that the electronic signature:

1. is uniquely linked to the user;
2. is capable of identifying that user;
3. is created using means that can be maintained under the sole control of that user;
4. will be linked to the data or data message to which it relates in such a manner that any subsequent change of the data or data message is detectable;
5. is based on the face-to-face identification of the user.

An accredited authentication provider is required for the creation of an advanced electronic signature. Accredited service providers are those that have been designated as a preferred authentication service provider or whose products and services in support of advanced electronic signatures have been accredited by the SAAA. A list of these accredited authentication services providers can be found on the public [accredited authentication and certification products and services](#) page.

Special considerations

In general, there are no South African laws that prohibit the storage and processing of electronic signature data outside of South Africa. However, the Protection of Personal Information Act 4 of 2013 (POPIA), should be considered when processing, transferring, and storing personal information outside of South Africa.

Transacting with public sector entities

Section 27 and 28 of ECTA allows a public body to accept electronic documents, licenses and permits and payments via electronic form or means. However, this must be specifically permitted by law and the public body is entitled to specify the type of electronic signature required and the manner and format of the electronic signature to be attached or incorporated in the data message.

Use cases that generally require a traditional signature

Any agreement may be signed with electronic signatures save for the following exclusions:

1. an agreement for alienation of immovable property, as provided for in the Alienation of Land Act 68 of 1981;
2. an agreement for the long-term lease of immovable property in excess of 20 years as provided for in the Alienation of Land Act 68 of 1981;



3. the execution, retention and presentation of a will or codicil as defined in the Wills Act 7 of 1953;
4. the execution of a bill of exchange as defined in the Bills of Exchange Act 34 of 1964 (for example a cheque); and
5. the license of intellectual property, Intellectual Property transfers and employee invention agreements (Patents Act 57 of 1978, the Design Act 195 of 1993, the Trade Marks Act 194 of 1993 and the Copyright Act 98 of 1978).