**ELECTRONIC SIGNATURES IN PROPERTY AND OTHER TRANSACTIONS**

“To sign a document means to authenticate that which stands for or is intended to represent the name of the person who is to authenticate” (quoted in the case below)

We all know that verbal agreements, although fully binding for most types of transaction, are a recipe for uncertainty and dispute. It’s not just a question of trust - even if no one is deliberately dishonest about what was agreed, innocent misunderstandings are common. We have a natural tendency to hear what we want to hear and to remember what we want to remember, and a properly-drawn written agreement avoids that.

So even when a written and signed document isn’t required it is always wise to insist on one. Note that the parties themselves can require a document to be in writing and signed. Or it could be required by law – the most common examples of the latter are property sale agreements, wills, suretyship agreements, ante-nuptial contracts, and credit agreements (there are other less common examples – take professional advice in doubt).

But that’s not always easy to achieve, and the COVID-19 lockdown in particular has highlighted the challenges of getting everyone together for an old-fashioned original “paper and ink” signing session. Even when social distancing is no longer required and ceases to be the norm in society, the convenience and benefits of being able to sign documents remotely (whether you and the other party/ies are in different houses, cities, countries or even different continents) are obvious.

**Firstly, when is a digital agreement “in writing”; and can property sales and wills be electronic?**

Fortunately our law, in the form of the ECTA (Electronic Communications and Transactions Act) recognises the general validity of digital documents. A “document or information” is “in writing” if it is -

* “In the form of a data message; and
* Accessible in a manner usable for subsequent reference.”

As a result, perfectly valid and enforceable agreements are now often entered into online, by email, WhatsApp and the like.

Note that there are some specific exceptions where a physical (“wet ink on paper”) as opposed to an electronic format is still required – most commonly property sale agreements, “long” (10 or more years) leases and wills (there are others – take advice in doubt).

**Secondly, is “signature” always required?**

Formal “signature” isn’t always essential as the ECTA provides that if the parties to an electronic transaction don’t specifically require an electronic signature, “an expression of intent or other statement is not without legal force and effect merely on the grounds that –

* It is in the form of a data message; or

* It is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred.”

**Thirdly, how can you sign a document electronically?**

Where “signature” is required, the ECTA recognises the concept of “electronic signatures” (defined as “data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature”. They are valid except in cases where either a law (like the laws relating to property sales etc mentioned above) or the parties themselves require actual physical signatures.

An electronic signature can take many forms. Where it is required by the parties but they haven’t agreed on a particular type of electronic signature to be used, it is valid if –

* “A method is used to identify the person and to indicate the person's approval of the information communicated; and
* 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.”

That definition will often be wide enough to include names on email messages, scanned images of physical signatures and the like. But remember the parties can specify what formats are and aren’t allowed, plus our courts may well look at all the circumstances of a case and decide for example that an actual manuscript signature is required even when transmitted electronically (see for example the “R804k” judgment discussed below).

**“Advanced” electronic signatures**

This is a concept of authentication designed to make an electronic signature more reliable and it is used when a law requires signature for specified documents or transactions but doesn’t require another particular type of signature.

The Deeds Registries Act and the Credit Agreements Act provide good examples.

Even when not specifically required, a big advantage of advanced electronic signatures is that they are presumed to be valid. That means anyone attacking one would have to prove its invalidity and not the other way round.

**Security and fraud; with an R804k example**

Cyber criminals are as always waiting to pounce so all the normal warnings in regard to electronic communication apply here, with the added need to ensure that electronic documents cannot be altered after completion/signature.

A recent example of “forged electronic signatures” is an online fraud that went horribly wrong for a firm of financial advisers who were sued for R804,000 when their client’s Gmail account was hacked by fraudsters –

* Using the investor’s authentic email credentials, the fraudsters sent three emails to the financial advisers instructing them to transfer a total of R804,000 to the fraudster’s accounts. Two of the emails ended with the words: ‘Regards, Nick’ while the third ended with ‘Thanks, Nick’.
* The financial advisers made the transfers and the investor sued them on the grounds that they had paid out contrary to the written mandate he had given them which stipulated that ‘All instructions must be sent by fax to [011 \*\*\* \*\*\*\*} or by email to [\*\*\*@\*\*\*.co.za] with client’s signature.’
* The financial advisors argued that they had complied with the mandate in that the email endings “Regards, Nick” and “Thanks, Nick” were valid electronic signatures in terms of ECTA.
* The SCA (Supreme Court of Appeal) however upheld the High Court’s ruling that the financial advisors were liable. They had not complied with the mandate which “requires a ‘signature’ which in every day and commercial context serves an authentication and verification purpose ... The word ‘electronic’ is conspicuously absent from the mandate ... The court below cannot be faulted for concluding that what was required was a signature in the ordinary course, namely in manuscript form, even if transmitted electronically, for purposes of authentication and verification.”

Play it safe - have your lawyer draw and manage your agreements for you to minimise this sort of risk, and ask also about using an external service provider for secure, authenticated and verifiable electronic document signing and storage. If you do come to blows with the other party down the line, the integrity and evidential value of your electronic documents and signatures could be make-or-break.