WITH COMPLIMENTS

Susan B Cohen
Attorneys, Notaries & Conveyancers

Susan Barbara Cohen *BA LLB LLM (Property Law)*
Karlien van Graan *B COM LLB*

79 - 11th Street
Parkmore, SANDTON
P O Box 781622
2146

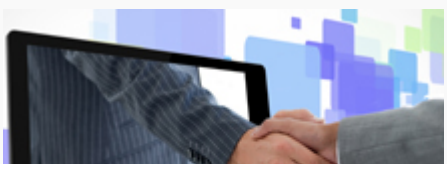
Tel: 011 883 4601
Fax: 011 883 2684
Email : susan@susancohen.co.za
Website: http://susancohen.co.za

In this Issue

July 2020

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.'

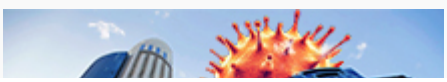
- The financial advisors argued that they had complied with the mandate in that the email endings "Regards, Nick" and "Thanks, Nick" were valid electronic signatures in terms of ECTA.

- 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.

Directors and Business Rescue in the Time of COVID-19

"A stitch in time saves nine" (wise old proverb)



The COVID-19 pandemic and the resultant lockdown have opened up new avenues of profit for some businesses, but they have also subjected many others to the spectre of business failure.

Unfortunately we can expect the level of bankruptcies to surge for some time to come, and the domino effect will multiply the numbers until our economy turns the corner.

If financial distress looms for your own company, bear in mind the very onerous duties imposed on directors by the Companies Act. One of those duties is to avoid any form of “reckless trading” or “trading in insolvent circumstances”, and if you drop the ball on that one you risk personal liability, claims for damages, and even criminal prosecution.

What action should you take? T**here is a lot at stake here so specific professional advice is indispensable,** but it is essential to face realities and to take decisive action quickly. Your legal options are likely to be either liquidation or business rescue. Let’s compare them…

Business rescue v liquidation

Liquidation: If your company is terminally ill you will probably have no option but to put it out of its misery by applying for liquidation. In that event a liquidator is appointed to oversee the winding-up of the company, to sell its assets and to distribute the net proceeds to creditors. Liquidation’s big advantage is in providing an orderly winding up of the company’s affairs, but there will be few winners emerging from the process.

All stakeholders are likely to lose out in a liquidation scenario. Shares become worthless, you lose your directorship, employees lose their jobs and, although they have preferent claims for outstanding pay, leave etc, these could well be worthless. Creditors holding some form of security aside, other creditors (which would include you if you have a loan account) are left with concurrent claims – which are probably worthless too.

To top all that off, if you signed suretyship for any claims, you will be personally liable for them.

Business rescue: Business rescue on the other hand is designed to restructure the company’s affairs and business “in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.”

Either way all stakeholders stand to benefit, including you as a director, shareholder and/or loan account creditor. Your staff have a better chance of keeping their jobs, suppliers have a better chance of retaining your company as an ongoing customer, and the economy benefits from avoiding another business failure (SARS in particular will be happy to retain your company as a taxpayer!).

The success rate for business rescues is not high, but even if it is partially successful it is likely to be better than liquidation.

There have also been concerns expressed about the costs of business rescue, and although these concerns have been disputed, cost is perhaps a factor to be put in the balance with all the other factors mentioned above when deciding between the two options.

How does it work?

In a nutshell (this is of necessity just a brief overview of what can be a very complex subject) –

- Normally you would voluntarily place the company into business rescue with a board resolution; alternatively an outside stakeholder can apply for a court order (which you could oppose).

- A business rescue practitioner (often referred to as a "BRP") is then appointed to take full management control of the company in substitution for the existing board and management, and to investigate the company's affairs in order to "consider whether there is any reasonable prospect of the company being rescued". The company is in the interim protected from legal action by creditors via a moratorium.

- As a director you "must continue to exercise the functions of director, subject to the authority of the practitioner", plus you have "a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so". In other words, you must assist and cooperate with the BRP as required.

- The BRP convenes a first meeting of creditors to advise whether there is a reasonable prospect of rescuing the company.

- If rescue seems feasible the BRP will then formulate a business rescue plan and present it to another meeting of creditors for consideration and voting.

- If the business rescue plan is adopted and successfully implemented, the company is returned to the marketplace as a viable business.

- If it turns out that there is no prospect of rescue or if the business rescue plan is rejected without any extension of the business rescue proceedings, the court can convert the rescue proceedings into a full liquidation. It can also in some circumstances set aside the business rescue resolution or court order.

Timing is everything!

"A stitch in time" really does make sense here. Your chances of rescuing the business are statistically (and logically) much greater if you take action as quickly as possible after the threat of financial distress first rears its ugly head.

As to the legal position, our courts have put it this way: "… it is clear that the business rescue procedure is intended to be used at the earliest possible moment, i.e. when a company is showing signs of pending insolvency, but where it has not yet reached the stage of actual insolvency."

Moreover the longer you leave it, the more likely you are to find yourself personally in trouble with the law and the higher the chance of all stakeholders losing everything.

Bear in mind that access to financing will be critical here, as will active support from major creditors both during the business rescue proceedings and in the longer term.

Our Brave New World: Using Zoom for Retrenchment Consultations

"O brave new world" (Shakespeare)

The COVID-19 pandemic will doubtless

lead to many new developments on the legal front.

For example, with widespread employee retrenchment now an unfortunate reality in our struggling economy, all employers, employees and trade unions should know of an important new Labour Court decision validating the use of remote conferencing for the retrenchment consultation process.

The consultation process, rudely interrupted

- An employer decided in January 2020 that it needed to restructure its business operations, which prompted it to contemplate dismissal of employees based on operational requirements.
- The next step in terms of the Labour Relations Act was to enter into a meaningful consultation process with employees and/or their representatives, aimed at discussing and seeking consensus on possible alternatives to retrenchment, minimizing dismissals, severance pay etc.
- This being a large scale retrenchment proposal the employer issued a formal notice inviting consultation and requested facilitation of the consultation process. A facilitator was appointed and several physical meetings were held.
- Before the final consultation meeting could be held however the process was rudely interrupted by the declaration of a National State of Disaster and the consequent lockdown and restrictions on gatherings.
- The Commission for Conciliation, Mediation and Arbitration (CCMA) proposed methods by which the process might continue, including usage of Zoom, but the trade union in question refused to participate via Zoom and the employer proceeded with the meeting in its absence.
- When the employer then issued notices of retrenchment, the union applied urgently to the Labour Court to declare the process procedurally unfair.

Our "new normal"

> ***"With the advent of the outbreak of the Covid-19 pandemic, the "new normal" presented itself" (extract from Labour Court judgment)***

Commenting on the irony of the union complaining about "the efficacy and reliability" of Zoom whilst using it to make its own urgent application to court, and noting that the facilitator, with "powers to make a final and binding ruling on procedure", was not averse to using Zoom for the meeting, the Court found that the union had refused to participate in the consultation process through no fault of the employer's.

As the Court put it: "With the *new normal* – lockdown period during Covid-19 pandemic – zoom is the appropriate form in which meetings can take place. What is involved in this period is the health and safety issue … It is a necessary tool to ensure that restrictions like social distancing as a measure to avoid the spread of the virus are observed."

Accordingly there was no procedural unfairness and the union's application was dismissed.

POPIA's Deadline is 30 June 2021 – Ignore the "Fake Headlines" But Start Planning!

At long last the main provisions of POPIA (the Protection of Personal Information Act) have been gazetted, and they will commence on 1 July 2020. That means that the one year transitional period will expire on **30 June 2021**.

Don't panic just yet, and ignore the many "fake headlines" in the media implying that you are at immediate risk of non-compliance, but at the same time don't leave this to the last minute! Preparing for compliance is going to be a time-consuming affair, almost all South African businesses will need to comply, and the penalties for not doing so will be very severe indeed –

- You risk administrative fines of up to R10m;
- You could face criminal prosecution (with up to 10 years' imprisonment);
- You could be sued for millions by anyone whose data has been compromised, and this is an instance of strict liability" in that no "intent or negligence" on your part need be proved;
- The loss of trust and the adverse publicity resulting if your data breach goes public could be devastating.

In future issues we'll let you have a lot more practical advice on how POPIA will affect your business, and on the steps you will have to take to protect yourself from the dangers of non-compliance, but for now get started with this first planning step: **Ask yourself what personal information you hold, where you hold it, who has access to it, and how secure it is.**

Website of the Month: The Mental Battle of Running a Small Business in Lockdown Level 3

"This Too Shall Pass. It might pass like a kidney stone, but it will pass" (Unknown)

Entrepreneurs and the small businesses they run are bearing much of the brunt of our deepening economic woes. Some SMEs have prospered, others have sunk – most of us have just battled on, preparing for and dreaming of happier times to come.

In "The mental battle of running a small business" on **Daily Maverick** Nic Haralambous shares his thoughts on how to stay mentally fit in these trying times with these wise words: "Your emotional wellbeing is an imperative part of your success and the survival of your business".

P.S. There may just be some light at the end of the tunnel here – keep an eye on the New York Times "Coronavirus Vaccine Tracker" **here**. Hold thumbs!

Disclaimer

The information provided herein should not be used or relied on as 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 professional adviser for specific and detailed advice.