

Can I cancel an agreement by email?

The purpose of a contract is to provide legal certainty. A well drafted contract should crystalize the rights and obligations of the contracting parties. In the event of a dispute, the parties should be able to fall back on the terms of the contract to resolve their dispute. It would make little sense to record only parts of an agreement, whilst the rest remains verbal or unrecorded. Parties should, therefore, ensure that their whole agreement is incorporated in the written document. Our courts have accepted the principle that where a contract has been reduced to writing, the recorded document is the exclusive memorial of the agreement.

In pursuit of certainty, it has also become general practice for contracts to contain a 'non-variation clause', also referred to as a 'Shifren clause'. Such a clause will generally provide that "no variation to, or cancellation of the agreement shall be of any force and effect unless reduced to writing and signed by the parties". The clause aims to prevent a situation where parties verbally agreed to amend a contract, and later disagree on the exact extent of their amendment.

In recent times, however, most communications are sent by email. This begs the question of whether an amendment or cancellation, done by email, will satisfy the requirement of 'signed by the parties' as required by a standard non-variation clause.

The Supreme Court of Appeal addressed this question in the case of *Spring Forest Trading CC v Wilberry (Pty) Ltd*. The relevant facts of the matter were that the parties concluded a written agreement containing a standard non-variation clause. The parties agreed, by way of emails, to cancel the agreement. One of the parties, at a later stage, alleged that the agreement was never validly cancelled because the cancellation was not in writing and not signed by the parties.

The party in favor of the cancellation argued that the email signature on the bottom of the emails constituted a valid signature and thereby satisfied the requirement of 'signed by the parties'.

The court turned to the Electronic Communications and Transactions Act ("the

Act”) for an answer. Section 13(3) of the Act provides that where an electronic signature is required, and the parties do not agree on the type of electronic signature, the requirement is met 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.

Section 13(1) of the Act, however, provides that where a person’s signature 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 signature is used.

It is important to note that the Act caters for two types of signatures. The first, is an advanced electronic signature, which is required where the law requires a person’s signature. The second, is a standard electronic signature, which is required where the

parties, amongst themselves, agree that a signature is required but they do not specify the type of signature required.

The Supreme Court of Appeal held that, in as far as non-variation clauses are concerned, the requirement for a signature is imposed by the parties on themselves. It is, in other words, not a requirement by law and does therefor not require an advanced electronic signature. A standard electronic signature would therefore suffice, provided it meets the two requirements of identification and reliability mentioned above.

The court held that, as long as the ‘data’ in an email is intended by the user to serve as a signature and is logically connected with other data in the email, the requirement for an electronic signature will be satisfied. This then, so the court said, includes typewritten names of parties at the foot of emails. Should there, however, be a dispute about the reliability of the emails, or the identity of the person who sent it, the requirement of a valid standard electronic signature will not be met because it will no longer comply with the two requirements of identification and reliability. A distinction should therefore be made between

cases where the owner of an email account sent the email, and where the email was sent by a hacker.

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