THE MEANING OF THE EXCLUSIONS IN SECTION 4 OF THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT 25 OF 2002

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The Electronic Communications and Transactions Act 25 of 2002 (the ECT Act) came into operation on 30 August 2002. Chapter 3 of the Act recognizes electronic documents, which the ECT Act calls data messages, as the equivalent of hard-copy documents. This applies for ordinary use (s 11) and in cases where the law requires writing (s 12). The ECT Act also makes such records admissible as evidence (s 15). Section 13 provides for advanced electronic signatures as the equivalent of a written signature where the law requires this. (At present it is not possible to use an advanced electronic signature because the Director-General has yet to accredit products and services to support advanced electronic signatures as required by s 37.)

In practice, of course, people were doing business electronically before the ECT Act, and electronic documents or data messages had for many purposes taken the place of written records. The first reported South African case involving the admissibility of electronic evidence, for example, was heard a quarter of a century before Parliament passed the ECT Act (*Narlis v South African Bank of Athens* 1976 (2) SA 573 (A)). It is likely that many South Africans think electronic records and electronic communications, such as SMS messages and e-mail, have the same legal weight as hard-copy records and communications.

Section 4 of the ECT Act, however, expressly excludes some important transactions from the operation of the Act. This means, in brief, that for these excluded transactions an electronic document does not satisfy the requirement of writing and an advanced electronic signature does not satisfy the requirement of a signature. Unfortunately, as this note explains, it is not always clear which are the excluded transactions.

It is possible to show in synoptic form the provisions in the ECT Act that deal with exclusions:

Schedule 1 (see s 4(3)) (Section 4(3): The sections of this Act mentioned in Column B of Schedule 1 do not apply to the laws mentioned in Column A of that Schedule.)			Schedule 2 (see s 4(4)) (Section 4(4): This Act must not be construed as giving validity to any transaction mentioned in Schedule 2.)	
Item	Column A	Column B		
1.	Wills Act, 1953 (Act 7 of 1953)	11, 12, 13, 14, 15, 16, 18, 19 and 20	1.	An agreement for alienation of immovable property as provided for in the Alienation of Land Act, 1981 (Act 68 of 1981).
2.	Alienation of Land Act, 1981 (Act 68 of 1981)	12 and 13	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, 1981 (Act 68 of 1981).
3.	Bills of Exchange Act, 1964 (Act 34 of 1964)	12 and 13	3.	The execution, retention and presentation of a will or codicil as defined in the Wills Act, 1953 (Act 7 of 1953).
4.	Stamp Duties Act, 1968 (Act 77 of 1968)	11, 12, 14	4.	The execution of a bill of exchange as defined in the Bills of Exchange Act, 1964 (Act 34 of 1964).

As appears, the two schedules overlap. Indeed, it is difficult to avoid the impression that Schedules 1 and 2 were alternative drafts that both found their way into the final version of the Bill and so into the Act. Even if this was the case, both schedules are part of the Act and a court will respect and try to reconcile the language they contain. Putting the details of the excluded transactions into schedules does not detract from their authority as part of the ECT Act. As Langa DCJ said in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) para 37, '[s]chedules to an Act form part of the enactment and are binding except where there is a clear conflict with a relevant section in the body of the Act'.

When interpreting the language in the schedules it should be remembered that chap 3 of the ECT Act, which contains the excluded sections, gives effect to the *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* of 1996. Paragraphs 9 and 29 of the Guide, which is part of the Model Law, discourage exclusions in commercial matters, and a court should take this into account when interpreting the exclusions. (See Julien Hofman ch 15, 'South Africa', in a forthcoming work by Stephen Mason (ed) *Electronic Evidence: Disclosure, Discovery and Admissibility* (2007).

Read together, the two schedules deal with five different legal transactions which this note will consider separately. The transactions are:

- agreements to sell land;
- long leases;
- executing, retaining and presenting a will or codicil;
- executing a bill of exchange; and
- stamping a document.

AGREEMENTS TO SELL LAND

Section 3 of the Alienation of Land Act 68 of 1981 requires that agreements for the sale of land be in writing and signed. Schedule 1, item 2 says that ss 12 and 13 of the ECT Act, the sections which allow the use of data messages and electronic signatures where a law requires writing and signing, do not apply to the Alienation of Land Act. The item makes it clear the drafters of the ECT Act did not want agreements for the sale of land to be concluded electronically.

Schedule 2, item 1 seems intended to achieve the same result. It says the ECT Act 'must not be construed as giving validity' to 'an agreement for alienation of immovable property as provided for in the Alienation of Land Act'. A problem with this formulation is that the Alienation of Land Act nowhere mentions 'immovable property'. (The closest it comes is 'immovable asset' in s 22(4).) There is also a detailed definition of 'land' in s 1 of the Alienation of Land Act which excludes some forms of property that qualify as immovable property.

The best way to deal with these difficulties is to treat item 1 of Schedule 2 as a poorly drafted and unnecessary repetition of item 2 of Schedule 1. It is true that when interpreting legislation there is, as Griesel J said in *National Director of Public Prosecutions v Engels* 2005 (3) SA 109 (C) para 32, a 'presumption against redundancy and tautology'. On the other hand, unnecessary repetition is relatively common in legislative drafting and it is likely that a court will treat this as such. As Hefer JA said of the Bills of Exchange Act 34 of 1964 in *Navidas (Pty) Ltd v Essop; Metha v Essop* 1994 (4) SA 141 (A) at 151C-D:

> 'I do not profess to know why para (v) was inserted; but tautology is something to which the Legislature is not unaccustomed and unnecessary provisions are more often than not inserted *ex abundanti cautela*.'

If the meaning of the exclusion is clear, Franks has questioned the policy it embodies. Electronic communication is now so much part of modern life that it seems unreasonable not to recognize an exchange of e-mails or SMS messages as a binding contract for the sale of land. It is even less reasonable to refuse to do this if the contracting parties use advanced electronic signatures (when these become available). (Simone Franks *The Capricious Relegation of Offers to Purchase to Invalid Electronic Transactions by the Electronic Communications and Transactions Act 25 of 2002* (LLM minor dissertation, University of Cape Town (2004), available at *http://lawspace.law.uct.ac; http://hdl.handle.net/2165/269*).)

LONG LEASES

Schedule 2, item 2 says the ECT Act shall not give validity to 'an agreement for the long-term lease of immovable property in excess of 20 years as provided for in the Alienation of Land Act'. There is no equivalent item in Schedule 1.

The Alienation of Land Act, of course, says nothing about a long lease of immovable property, or indeed about any other form of lease. What the drafters of Schedule 2, item 2 may have had in mind was the Formalities in Respect of Leases of Land Act 18 of 1969. This Act, however, applies to leases of more than ten years rather than the twenty years mentioned in item 2 of Schedule 2. It may be that a court interpreting the item would make these substitutions. In *S v Tieties* 1990 (2) SA 461 (A) at 463F-G, for example, Smalberger JA referred to what Ward J had said in *Skinner v Palmer* 1919 WLD 39 at 44:

> '[I]f a proper case arose the Court could delete one word and read in another. But the Court will not reject a word of clear meaning unless it is forced to do so. If I am forced to the conclusion that the word "fifty-eight" should be read for "fifty-nine" I can so read it.'

Making the substitutions, however, would not resolve all the problems with Schedule 2, item 2. Section 1(1) of the Formalities in Respect of Leases of Land Act is clear that a long lease does not have to be in writing. As Cooper points out, no lease of land has been invalid merely because it is not in writing since s 30 of the General Law Amendment Act 50 of 1956 (W E Cooper *Landlord and Tenant* 2 ed (1994) 69ff). What the Formalities in Respect of Leases of Land Act does is allow a tenant to have a lease of more than ten years registered against the title deeds of the leased land, so making the lease effective against creditors and successors in title. For registration s 77 of the Deeds Registries Act 47 of 1937 requires that a long lease be executed and attested by a notary public. This means, in effect, that until the Deeds Office introduces online registration and the electronic notarization that s 18(1) of the ECT Act envisages becomes a reality, only a written lease can be registered. This means that, even making the suggested changes, Schedule 2, item 2 does not achieve anything.

It is interesting to speculate how far a court interpreting item 2 will go to give it a meaning. (See the remark by De Villiers CJ in *Ex parte Myburg* (1906) 23 SC 668 at 670: 'So in order to give this Act any intelligible meaning — and I suppose we must assume that the Legislature did have some meaning in passing the Act . . .'.) There are two ways to give some meaning to Schedule 2, item 2. One is to treat it as a restatement of the requirements in s 77 of the Deeds Registries Act. Another is to see it as a prohibition on drawing up any lease for more than twenty (or ten?) years in the form of an electronic document.

Both of these interpretations are somewhat forced. It may be that a court will decide this is one of the cases of last resort in which a legislative provision must be ignored as a meaningless expression inserted by the drafters by mistake or, as it is said, per incuriam (see *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 and the remarks of Nicholas AJA in *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 116).

EXECUTING, RETAINING AND PRESENTING A WILL OR CODICIL

Section 2 of the Wills Act 7 of 1953 says a will and a codicil have to be in writing, signed and witnessed. Schedule 2, item 3 says the ECT Act 'must not be construed as giving validity' to '[t]he execution, retention and presentation of a will or codicil as defined in the Wills Act'. The reference to 'execution' means that a will and its signatures have to be in writing. There is no scope for using data messages and electronic signatures when executing a will or codicil. Schedule 1, item 1 appears to aim at the same result when it says that ss 12 and 13 of the ECT Act do not apply to the Wills Act.

Some of the other exclusions in item 1 of Schedule 1 may be unnecessary. It is unlikely that s 14, dealing with an original, refers to an original hard-copy document such as a will that is subsequently converted into electronic form. If this is correct, it is not necessary to exclude ss 16 and 17

which allow for an electronic document to be retained and produced in court in electronic form. Not excluded in item 1 of Schedule 1 is s 17, which allows for producing a document as a data message, although this appears to go against item 3 of Schedule 2 which excludes the electronic 'presentation' of a will. The two could be reconciled by saying that a data message version of a will can be presented to a public body which requires a copy of a will but not the original. The data message must, of course, comply with any special requirements imposed by the public body in terms of s 28 of the ECT Act.

It is even more difficult to see why item 1 of Schedule 1 excludes ss 18–20. These sections deal with electronic notarization, certification and sealing, electronic service by post, and agreements concluded by automated electronic transactions and electronic agents. (The significance of excluding s 15, the section that allows electronic evidence, is discussed immediately below.)

The two formulations agree in insisting on paper, writing and signatures for wills and codicils. They could, however, be read as giving different answers to the question whether the exclusion applies to the amendments to the Wills Act introduced by the Law of Succession Amendment Act 43 of 1992. The 1992 amendment allows a court, subject to certain conditions, to set aside a will and give effect to later documentary expressions of a testator's intention even if these documents do not comply with the formalities for a will. Chief among these formalities, of course, are writing, signing and witnessing. Item 3 of Schedule 2, dealing only with executing, retaining and presenting a will or codicil, does not appear to exclude electronic documents from qualifying as 'documentary expressions of a testator's intention'. Item 1 of Schedule 1, on the other hand, applies to the whole of the Wills Act. Excluding s 15 of the ECT Act, which makes electronic documents admissible as evidence, seems to prevent an electronic version of a will or a draft of a will being used as evidence of a testator's intention as allowed by ss 2(3) and 2A of the Wills Act.

It is not easy to say how a court will resolve this conflict. In *Bekker v Naude* 2003 (5) SA 173 (SCA) the court took a narrow view of the powers in s 2(3) of the Wills Act and insisted on personal drafting. Personal drafting, however, may be in electronic form and it seems unreasonable to exclude this. In *De Reszke v Maras* 2003 (6) SA 676 (C) para 9 Moosa J quoted with approval from M M Corbett et al *The Law of Succession in South Africa* 2 ed (2001) 62: 'It is submitted that it is clear that the person drafts (prepares) a will not only where such person writes it out in longhand but where such person types it or puts it on a word processor.'

EXECUTING A BILL OF EXCHANGE

The Bills of Exchange Act 34 of 1964 deals with bills of exchange, cheques and promissory notes. These are known as negotiable instruments. The Bills of Exchange Act requires that bills of exchange, cheques (a cheque being a bill of exchange to which some special conditions apply) and promissory

notes should be in writing and signed. A document that does not satisfy these requirements will not be regulated by the Bills of Exchange Act, although it may be legally effective in other ways.

Schedule 1, item 3 of the ECT Act says that ss 12 and 13 of the ECT Act, allowing the use of data messages and electronic signatures when the law requires writing and signing, do not apply to the Bills of Exchange Act. Schedule, 2, item 4 says the ECT Act must not be taken to give validity to executing a bill of exchange. Despite the awkward wording of Schedule 2, item 4 and the failure of this item to mention cheques and promissory notes, the combined effect of the two items is that the ECT Act does not allow electronic bills of exchange.

There are two points to note here. First, it is possible to envisage an electronic negotiable instrument. One way to do this is outlined in art 17 of the *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* of 1996 read with the discussion of this article in paras 110–22 of the Guide. (Article 17 deals with non-negotiable electronic transport documents and transferable bills of lading.)

Secondly, although bills of exchange, cheques and promissory notes are negotiable instruments they do not exhaust the list of negotiable instruments. There are also common-law negotiable instruments such as defence bonds (see *Kahn v Volschenk* 1986 (3) SA 84 (A) at 100) and treasury bills (see *Secfin Bank Ltd v Mercantile Bank Ltd* 1993 (2) SA 34 (W) at 36–7). The Bills of Exchange Act does not mention these, and presumably the exclusions in the ECT Act do not apply to them. In *Secfin Bank Ltd* (supra) at 35E-F, Goldblatt J says the basis of a common-law negotiable instrument is custom or trade. Given that s 12 and 13 of the ECT Act refer to situations where writing and signature are required by law (not legislation), it should not be necessary to show an established trade custom to justify recognizing electronic common-law negotiable instruments.

STAMPING A DOCUMENT

Section 3 of the Stamp Duties Act 77 of 1968 requires that certain listed instruments or documents be stamped. Failing this, as Waddington J and Lawrence AJ explained in *Buyers Guide (Pty) Ltd v Dada Motors (Mafikeng) Pty Ltd* 1990 (4) SA 55 (B) at 57–9, the transaction the document embodies is valid but the document cannot be produced in court as evidence until it is stamped and any penalties for late stamping paid.

Traditionally, someone stamping a document affixes the stamps to the face of the document and cancels them. This is clearly not possible with an electronic document, and Schedule 1, item 4 attempts to deal with this problem. There is no equivalent provision in Schedule 2.

A superficial reading of item 4 is that it does not allow any document that needs stamping to be in electronic form. What item 4 says, however, is that ss 11, 12 and 14 of the ECT Act, dealing respectively with the legal recognition, status as writing and preservation of data messages, do not apply

to the Stamp Duties Act. But these sections apply only where the law requires writing, and the Stamp Duties Act, as was the case with the Formalities in Respect of Leases of Land Act discussed above, does not require any transaction to be in writing. The Stamp Duties Act says only that some kinds of writing must be stamped.

The meaning of item 4 is more difficult to decide because the Stamp Duties Act does in fact allow for stamping in ways that can be used with an electronic document. Even before the ECT Act, s 3 of the Stamp Duties Act allowed for stamping a document by receipt. Since the ECT Act, s 74 of the Revenue Laws Amendment Act 32 of 2004 amended s 5 of the Stamp Duties Act to allow for electronic stamping.

The Revenue Laws Amendment Act does not mention the ECT Act. If, however, there is a conflict between s 74 of the Revenue Laws Amendment Act and item 4 of Schedule 1 to the ECT Act, then s 74, which is the later and more specific legislation, should be understood as repealing item 4 by implication. Whether item 4 prevents anyone from using the procedure in s 3 of the Stamp Duties Act to stamp an electronic document is not clear. Finally, it should be noted that item 4 does not deal with stamping required by other law, such as the Rules of Court.

CONCLUSION

It is unfortunate to have to make such a meal out of the two schedules to the ECT Act. A simpler drafting style might have made this note unnecessary. Simpler drafting could also have dealt with the possibility, not previously discussed in this note, that other legislation recognizes electronic documents as the equivalent of writing. In *Lazurus v Said NO and Roos NO* 1958 (3) SA 864 (E) at 868–71, for example, Wynne J said that s 3 of the Interpretation Act 33 of 1957, 'Interpretation of expressions relating to writing', extended to a tape recording if the tape recording was later used to produce a typewritten record.

Omitting the unhappy and probably ineffectual attempts to deal with electronic long leases and electronic stamping, and leaving it to the legislator to settle whether a court should be allowed to look at an electronic document in terms of ss 2(3) and 2A of the Wills Act, the following or similar language might have expressed the policy behind the exclusions in the ECT Act:

4 Sphere of application

(3) Data messages and advanced electronic signatures do not satisfy the requirements of writing and signatures in:

(a) Sections 2, 71 and 87 of the Bills of Exchange Act 34 of 1964;

(b) [Sections 2 and 2A] or [section 2(1) and (2)] of the Wills Act 7 of 1953; and

(c) Section 3 of the Alienation of Land Act 68 of 1981.