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e-Mail and SMS contracts



Lessons from the Labour Court

Introduction

The Electronic Transactions and Communications Act 25 of 2002 ('the ECT Act') aims to facilitate electronic transactions and promote legal certainty in respect of such transactions. To achieve this, the Act specifically provides for the formation and validity of electronic agreements, and for a default legal regime for the time and place of communications. These rules for the formation of a contract, read together with the common-law rules, were recently applied in the Labour Court in *Jafta v Ezemvelo KZN Wildlife* [2008] JOL 22096 (LC) to e-mail and SMS communications involving the conclusion of a contract of employment.

The facts of *Jafta v Ezemvelo KZN Wildlife*

Jafta was offered the position of General Manager: Human Resources at Ezemvelo KZN Wildlife ('Wildlife'), to commence on 1 February 2007. He tried unsuccessfully to negotiate a later commencement date, and was given until the end of December 2006 to accept the offer. At 7:51 p.m. on 29 December, he e-mailed his acceptance as an attachment from an Internet café to a certain Phakathi from Wildlife. Jafta also responded to an SMS from Phakathi on the same day, as follows:

'Have responded in the affirmative through a letter emailed to you this evening for the attention of your CEO. Had problems with email I had to go to internet café.'

Wildlife denied receiving the e-mail from Jafta. Phakathi admitted receiving the SMS but did not recall seeing the word 'affirmative' in the SMS. Experts from both sides were able to show that Jafta did send the e-mail and that it did not 'bounce back' but simply was not received by Wildlife. The court accepted Jafta's version of the content of the SMS. Wildlife, however, denied that an SMS was an appropriate or an unequivocal acceptance of the offer. Wildlife agreed that if the court found that a valid contract had been concluded, then Wildlife had repudiated the contract, in which event Jafta was entitled to contractual damages.

The court (in para [31]) identified five issues for determination:

- (i) Was the content of Jafta's e-mail an acceptance of Wildlife's offer of employment?
- (ii) Was the content of Jafta's SMS an acceptance of Wildlife's offer of employment?
- (iii) Did Wildlife receive Jafta's e-mail?
- (iv) Is an SMS a proper mode of communicating acceptance of an offer?
- (v) If Wildlife did receive an acceptance of the offer and a valid contract of employment came into existence, what are Jafta's damages arising from Wildlife's repudiation?

The court considered the first four issues in the light of the common-law requirements

for a valid acceptance together with the ECT Act's provisions in respect of the receipt of electronic communications. Issues (i) and (ii) were resolved by the court with reference to the common law, and issues (iii) and (iv), concerning the mode and receipt of the communications, were decided with reference to the ECT Act.

The applicable law (1): the common law

The common-law requirements for a valid acceptance of an offer are as follows:

- the acceptance must be clear, unequivocal and unambiguous;
- the acceptance must correspond with the offer;
- the acceptance must be made in the mode prescribed by the offeror; and
- the offeree must communicate acceptance of the offer to the offeror.

As regards the first two requirements, the court found that the content of both Jafta's e-mail and the SMS were clear, unequivocal, and unambiguous acceptances of the offer, which corresponded with the offer from Wildlife. As regards the third requirement (the mode of acceptance), the court found that as Wildlife had made the offer by e-mail and Phakathi had initiated communication by SMS, it was in order for Jafta to reciprocate accordingly. The fourth requirement (that the offeree must communicate acceptance of the offer to the offeror) was found to be met by the fact that Phakathi was clearly mandated to receive acceptance from Jafta and that she herself had invited an SMS response from Jafta.

The applicable law (2): the ECT Act

After applying the common law, the court went on to consider the impact of the ECT Act on issues (iii) and (iv). The court considered whether Wildlife had received Jafta's e-mailed letter of acceptance, and whether an SMS was a proper mode of communicating the acceptance of an offer (para [55]).

As regards whether Wildlife had received Jafta's e-mail, the court applied section 23 of the ECT Act, which states:

'A data message —

- (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;
- (b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
- (c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.'

The court focused on section 23(b), which provides that a data message (which includes an e-mail) is regarded as having been received when the e-mail, first, enters the addressee's information system, and, second, is capable of being retrieved. In other words, the Act adopts the reception theory for the receipt of electronic communications. The court noted that section 23 'supplants the general rule of the common law that an acceptance of an offer must come to the knowledge of the offeree for a contract to arise' (para [80]). This, according to the court, is justified by the fact that many electronic acceptances trigger an automated, rather than a human, response. In addition, the offeree would be disadvantaged by not knowing whether the offeror knew about the acceptance. In any event, under section 21 the parties are entitled to vary the default regime regarding the communication of data messages provided for by the ECT Act.

The evidence before the court was that the e-mail did not enter Wildlife's information

system. As the law provided no presumptions about receipt, the court concluded that the e-mail acceptance had not been received under section 23(b) of the ECT Act.

On the second issue (whether the SMS was a proper mode of communicating acceptance), the court considered the definition of a data message (which includes ‘data generated, sent, received or stored by electronic means’). The court found that an SMS is a data message and thus an effective mode of communication in terms of the ECT Act. The court therefore concluded that a valid contract had been formed, that Wildlife had unlawfully repudiated the contract by denying its existence, and that Jafta was therefore entitled to damages.

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Lessons from international and foreign law

The judgment is refreshing in its approach to comparative law. Although neither of the parties initially raised international or foreign law comparisons, they were asked to do so by the court in order to assist with the interpretation and application of the ECT Act. Pillay J warned against parochialism and observed (para [56]) that:

‘[a]s a technical matter devoid of ethical, political, social or other value-laden considerations, electronic communication calls out to be regulated by universal principles. Electronic communications law therefore had to be internationalized to be effective.’

The judgment then sets out the following five lessons learnt from the comparative exercise undertaken by the court:

- The regulation of electronic communication is internationalized; and in this regard,

the judgment explores the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996 from which the ECT Act draws much of its content.

- There is a substantial degree of convergence between the Model Law, the ECT Act and foreign law; and in this regard, the judgment explores comparative statutes and case law from Singapore and the United States of America.
- Although e-mails and SMSs are often informal, it would be a mistake to treat them as having no legal effect.
- The common-law presumptions about when acceptance is sent and received have been supplanted by statute, to the extent that the reception theory is the default position with regard to electronic transactions.
- The common-law right of the parties to dictate the formalities applicable to their contract is retained in the ECT Act. Generally, self-regulation is encouraged.

The court’s discussion of lessons from comparative law is illustrated with useful examples from a number of jurisdictions.

Conclusion

So far, few decisions interpreting the ECT Act have been given by our courts, and the Labour Court is an unlikely originator of such a decision. The judgment in *Jafta v Ezemvelo KZN Wildlife* shows, however, that our courts are reaching a certain level of maturity in the general attitude toward electronic communications. While there may still be work to be done in looking more broadly, and in a more nuanced way, at the effect of the ECT Act on common law and on the relationship between the common law and the ECT Act, the decision in *Jafta v Ezemvelo KZN Wildlife* is certainly to be welcomed and is likely to serve as a useful precedent, going beyond the reaches of the Labour Court.

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