Order

[72] The following order is accordingly issued:

1 The defendant's point in limine is dismissed.
2 This court is declared to have jurisdiction to determine both the claim in convention and the claim in reconvention.
3 The defendant is to pay the costs of the in limine application and any wasted costs occasioned thereby.

Plaintiff's Attorneys: *Cooper Conroy Bell & Richards.*

Defendant's Attorneys: *Smith Tabata.*

JAFTA v EZEMVELO KZN WILDLIFE

LABOUR COURT (D204/07)

19-20 May; 1 July 2008

Before PILLAY J

Contract of employment—Offer and acceptance—Common-law requirements for acceptance of offer—Whether e-mail and SMS communications comply with common-law requirements for acceptance of offer of employment.

Contract of employment—Offer and acceptance—Electronic communication of acceptance by employee—E-mail and SMS—Electronic Communications and Transactions Act 25 of 2002—Both e-mail and SMS electronic communications are effective modes of communication in terms of Act—Communication of acceptance of job offer by SMS received by employer—Contract of employment coming into existence—Denial of receipt of SMS constituting repudiation of contract of employment and employee entitled to damages.

Contract of employment—Offer and acceptance—Electronic communication of acceptance by employee—E-mail and SMS—Electronic Communications and Transactions Act 25 of 2002—Electronic communications systems have become standard forms of transacting in information age—Anyone seeking to exclude particular forms of communication must expressly contract out of them—If not, provisions of s 23 of Act triggered as default rules.

Contract of employment—Offer and acceptance—Electronic communication of acceptance by employee—E-mail and SMS—Electronic Communications and Transactions Act 25 of 2002—Whether e-mail and SMS communications comply with common-law requirements for acceptance of offer of employment.

Electronic Communications and Transactions Act 25 of 2002—Forms of communication—Electronic communications systems have become standard forms of transacting in information age—Anyone seeking to exclude particular forms of communication must expressly contract out of them—If not, provisions of s 23 of Act triggered as default rules.

Electronic Communications and Transactions Act 25 of 2002—International and foreign law—Act has origins in international law, namely UNCITRAL Model Law—Comparison between Model Law, foreign laws and Act—Court has duty to ascertain international and foreign law applicable to internet and other electronic communication systems to determine whether international instruments binding on South Africa, what best practice is and how court should interpret and apply provisions of Act.

The applicant, who had been offered the position of general manager: human resources at the respondent, sent an e-mail to the chief executive officer of the respondent confirming his acceptance of the offer on 29 December 2006, the deadline set for acceptance. On the same day the applicant received an SMS from the respondent's human resources officer, Ms P, requesting that he respond to the offer immediately. According to the applicant he replied by SMS as follows: 'Have responded to 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.' Ms P admitted receiving the SMS, but did not recall seeing the word 'affirmative' in it, believing that it merely informed her that the applicant had already e-mailed his response to the CEO. The applicant did not get the job and approached the Labour Court for relief, contending that the respondent had repudiated the contract of employment concluded on 29 December 2006. Although the respondent did not dispute that e-mailing an acceptance of its offer was an acceptable form of concluding a contract, it denied that it had received the e-mail addressed to the CEO by the applicant. Furthermore, it denied that the SMS was an unequivocal acceptance of the offer, that Ms P had been authorized to conclude a contract via SMS and that an SMS was an appropriate mode of communicating acceptance of an offer.

The court first determined that the applicant's version of the text of the SMS was more probable than that of Ms P, and therefore that the SMS did contain the word 'affirmative', indicating the applicant's acceptance of the offer. The court, having considered the common-law requirement that an acceptance of an offer must be clear, unequivocal and unambiguous, found that both the e-mail of 29 December 2006 and the SMS of the same date constituted unequivocal acceptances of the offer of employment. It also found that the acceptance complied with the common-law requirement that an acceptance had to correspond with the offer. Regarding the third common-law requirement for acceptance, namely that the acceptance had to be made in the mode prescribed by the offeror, the respondent did not dispute that e-mail would have been an appropriate mode of accepting the offer, provided it had received the e-mail. Although the respondent disputed that the applicant's SMS was an appropriate mode of acceptance, the court was satisfied that Ms P had initiated communication by SMS and by eliciting an affirmative response via SMS, it had impliedly acquiesced in acceptance by SMS as a proper mode of accepting its offer.

The court then considered the fourth common-law requirement, namely that the offeree's acceptance must be communicated to the offeror, with reference to the Electronic Communications and Transactions Act 25 of 2002. The court observed that the ECT Act had its origins in international law, namely the resolution adopted by the General Assembly of the UN Commission on International Trade Law (UNCITRAL) regarding the Model Law on Electronic Commerce, and that the court has a duty to ascertain the international and foreign law applicable to the internet and other electronic communication systems in order to determine whether the international instruments are binding

on South Africa, what the best practice is and consequently how the court should interpret and apply the provisions of the ECT Act.

The court compared the UNCITRAL Model Law, foreign law and the ECT Act and noted that there is a substantial degree of convergence amongst the three. It analysed various provisions in the Model Law, foreign laws and the ECT Act and observed that, whereas the expedition theory applies applies to postal contracts and the information theory to telephone contracts the model the model law, s 23 of the ECT Act and similar statutes of other implementing states adopt the reception theory for receipt of electronic communication. Since communications systems have become standard forms of transacting in the information age, anyone seeking to exclude particular forms of communication must expressly contract out of them or else the provisions of s 23 of the ECT Act are triggered as default rules, ie rules that apply when the parties have not agreed otherwise. When they do agree on the mode of communication, they must abide by it.

Returning to the matter before it, the court observed that, as the parties had not agreed to exclude the exchange of offers, counteroffers and acceptance generated electronically, the rules set out in the ECT Act applied by default. Regarding the applicant's e-mailed letter of acceptance, the court found that because the e-mail had not bounced back, it had to accept the applicant's evidence that his e-mail had been sent and that it had entered the Gmail information system. However, the e-mail had not entered the respondent's information system and was not capable of being retrieved and processed by the respondent. Consequently, the respondent could not be regarded as having received the applicant's e-mail, whether under s 23*(b)* of the ECT Act or under article 15(2) of the Model Law.

Regarding the SMS acceptance, the court was satisfied that an SMS is an electronic communication that is transmitted from an originator to an addressee. Applying s 24 of the ECT Act, the court found that as between the applicant, the originator, and the respondent, the addressee, the applicant's SMS was an electronic communication. Since an SMS was as effective a mode of communication as an e-mail or a written document, the court concluded that the applicant had communicated his acceptance via SMS and that a contract of employment had come into existence. As the respondent repudiated the contract by denying receipt of the applicant's acceptance, its repudiation was unlawful and the applicant was entitled to damages.

The court accordingly declared that the applicant and the respondent had concluded a contract of employment and that the respondent had unlawfully repudiated the contract, and awarded the applicant damages plus costs.

Application to the Labour Court for relief for alleged repudiation of contract of employment. The facts appear from the reasons for judgment.

Annotations

Cases

Southern Africa

Cape Explosives Works Ltd v SA Oil & Fat Industries; Cape Explosives Works Ltd v Lever Brothers (SA) Ltd 1921 CPD 244 (referred to)

Meyer v Neveling 1981 (3) SA 994 (N) (referred to)

N K v Minister of Safety & Security 2005 (6) SA 419 (CC); (2005) 26 *ILJ* 1205 (CC) (referred to)

R v Nel 1921 AD 339 (referred to)

Schoeman v IT Management Advisory Services (Pty) Ltd (2002) 23 *ILJ* 1074 (LC) (distinguished)

Smeiman v Volkersz 1954 (4) SA 1970 (C) (referred to)

White v Pan Palladium SA (Pty) Ltd 2005 (6) SA 384 (LC); (2006) 27 *ILJ* 2721 (LC) (considered)

Canada

Rajakaruna v E* Trade Canada Securuling Corporation 2007 ADPC 45 (CanLii) (referred to)

Singapore

SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd [2005] SGHC 58 (referred to)

United Kingdom

North Range Shipping Ltd v Seatrans Shipping Corp [2002] EWCA Civ. 405 (referred to)

United States

Al-Bawaba Com Inc v Nstein Technologies Corp 19 Misc 3d 1125 (A) (referred to)

Rosenfeld v Zerneck 4 Misc 3d 193; 776 MYS 2d 458 (referred to)

Shattuck v Klotzbach 14 Mass L Rptr 360; 2001 WL 1839720 (Mass Super) (referred to)

Singer v Adamson 2003 WL 23641985 (Mass Land Ct) (referred to)

Statutes

Electronic Communications and Transactions Act 25 of 2002 s 1 ('electronic communication'), s 1 ('e-mail'), s 2(1), s 11, s 12*(b)*, s 22, s 23, s 23*(a)-(b)*; s 24

Attorney Jafta for the applicant.

Adv C J Pammenter SC for the respondent.

Judgment reserved.

PILLAY J:

Introduction

[1] Does acceptance of an offer of employment sent by e-mail or short message service (SMS) result in a valid contract? When is an acceptance of an offer sent by e-mail or SMS received? Is an SMS an electronic communication? What is an electronic communication? To answer these electronic commerce or e-commerce questions that arise in this claim for contractual damages, the court looks to the Electronic Communications and Transactions Act 25 of 2002 (ECT Act). As the ECT Act has its origins in international law, the court also looks to international and foreign law for best practice.

The facts

[2] Siyolo B Jafta, the applicant employee, responded to a job advertisement from Ezemvelo KZN Wildlife (Wildlife), the respondent. At his job interview on 5 December 2006, Wildlife offered Jafta the position of general manager: human resources. He explained to his interviewers that he would be on leave from 22 December 2006 to 8 January 2007, that he was obliged to give two months' notice to resign to his employer, the Eastern Cape Parks Board (ECPB), and that he would only be able to give such notice after he returned from leave. He could not rearrange his leave without incurring losses for

himself because his leave had been approved. Besides, he had paid for a vacation in Maputo.

[3] Wildlife's human resources officer, Cynthia Phakathi, e-mailed the job offer to Jafta on 13 December 2006. Jafta wanted to accept the offer but with a later commencement date of his contract. Wildlife wanted him to start working on 1 February 2007. He did not want to leave ECPB without giving proper notice.

[4] Jafta was about to go on leave when he received the offer on 13 December 2006. On 28 December 2006 he received by e-mail a letter dated 27 December 2006 urging him to respond to Wildlife's offer of employment by the end of December 2006. The chief executive officer of Wildlife, Mr Khulani Mkhize, the author of the letter, emphasized that the commencement date of the contract was non-negotiable.

[5] As he was on leave, Jafta had to use his laptop to respond to the offer. When he tried to e-mail this response, his laptop malfunctioned. He found an internet café in Pietermaritzburg. With the help of a student employed at the internet café, Jafta e-mailed his response as an attachment to Phakathi's mailbox on 29 December 2006 at 7:51pm. Wildlife denies that it received this e-mail.

[6] On 29 December 2006 Jafta received an SMS from Phakathi stating the following:

> 'Due to operational requirements of EKZNW the GMHR must start on 01/02/07. Failing to confirm the offer will be given to the next candidate. Pls respond. Cynthia.'

[7] Jafta alleges that he replied by SMS as follows:

> 'Have responded to 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.'

[8] Phakathi admits receiving the SMS but does not recall seeing the word 'affirmative' in it. She disputes that the SMS amounted to an acceptance of the offer. She understood it as being no more than a communication to inform her that Jafta had e-mailed his response to her offer of employment.

Analysis of evidence

[9] The court has first to determine whether Jafta's or Phakathi's version of the text of the SMS is more probable.

[10] In making this determination the court is satisfied that all the witnesses gave their evidence honestly and to the best of their recollection. In response to questions from the court, Attorney *Jafta* submitted that Wildlife had engaged in foul-play by denying that it received the letter of 29 December 2006. That averment was never pleaded nor put to any of the witnesses. Nor does the tenor of the evidence have even a whiff of foul-play. On the contrary, if Wildlife had second thoughts about employing Jafta, it would not have reminded him by e-mail on 28 December 2006 and again by SMS on 29 December 2006 to indicate his acceptance of the offer. After the deadline for acceptance of the offer expired, Wildlife tried to

contact Jafta as it allegedly could not retrieve his e-mail. However, as Jafta was in Mozambique, Wildlife could not contact him. The court is satisfied that Wildlife did not dishonestly deny receipt of the e-mail.

A [11] Jafta, too struck the court as a cautious, meticulous official who prided himself on his integrity and keen sense of propriety. After Wildlife informed him that it had appointed someone else, noting the text of his SMS was important. He kept the message on his cellular telephone for a while and noted the SMS before the telephone was stolen.

B [12] Jafta quoted the text of the SMS in the documents before the court. Phakathi deleted Jafta's SMS the same day. She conceded the correctness of the wording of both SMSs quoted above, save for the word 'affirmative' appearing in Jafta's SMS.

C [13] Wildlife did not take issue with Jafta's inclusion of the word 'affirmative' in its response to Jafta's request for further particulars for trial. Phakathi disputed at the trial for the first time that the word 'affirmative' was in Jafta's SMS.

D [14] Phakathi did not notice the word 'affirmative' in Jafta's request for further particulars for trial and probably also did not notice it when she received the SMS. When she received the SMS and when she responded to the request for further particulars for trial, she focused on the gist of the message, namely, that Jafta had responded to the offer by e-mail and that Wildlife had to look out for his e-mail sent from an internet café address.

E [15] Jafta also recorded the time at which he received and sent each SMS. To Jafta's request for further particulars for trial, Wildlife responded that Phakathi received the SMS from Jafta at about 17h30. Jafta obtained a printout of his cellular telephone records from Vodacom's Forensic Services Division and confirmed that he in fact sent the SMS

F at 20h33, as he alleged.

[16] In the circumstances the court prefers Jafta's account of the contents of the SMS.

The e-mail

G [17] Another aspect of the evidence related to whether Wildlife received Jafta's e-mailed letter of acceptance. The issue was technical. Jafta called Kerry Robert Jones, a Microsoft systems engineer since 1997. He was also the owner of the internet café from which Jafta sent the e-mail.

H [18] Wildlife called Mdu Simelane, its computer network administrator. Both parties must be commended for having their experts collaborate with each other to produce for the court a substantially agreed set of facts.

I [19] Jafta sent the e-mail using GMail. Jones confirmed that the e-mail had been sent because, when Jafta asked him to check the 'sent' box, he did so and found the e-mail there.

[20] According to the experts, GMail (or Google Mail) is a world wide web-based e-mail (or webmail). A webmail is an e-mail service accessed via a web browser and is distinguishable from e-mail services using licensed software such as Microsoft Outlook.

J

[21] When an e-mail is sent via GMail, the Google server receives it first. If an e-mail is not delivered to the Google server, eg because it is spam, ie unsolicited bulk or junk e-mail, the sender receives notice of non-delivery instantly or within a few hours if the system makes several attempts to deliver the e-mail. To use the terminology in the industry, an e-mail that is not sent or received bounces back.

[22] Neither Jones nor anyone he employed at the internet café received notice of non-delivery of Jafta's e-mail. Jones's computers had more than 50% memory available and could easily have received the notice of non-delivery if the e-mail had bounced back.

[23] Simelani outlined the process as follows: Jafta's e-mail was sent to the server for the gmail.com domain.[1] If it did not bounce back, the Gmail server would have forwarded it to the next Simple Mail Transfer Protocol (SMTP) (or similar protocol) server. The SMTP transfers the e-mail to the server defined for the domain specified in the e-mail. That could have been kznwildlife.com, that is, Wildlife's Groupwise server.

[24] Any e-mail sent to Wildlife's Groupwise server underwent several checks before the addressee received it in her mailbox. Wildlife had Postfix installed. Postfix was a filtering system which bounced back e-mails addressed to persons who did not hold e-mail accounts at Wildlife. As Postfix did not store messages, Wildlife was not able to check whether Jafta's e-mail reached the Postfix stage.

[25] Even if it had, e-mails that passed through Postfix were scanned by Antivirus for viruses. The Antivirus would delete spam and contaminated attachments, but would forward the e-mail accompanying the attachment to the Mail Sweeper. Thus, even if Jafta's attached letter was contaminated, his e-mail would have been forwarded without the attachment if it had reached the Antivirus.

[26] The Mail Sweeper scanned the e-mail for spam. Spams would park in the Mail Sweeper until the network administrator checked them. The network administrator would accept or reject messages parked as spam after considering the size of the e-mail, the subject line and address of the sender.

[27] Having regard to Jafta's e-mail with the attached letter, neither its size of 27k, its subject 'acceptance of offer : General Manager-Human Resources', nor its gmail address would have caused the Mail Sweeper to reject it as spam.

[28] Simelani extracted the e-mail log from Phakathi's computer for the trial. Jones accepted that if Wildlife downloaded or deleted e-mail messages, they would nevertheless remain on the server so that when a log of e-mails is generated, the e-mails sent and received would be listed in a block. Individual items of data listed on the log could not be deleted without deleting an entire block of information. Wildlife's extract from its log does not show any e-mail sent from a Gmail

[1] Which, like the world wide web, is a sub-service of the internet. A domain is a series of random numbers called an Internet Protocol (IP) address. Domain names are developed because they are easier to use than a series of random numbers. Reinhardt Buys *Cyberlaw — The Law of the Internet* at 36, 148.

address to Wildlife on 29 December 2006 at 7:51pm. The last e-mail appearing on the log in the block for 29 December 2006 from Phakathi's computer was at 6:41:30.

[29] As 29 December 2006 was Phakathi's last working day, she handed in her computer. Simelane confirmed that whenever an employee left the services of Wildlife, that employee's computer user account would expire and be renamed. In the case of Phakathi's computer, her e-mail account did not expire immediately. If it had been renamed, e-mails sent to her would have bounced back to the sender or been sent to her e-mail account, which would have been renamed with the prefix 'old'. Her renamed account did not receive Jafta's e-mail.

Issues for determination

[30] Wildlife does not dispute that e-mailing an acceptance of its offer was an acceptable form of concluding the contract. It denies, however, that it received Jafta's e-mail. Even if it had received Jafta's e-mail, it contends that his response was not a clear and unequivocal acceptance that corresponded with its offer. It denied that the SMS was an unequivocal acceptance of the offer, that Phakathi was authorized to conclude a contract via SMS and that an SMS was an appropriate mode of communicating acceptance of an offer. Wildlife acknowledged that if the court finds that the parties had concluded a contract, Wildlife repudiated the contract.

[31] The issues for determination therefore are the following:

(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?

[32] To determine whether Jafta meets the requirements for a valid acceptance of an offer, he must show that the contents of his responses satisfy the common-law requirements of a valid acceptance. If they do, then he must also show that Wildlife received his acceptance of its offer. Receipt of electronic communications is regulated by the ECT Act. Jafta's acceptance by e-mail and SMS will be considered in the context of the ECT Act.

The common-law requirements for an acceptance of an offer

Unequivocal acceptance

[33] Under the common law, the first requirement for an acceptance of an offer is that it must be clear, unequivocal and unambiguous.

[34] In his first e-mailed response to the job offer to Phakathi on 22

December 2006, Jafta was ambivalent. Whilst indicating that the information he had was not enough to commit himself, he also accepted the position in principle, pending receipt of a formal written contract of employment. That ambivalence had dissipated by the time Jafta e-mailed his second letter on 29 December 2006.

[35] In his second letter, Jafta explained at length his difficulties about the contract commencing on 1 February 2007. Notwithstanding his difficulties, he confirmed unequivocally that 1 February 2007 would be his starting date, if the Wildlife Board did not accept his counter-proposal to start on 15 February 2007.

[36] Jafta also wanted a copy of the contract of employment before 31 December 2006. Getting a copy was not a precondition to accepting employment with Wildlife. He wanted the written contract to secure his new job before he resigned from his old job.

[37] In the circumstances, the court finds that the content of the e-mailed letter of 29 December 2006 was an unequivocal acceptance of the offer of employment.

[38] Having found that the word 'affirmative' was in the text of the SMS, the court must now decide whether the SMS amounted to acceptance of the offer.

[39] In her e-mail of 13 December 2006, Phakathi requested Jafta to give her his response in writing before he went on vacation. She also asked him to liaise with her executive director, Mr Baloyi, about the starting date. However, as 31 December loomed, Wildlife was concerned about the starting date. In his letter of 27 December 2006, Mkhize merely wanted Jafta to 'indicate' whether he would be able to assume his duties before 1 February 2007.

[40] Phakathi's SMS, to which Jafta was responding, urged Jafta to confirm that he would start on 1 February 2007. Jafta's reply 'to the affirmative' was a direct response to Phakathi and Mkhize's enquiry. Acceptance of the starting date was implicitly acceptance of the offer. Jafta's SMS was therefore an unequivocal acceptance of the offer.

Correspond with the offer

[41] The second requirement for acceptance of an offer under the common law is that it must correspond with the offer. *Schoeman v IT Management Advisory Services (Pty) Ltd* (2002) 23 *ILJ* 1074 (LC); [2002] 7 BLLR 672 (LC), a case which Mr *Pammenter* for Wildlife referred to the court, is distinguishable from the facts of this case. On the facts, Landman J found that there had not been a meeting of the minds on material terms of the agreement. In contrast, in *White v Pan Palladium SA (Pty) Ltd* 2005 (6) SA 384 (LC); (2006) 27 *ILJ* 2721 (LC), another case which Mr *Pammenter* referred to the court, even though the parties had not finalized material terms of the contract, such as the vehicle through which the applicant would be employed, the court found that an employment contract did exist.

[42] Neither party disputes that Wildlife made a valid offer. It offered Jafta a position as general manager: human resources and disclosed to him details of his remuneration package. It did not know the amount of the increase for the following year at that stage. Notwithstanding,

Jafta accepted that offer. He did not counter-propose the starting date and being given a copy of the contract of employment as preconditions for the conclusion of the contract.

[43] Jafta's acceptance by e-mail therefore corresponded with Wildlife's offer. As stated above, by accepting the starting date in his SMS Jafta also accepted all the terms of the offer. Jafta's SMS therefore also corresponded with the offer.

[44] Jafta's acceptance also had to correspond with the offer in another respect. He had to communicate his acceptance within the time stipulated by Wildlife. With regard to Jafta's SMS, it was common cause that Phakathi received it after working hours on 29 December 2006. Jafta had to indicate his acceptance before the end of December 2006. By sending an SMS after hours on 29 December 2006, Jafta nevertheless met the deadline for acceptance. Phakathi shifted the goal posts unilaterally and without forewarning by anticipating his response to her SMS by 1:00pm on 29 December 2006, merely because Wildlife's office was closing at that time for the long weekend. That Wildlife's offices were closed after 1:00pm on 29 December 2006 until 3 January 2007 could not limit the option it had extended to Jafta to indicate his acceptance before the end of December 2006. Jafta could indicate his acceptance or rejection electronically. The closure of the office was therefore irrelevant to the contract being concluded.

[45] Jafta's SMS was timeous acceptance of the offer. With regard to whether Wildlife received Jafta's e-mailed letter of acceptance, the court will consider the evidence of the experts in the context of the ECT Act in due course.

Mode of acceptance

[46] The third requirement under the common law for acceptance of an offer is that the acceptance must be made in the mode prescribed by the offeror.[2] In Schoeman above, the parties had stipulated that the agreement had to be in writing and signed by both parties. As these formalities were not fulfilled, Landman J found that no agreement of employment had come into existence.

[47] Electronic communication appears not to have been an issue in *Shoeman*, but in *White* above, an offer of employment in the form of a letter of appointment was e-mailed. The employer undertook in the e-mail to draw up a suitable employment contract for signature. Because the parties already implemented their agreement, Oosthuizen AJ concluded that they did not intend to postpone their employment contract coming into effect until they reduced it to writing. *White* did not invoke the ECT Act to submit that the e-mail should be treated as the written contract.

[48] As Wildlife made the offer by e-mail, Mr *Pammenter* conceded, as indicated above, that if Jafta accepted by e-mail, the contract would

[2] Pistorius T 'Formation of Internet Contracts: An Analysis of the Contractual and Security Issues' 1999 (282) *SA Mercantile Law Journal* 286.

have been concluded. There was no dispute therefore, that Jafta's e-mail would have been an appropriate mode of accepting the offer, provided Wildlife received it. However, Mr *Pammenter* disputed that Jafta's SMS message was an appropriate mode of communicating his acceptance of the offer because Phakathi did not have authority to conclude contracts via SMS; furthermore, the parties had not exchanged offers and counter-offers via SMS.

[49] Was Jafta's SMS an appropriate mode of acceptance? As Phakathi initiated communication by SMS, Jafta reciprocated in the same mode. Furthermore, as stated above, he was responding to the singular but critical issue of the starting date. With all other terms of the contract having been agreed, an 'affirmative' response was implicitly acceptance of the offer of employment. Therefore, by eliciting an affirmative response via SMS, Wildlife impliedly acquiesced in acceptance by SMS as a proper mode of accepting its offer. Whether acceptance of an offer by SMS is also a proper mode of concluding a contract under the ECT Act will be assessed below.

Communicate to offeror

[50] The fourth requirement under the common-law is that the offeree has to communicate acceptance of the offer to the offeror.

[51] With regard to Jafta's acceptance by SMS, it was common cause that Phakathi received his SMS. Wildlife disputed that sending an SMS to Phakathi constituted proper communication of the acceptance because firstly, Phakathi was not the person authorized to receive it. Secondly, despite knowing that Phakathi was leaving Wildlife at the end of December, Jafta should have known that Phakathi was no longer employed at Wildlife after working hours on Friday 29 December 2006 when he sent the SMS.

[52] Jafta received Phakathi's SMS earlier that Friday, the last working day in December 2006. As her SMS invited an immediate response, Jafta obliged. He had to, or else he risked losing the position. He also had to respond to Phakathi and not anyone else, because she sent him the SMS. Furthermore, Phakathi had directed him in her e-mail of 13 December 2006 to write to her. That implied that she was authorized to not only send but also receive communications about his employment.

[53] As requested, Jafta e-mailed his letter of acceptance to Phakathi, even though he addressed it to Mkhize. As the human resources officer, Phakathi was Mkhize's intermediary. As such, she was authorized to receive Jafta's SMS and relay its contents to Mkhize. Jafta, therefore, correctly communicated his acceptance to Phakathi by SMS. A decision of the Natal Bench supports this conclusion in its finding that a letter of acceptance of an offer was given to the offeror even though it was sent to his attorneys, who had no authority to receive it, but who informed him that they had received it before the offer expired.[3]

[3] Christie R H *The Law of Contract in SA* (3 ed 1996) at 69 citing *Meyer v Neveling* 1981 (3) SA 994 (N).

[54] Furthermore, the content of Phakathi's SMS did not raise new matter outside the terms of the offer; it was within her mandate as human resources officer to secure a response from a potential employee. In the circumstances, Wildlife represented that Phakathi had the authority to represent it in receiving his acceptance of the offer.

[55] To summarize, two issues now remain for determination with reference to the ECT Act:

(i) Did Wildlife receive Jafta's e-mailed letter of acceptance?
(ii) Was Jafta's acceptanee via SMS an appropriate mode of concluding a contract?

Why comparative law?

[56] Neither party referred the court to international or foreign law during their final submissions. Being ubiquitous, electronic communication renders electronic commerce and transactions borderless. As a technical matter devoid of ethical, political, social or other value-laden considerations,[4] electronic communication calls out to be regulated by universal principles. Electronic communications law therefore had to be internationalized to be effective.

[57] Internationalization of electronic communications law means that it has to apply harmoniously and uniformly to alternatives to paper-free communication systems.[5] Harmonization is the process through which states modify domestic laws to enhance predictability in cross-border commercial transactions. Unification occurs when states adopt common legal standards, such as conventions, guides, model laws, rules and practice notes to govern particular aspects of international commercial transactions.[6] In the interest of harmonization and uniformity, the court needed to establish whether the ECT Act has its origins in an international instrument[7] and whether any relevant foreign law exists.

[58] Even though this case was not transnational and therefore did not raise private international law questions, the court was concerned nevertheless that if it ignored international and foreign law, it might take a parochial approach to solve a local dispute thereby losing sight of the broader objectives of the ECT Act. Justice O'Regan warned against parochialism in *NK v Minister of Safety & Security* (2005) 26 *ILJ* 1205 (CC); 2005 (6) SA 419 (CC); [2005] 9 BLLR 835 (CC) para 345, and urged practitioners to seek guidance, positive or negative, from other legal systems struggling with similar issues. By inviting the parties to address it on international and foreign law, the court hoped to broaden its mind, to acquire 'a new optic' on whether

[4] Markesinis B & Fedtke J *Judicial Recourse to Foreign Law A New Source of Inspiration* (1 ed 2006) at 138.

[5] General Assembly Resolution at 264.

[6] http://www.uncitral.org/.

[7] Markesinis B & Fedtke J chapter 3; Canivet G 'The Practice of Comparative Law by Supreme Courts — Brief Reflections on the Dialogue Between the Judges in French and European Experience' in Markesinis B & Fedtke J at 321.

the problem in this case is common and how it is solved by other judges.[8]

[59] Usually, comparing foreign laws is risky. Not having precise information, not knowing the socio-economic and political context in which the foreign law operates and not having the luxury of time to delve sufficiently into foreign laws and the context in which they are applied, may lead to inappropriate comparisons and consequently incorrect application of foreign law.[9] These risks are minimized somewhat in the information age when the law regulating electronic communication is itself freely available electronically and ubiquitously. Furthermore, many of the impediments to unification such as geographical, cultural, religious, economic, social and political differences are non-existent in e-commerce law. Countervailing the risks of comparison and the obstacles to reaching the utopia of universal law is the need to manage diversity[10] in a field of law that must be harmonized and uniform for the sake of predictability and certainty; for that, comparative law is indispensable.

[60] The court has a duty to ascertain the international and foreign law applicable to the internet and other electronic communication systems in order to determine whether the international instruments are binding on South Africa, what the best practice is and consequently how the court should interpret and apply provisions of the ECT Act. This duty is reinforced by the very aims of the ECT Act which include ensuring that electronic transactions in the Republic conform to the highest international standards.[11]

[61] Consequently, the court requested further heads of argument on international and foreign law to interpret and apply the ECT Act.

Comparative law applied

[62] The first lesson learnt for this case from the comparative enterprise is that, as anticipated, the regulation of electronic communication is internationalized. The ECT Act takes its cue from the resolution adopted by the General Assembly of the United Nations Commission on International Trade Law regarding the Model Law on Electronic Commerce (UNCITRAL Model Law or Model Law). UNCITRAL is a subsidiary of the General Assembly of the United

[8] Markesinis B & Fedtke J at 167; Konrad Schiemann (European Court of Justice) 'The Judge as Comparatist' in Markesinis B & Fedtke J at 359 who points out that if judges refuse to look abroad for jurisprudence we will needlessly clothe ourselves in a 'restricting intellectual corset'; Reimann M 'Comparative Law and Private International Law' in *The Oxford Handbook of Comparative Law* at 1391–2.

[9] Markesinis B & Fedtke J chapter 4.

[10] Canivet G in Markesinis B & Fedtke J at 312; Reimann M at 1366.

[11] s 2(1) of the ECT Act.

Nations.[12] The resolution recommended firstly, that all states give favourable consideration to the Model Law in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communicating and storing information. Secondly, it encouraged efforts to popularize the Model Law and its Guide.[13]

[63] As one of 60 member states of UNCITRAL,[14] South Africa, like many other 'implementing states', aims to give effect to the Model Law by enacting the ECT Act based on the Model Law. As Reimann observes, it is widely recognized that conventions must be interpreted on their own terms but with guidance from other signatory states' substantive laws and practices.[15]

[64] Triggered as they are by a single international instrument, national legislation completes the unification of electronic communication law. As many states also import the content of electronic communication law from the Model Law with little change, the unification of electronic communication law is both multilateral and complete. By adopting the Model Law, implementing states have thereby internationalized electronic communication law.

[65] The significance of the first lesson of the comparative enterprise for this case is that South Africa has incurred international law obligations and in its judgment, this court must give effect to them.

[66] The second lesson from the comparative enterprise is that there is a substantial degree of convergence between the Model Law, the ECT Act and foreign law. The common terminology and the similarity in the sending and receiving provisions of the Model Law and the ECT Act illustrate this point. Article 15 of the Model Law provides as follows:

'Time and place of dispatch and receipt of data message

1 Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

2 Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

a. If the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

i. at the time when the data message enters the designated information system; or

ii. if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

b. if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.'

[12] http://www.uncitral.org/.

[13] General Assembly Resolution 85th Plenary Meeting 16/12/96.

[14] http://www.uncitral.org/.

[15] Reimann M at 1388.

[67] Section 23 of the ECT Act provides as follows:

> '23 Time and place of communications, dispatch and receipt
> 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.'

[68] Other implementing states, such as Australia, Canada, United States of America and India, all have similar sending and receiving provisions.[16] Cherry-picking a statute such as the Electronic Communications Act 2000 of the United Kingdom, which does not have a sending and receiving provision, to show that some states do not abide closely by the Model Law does not, in these circumstances, seriously diminish the international character of electronic communication law.

[69] Similarly defined key terms in the sending and receiving provisions used in the Model Law, the ECT Act and some foreign statutes include 'addressee',[17] 'originator',[18] 'data message'[19] (or 'electronic

[16] Section 13 of the Electronic Transactions Act 10 of 2001 of Australia (Australian Law), s 23 of the Uniform Electronic Commerce Act of Canada (1999) (Canadian Law), s 15 of the Uniform Electronic Transactions Act (1999) of the USA (USA Law) and s 13 of the Information Technology Act 21 of 2000 of India (Indian Law).

[17] *Article 2(d) of Model Law:* 'addressee' of a data message means 'a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message'. *Section 1 of ECT Act:* 'addressee', in respect of a data message, means 'a person who is intended by the originator to receive the data message, but not a person acting as an intermediary in respect of that data message'. *Article 2(e) of Model Law:* 'intermediary', with respect to a particular data message, means 'a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message'. *Section 1 of ECT Act:* 'intermediary' means 'a person who, on behalf of another person, whether as agent or not, sends, receives or stores a particular data message or provides other services with respect to that data message'.

[18] *Article 2(c) of Model Law:* 'originator' of a data message means 'a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message'. *Section 1 of ECT Act:* 'originator' means 'a person by whom, or on whose behalf, a data message purports to have been sent or generated prior to storage, if any, but does not include a person acting as an intermediary with respect to that data message'.

[19] *Article 2(a) of Model Law:* 'data message' means 'information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy'. *Section 1 of ECT Act:* 'data message' means 'data generated, sent, received or stored by electronic means and includes — *(a)* voice, where the voice is used in an automated transaction; and *(b)* a stored record'.

record'[20] or 'electronic document')[21] and 'information system'[22] (or 'information processing system',[23] 'computer resource'[24] or 'computer system').[25]

A [70] The relevance of the second lesson to this case is that in order to sustain the convergence achieved through harmonization and unification of the law, the court has a duty to be mindful of the technical terminology so that it uses it deliberately, consistently and in ways that avoid confusion.

B [71] The third lesson from the comparative enterprise is that internationally, the shift towards paper-free communication is irreversibly underway. In the Model Law and statutes of some implementing states,[26] including South Africa, paper-based concepts such as 'writing', 'signature' and 'original' are differently defined to include electronic records and signatures. In addition, a data message is treated as a document or information in writing if it is accessible or usable for subsequent reference.[27]

C

[72] Section 15 of the ECT Act stipulates that in legal proceedings adjudicators must not apply the rules of evidence in ways that deny the admissibility of a data message because it is a data message, or because it's not in its original form, if it is the best evidence available. The courts must give due evidential weight to information in the form of a data message.

D

E

[20] *Section 2(t) of India Law:* 'electronic record' means 'data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche'. *Section 2(7) of US Law:* 'electronic record' means 'a record created, generated, sent, communicated, received, or stored by electronic means'.

F

[21] The Canadian Law uses the term 'electronic document' without defining it. Section 1*(a)* however, defines 'electronic' to include 'created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and "electronically" has a corresponding meaning'. 'Electronic document' therefore has a meaning similar to 'data messages' defined in the ECT Act.

G

[22] *Article 2(f) of Model Law:* 'Information system' means 'a system for generating, sending, receiving, storing or otherwise processing data messages'. *Section 1 of ECT Act:* 'information system' means 'a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet'.

H

[23] *Section 2(11) of US Law:* 'information processing system' means 'an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information'.

[24] *Section 2(k) of Indian Law:* 'computer resource' means 'a computer, computer system, computer network, data, computer data base or software'.

I

[25] *Section 2(l) of Indian Law:* 'computer system' means 'a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions'.

[26] Such as ECT Act, Illinois Electronic Commerce Security Act (1998) (file:///D|/ecommerce/legis/ill-esca.html (13 of 49)), Indian Law, US Law, Canadian Law.

J

[27] s 12*(a)* and *(b)* of the ECT Act.

[73] Furthermore, s 11 of the ECT Act states that information is not without legal force and effect simply because it is in the form of a data message.[28] Likewise, s 22 of ECT Act acknowledges that agreements formed from data messages have legal effect. Section 24 also affirms that as between the originator and the addressee of a data message, an expression of intent or other statement is not without legal force and effect merely because it is in the form of a data message; or it is not evidenced by an electronic signature but by other means.

[74] The Singapore High Court declared a lease agreement concluded by an exchange of e-mails to be binding between the parties.[29] The parties in that case negotiated by telephone, e-mail and personal meetings. They exchanged no offline paper correspondence.

[75] The judge found that s 4 of Singapore's Electronic Transactions Act (Cap.88) complied with the requirements for an enforceable lease to be written and signed. The plaintiff persuaded the judge that even though e-mails are files of binary information which, while transmitted or stored are invisible, they are visible on a computer screen. Furthermore, the sender and recipient may print the e-mail message and attachments.

[76] With regard to the signature requirement, the judge developed the common law by finding that the common law does not require handwritten signatures. A typewritten or printed form of a signature is sufficient even if the sender's name is not typed onto the e-mail. The signature requirement is also met if the sender's name appears on the e-mail in the line reading 'From: _____ (Sender's Name)' and the sender was aware that its name appeared at the head of its messages, next to its e-mail address. That, the court said, left no doubt that the person so named intended to be identified as the sender of the e-mail message.

[77] Similarly, US courts held in *Shattuck v Klotzbach* 14 Mass L Rptr 360, 2001 WL 1839720 (Mass Super) and *Rosenfeld v Zerneck* 4 Misc 3d 193, 776 MYS 2d 458 that electronically transmitted memoranda satisfied the requirements for a valid sale of immovable property in each case. *Rosenfeld* also held that a typewritten signature on an e-mail evidenced intention to authenticate the transmission. Significantly, *Shattuck* does not refer to any electronic communication law whereas the 2004 decision in *Rosenfeld* refers to the US Law. *Al-Bawaba Com Inc v Nstein Technologies Corp* 19 Misc 3d 1125 (A) followed *Rosenfeld* but in *Singer v Adamson* 2003 WL 23641985 (Mass Land Ct) the court declined to follow *Shattuck*. One of the court's concerns was that e-mails 'by their quick and casual nature, tend to lack in many instances the cautionary and memorializing functions a traditional signed writing serves'.

[28] s 11(1) of the ECT Act.

[29] Case 661:MLEC6, 7(1)*(a)* — Singapore High Court — Suit No 594 of 2003: *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] SGHC 58.

[78] The significance of the third lesson for this case is that e-mails and SMSs and the language of the text messages they carry may seem informal, but treating them as having no legal effect[30] would be a mistake.

A [79] The fourth lesson learnt from the comparative enterprise is that the old common-law presumptions about when an acceptance of an offer is sent and received have been supplanted by statute. The assumption that postal contracts are concluded when a letter or tele-
B gram of acceptance is handed at the post office cannot apply to acceptance by e-mail or SMS because the forms of communication differ substantially.[31] Whereas the expedition theory applies to postal contracts and the information theory to telephone contracts,[32] the Model Law, s 23 of the ECT Act and similarly convergent statutes of
C other implementing states adopt the reception theory for receipt of electronic communication.

[80] The ECT Act prescribes when a contract by e-mail and SMS come into existence.[33] Subsection 22(2) stipulates that such contracts are formed at the time when and place where the offeror receives accep-
D tance of the offer. Furthermore, s 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.[34]

[81] It is not hard to see why the information theory is unworkable for contracts concluded electronically. A typical electronic or cyber con-
E tract is concluded when an offeree clicks on 'accept' or 'I agree' on a website that offers goods for sale. The acceptance of the offer may not even come to the attention of the seller if the thing sold is packaged and delivered automatically or through a despatch service.[35]

F [82] Another reason why the reception theory applies to electronic contracts as an exception to the information theory is that the offeree will be disadvantaged by not knowing whether the offeror knows about the acceptance. The offeree will have to wait until the offeror acknowledges receipt of the acceptance. The offeree may be at the
G mercy of a dishonest offeror if the offeror received and destroys the acceptance and pretends not to have received it.[36] To minimize this risk, some electronic communication systems, such as e-mail, have facilities to notify the originator or sender that the addressee retrieved the e-mail. As discussed below, e-commerce law invites parties to
H agree to stipulate an acknowledgment of receipt.

[30] Article 5 of Model Law; ss 22 and 24 of ECT Act; s 7 of USA Law; s 5–110 of the Illinois
I Electronic Commerce Security Act (1998); s 5 of Canadian Law.

[31] Pistorius T at 290.

[32] Pistorius T at 287.

[33] Pistorius T at 288.

[34] *R v Nel* 1921 AD 339; *Smeiman v Volkersz* 1954 (4) SA 1970 (C) at 176G.

J [35] See s 20 of ECT Act for added protection for those using automated transactions.

[36] Christie R H at 75.

[83] Philosophically, the information theory is the ideal that should apply to acceptance of offers for all forms of contracts. However, as Kotze JP observed as long ago as 1921,[37] the philosophical ideal is lofty but casts little light when situations call for theories that balance practical convenience. Section 23 therefore offers practical solutions to real problems encountered worldwide in electronic commerce.

[84] The critical common denominator between s 23*(a)* of the ECT Act, article 15(1) of the Model Law and other implementing states with similar convergent statutes, is that the message must enter an information system outside the control of the sender. The critical element is the sender losing and the recipient acquiring control.

[85] Section 23*(a)*, which was enacted after the Model Law, caters additionally for the situation where the sender and recipient share the same information system. In this way, s 23*(a)* of the ECT Act substantially replicates s 23(1) of the Canadian Law. The originator and the addressee are in the same information system, for example, when parties employed within the same organization use the internet, e-mail or intranet service.

[86] Although s 23(2) of the Canadian Law expressly 'presumes' (*sic*) that an electronic document is received, the terminology in s 23*(b)* of the ECT Act stops short of creating a presumption. Article 15 of the Model Law also avoids the words 'presume' and 'presumption' in sub-articles (1) and (2); however, in sub-article (3) it 'deems' (*sic*) the place of the contract.

[87] Section 23 of the ECT Act uses the same words — 'must be regarded as' — for both the sending and receiving provisions. Therefore, with regard to sending and receiving provisions, the ECT Act is consistent with the Model Law.

[88] The practical effect of the difference in terminology is that the phrase 'must be regarded as' makes it easier for an offeror to impugn an allegation that it received acceptance of an offer than if s 23 created a presumption or deeming provision. Section 23 therefore sets a lower standard of proof than a presumption or deeming provision. An offeror or addressee who denies receipt must adduce evidence of sufficient quantity and quality to shift its evidential burden. What will be sufficient evidence depends on the circumstances of each case, taking into account the over-arching objectives of the ECT Act.

[89] Another difference between article 15(1) and s 23*(a)* is that in s 23*(a)* data message is limited to its use 'in the conclusion or performance of an agreement'. A similar limitation is not placed on the receipt of data messages. The clear purpose of s 23*(a)* is to apply to agreements.

[90] However, s 23*(b)* is more onerous than article 15(2) in that s 23*(b)* requires the data message to both enter into the addressee's information system *and* be capable of being retrieved by the addressee. These two criteria apply in the alternative in article 15(2). The difference in effect between article 15(2) and s 23*(b)* emerges when they are

[37] *Cape Explosive Works Ltd v SA Oil & Fat Industries, Cape Explosive Works Ltd v Lever Brothers (SA) Ltd* 1921 CPD 244 at 265–76.

applied to the facts of this case. Under article 15(2), Jafta's e-mail had merely to enter the Wildlife's information system. Under article 23*(b)*, his e-mail had also to be capable of being retrieved and processed by Phakathi, the addressee. The test for receipt of data messages is therefore higher in South Africa than the international standard.

[91] The fourth lesson learnt is relevant to this case to show that adjudicators will regard an SMS or e-mail as having been received even if the addressees have no knowledge of it being in their inboxes. The data message has to be merely capable of being retrieved; the addressee does not have to actually retrieve it. Furthermore, the addressee does not have to acknowledge receipt of a data message for it to have legal effect.[38] To ameliorate the potentially harsh consequences of the reception theory and to be universally applicable, electroniic law has built in flexibility by encouraging self-regulation as discussed below.

[92] The fifth lesson from the comparative enterprise teaches that the common-law right of the parties to decide on the formalities to apply to their contract is reinforced in the Model Law, the ECT Act and in statutes of the other implementing states.[39] Article 4 of the Model Law permits parties to vary by agreement any rule of law in chapter II, which deals with the application of legal requirements to data messages, unless chapter II provides otherwise, and chapter III, which deals with the communication of data messages. Furthermore, article 15(1) and (2) is prefaced with the clause '(u)nless otherwise agreed between the originator and the addressee'.

[93] Taking its cue from these provisions of the Model Law, s 21 of the ECT Act declares that certain provisions of the ECT Act apply only if the parties processing data messages have not reached agreement on the issues provided for in that part.[40] Furthermore, according to Christie, an equitable interpretation should apply to an offer which does not prescribe unequivocally the method of acceptance.[41]

[94] The Model Law and the ECT Act do more than simply leave it up to the parties to agree to contract out of particular provisions. For instance, article 14 of the Model Law and s 26 of the ECT Act expressly invite parties to agree to stipulate an acknowledgment of receipt of an electronic communication. Such acknowledgment may be automated or by conduct. The Indian Law suggests that when the originator has not agreed with the addressee on the form of acknowledgment of receipt, an acknowledgment may be given by automated communication from the addressee. If the originator stipulates that the electronic record is binding only on receipt of an acknowledgment, then unless acknowledgment is received, the electronic record

[38] s 26 of the ECT Act.

[39] eg ss 10(1), 20, 23(1) and (3) and 25(3) of the Canadian Law; ss 2(1) and (4) and 5 of the USA Law; ss 12(1) and 13(1)–(3) of the Indian Law; ss 13(1)–(5) and 14(1) of the Australian Law; and s 1–110 of the Illinois Law.

[40] Part Two of chapter 3 dealing with facilitating electronic transactions.

[41] Christie R H at 69.

is deemed not to have been sent.[42] Without an acknowledgment, the parties have to wait for the communication to bounce back for clear proof that a communication was not received. Otherwise, they will have to lead evidence as they did in this case, to prove that the data message did not enter the information system of the addressee.

[95] Furthermore, as s 12*(b)* of the ECT Act permits parties to agree not to communicate electronically, inferentially, parties may also stipulate particular requirements for accepting data messages when they do agree to communicate electronically. Without such agreement, the ECT Act applies. The ECT Act therefore does not compel anyone to communicate electronically; it merely facilitates and gives legal effect to new ways of transacting in the information age to those who do choose to communicate electronically. [43]

[96] In *Rajakaruna v E* Trade Canada Securuling Corporation* 2007 ADPC 45 (CanLii) Judge B K O'Ferrall, a Judge of the Provincial Court of Alberta, had to decide whether the petitioner gave proper instructions to its broker, the defendant, to sell its shares if it issued those instructions telephonically and by e-mail. The material terms of the contract between the parties were firstly, that the plaintiff had to give instructions at least three business days before the deadline for tendering for the offer expired. Secondly, the defendant would not accept written, faxed or e-mailed instructions as such communications took several days to process. The plaintiff alleged that it attempted twice to telephone the defendant before the deadline expired, but its calls went unanswered. It then e-mailed its instructions to the defendant.

[97] On the facts, the judge found that the plaintiff failed to prove that it telephoned the defendant as it did not produce any record of such calls. To its e-mailed instructions, the plaintiff received an automated reply before the deadline expired. The reply directed the plaintiff to contact the defendant telephonically if the matter was urgent. The plaintiff did not telephone the defendant after receiving the automated message. The court found that the plaintiff was not justified in failing to call the defendant after receiving the automated response.

[98] The significance of that dictum for this case is that electronic communications systems are now standard forms of transacting in the information age. Anyone seeking to exclude particular forms of communication must expressly contract out of them, or else the provisions of s 23 of the ECT Act are triggered as default rules, that is, rules that apply when the parties have not agreed otherwise. When they do agree on the mode of communication, they must abide by it. Furthermore, when time is of the essence and the communication system used accelerates the speed of communication,

[42] s 12 of Indian law.

[43] Shumani L Gereda 'The Electronic Communication and Transactions Act' in Thornton L et al (ed) *Telecommunications Law in South Africa* at 270.

contracting parties should be especially vigilant about sending and receiving offers and acceptances electronically.

[99] The fifth lesson learnt from the comparative enterprise is that international and foreign law encourage self-regulation. When commercial practice is international and borderless, predictability and certainty of the law is all the more imperative. Self-regulation accomplishes this objective more easily than legislation. In addition, to ensure that our systems remain efficient, competitive, familiar and easy to implement so that it attracts favourable international attention,[44] our courts should, as far as possible, promote self-regulation. In that way, e-commerce and communication law can also keep up with e-commerce and communication practice.[45]

Acceptance received?

[100] The onus of proof is on the party who alleges that a contract exists.[46] Parties conclude a contract when they consent to be bound to its terms. Consent arises when one party accepts an offer from the other party. The offeree must communicate acceptance of the offer in a manner stipulated by the offeror, unless the offeror expressly dispenses with the communication of acceptance.[47]

[101] There is no dispute that Wildlife's offer by e-mail was valid. Acceptance by e-mail of the offer would therefore also have been valid, if the acceptance had been received. By communicating its request for Jafta's response and putting him on terms electronically via e-mail and SMS, Wildlife signalled that the mode of acceptance of the offer may also be via email and SMS.[48]

[102] Having resolved all other issues about whether, under the common law, Jafta's e-mail and SMS constituted proper acceptance of Wildlife's offer, the two remaining issues for determination are, as summarized above, whether, with reference to the ECT Act, Jafta firstly communicated his letter of acceptance by e-mail. Secondly, as the court has found, Phakathi precipitated acceptance by SMS, and as Jafta reciprocated by communicating his acceptance by SMS, the only issue relating to the SMS then is whether it was an appropriate mode of communication for concluding a contract.

[103] As the parties did not agree to exclude the exchange of offers, counteroffers and acceptance generated electronically, the rules set out in the ECT Act apply by default.

[44] Canivet G in Markesinis B & Fedtke J at 311.

[45] Pistorius T at 283.

[46] Christie R H at 115–18.

[47] Pistorius T at 287.

[48] Pistorius T at 286; *Rajakaruna v E* Trade Canada Securuling Corporation* 2007 ADPC 45 (CanLii).

The e-mail

[104] Jafta was the originator of his e-mailed letter of acceptance, even though he sent it from an internet café and with assistance from an attendant.[49] His e-mailed letter of acceptance was a data message. Gmail is a world wide web based information system that is outside Jafta's control. Because Jafta's e-mail did not bounce back, the court accepts his evidence that his e-mail was sent and that it entered the Gmail information system.

[105] Jafta sent his e-mail to Wildlife's information system, as designated by Phakathi. Jafta's and Jones's evidence show that although Jafta did nothing to prevent Wildlife from retrieving his e-mailed letter of acceptance, his e-mail neither entered Wildlife's information system nor was it capable of being retrieved and processed by Wildlife. Consequently, Wildlife cannot be regarded as having received Jafta's e-mail either under s 23*(b)* of the ECT Act or article 15(2) of the Model Law. This would be the court's conclusion, even if s 23*(b)* creates a presumption or deeming provision, as the overwhelming weight of evidence firmly rebuts the presumption, if it exists.

[106] The probabilities are that one or other information system malfunctioned and did not either bounce back the e-mail or forward it to Wildlife. In the time available, the court's cursory search through the Model Law, the ECT Act and statutes of the other implementing states considered in this judgment reveals that none of these instruments cater for situations in which communication systems malfunction. In *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405 the court had to decide when a notice sent by e-mail became effective if it did not enter the addressee's mailbox because of some fault in the system. However, the court determined the matter without having to resolve the question as to when the e-mail was received.

[107] To counteract the potentially harsh consequences of malfunctioning systems, the Model Law and the statutes of the implementing states considered in this judgment, encourage self-regulation by contracting out of the statutes to avoid them being invoked by default.

The SMS

[108] Is SMS an appropriate mode of concluding a contract?

[109] E-mail and SMS use technology that facilitates communication. The ECT Act defines 'e-mail' but not an SMS. An 'e-mail' means —

> 'electronic mail, a data message used or intended to be used as a mail message between the originator and addressee in an electronic communication'.[50]

[49] s 25 of the ECT Act.

[50] s 1 of the ECT Act.

[110] Athough ECT Act does not define 'electronic' as the statutes of some other implementing states do,[51] it does define 'electronic communication' to mean 'a communication by means of data messages', and 'data message' to include 'data generated, sent, received or stored by electronic means'.[52]

[111] The critical common elements in the definitions of 'data message' and 'electronic' are the capabilities of being generated or created, sent, received or transmitted and stored.

[112] Mr *Pammenter* conceded that an SMS is a data message. From these definitions and the concession, the court deduces that an SMS is an electronic communication that is transmitted from an originator to an addressee. An online encyclopaedia describes an SMS as an electronic communications protocol that allows short text messages between mobile telephone devices.[53] A telecommunications protocol is a set of standard values for data presentation, signalling, authenticating and transmitting information.[54] Applying s 24 of ECT Act, the court finds that as between Jafta, the originator, and Wildlife, the addressee of the SMS, Jafta's SMS was an electronic communication. As such Jafta's acceptance by SMS was not without legal force and effect merely on the grounds that it was in the form of an SMS.

[113] To summarize, the court finds therefore that Jafta did not communicate his e-mail accepting the offer to Wildlife. He did communicate his acceptance via SMS. An SMS is as effective a mode of communication as an e-mail or a written document. In view of these findings, the court concludes that a contract of employment came into existence. As Wildlife repudiated the contract by denying receipt of Jafta's acceptance, its repudiation is unlawful. Jafta is entitled to damages.

Damages

[114] The parties agreed the quantum of the damages at the pretrial conference. At the trial, Mr *Pammenter* conceded that the parties agreed the arithmetical calculations but Wildlife persisted in denying that Jafta was entitled to the damages claimed.

[115] The pretrial minute records the agreement as follows:

> '2.6 The quantum of the applicant's damages as set out in his statement of claim is not disputed.
> 2.7 The crux of this case revolves around whether the applicant accepted the offer by 31 December 2006.'

[51] *Section 1(a) of Canadian Law:* 'electronic' includes 'created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and 'electronically' has a corresponding meaning'. *Section 2(5) of USA Law:* 'electronic' means 'relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities'.

[52] s 1*(d)* of the ECT Act.

[53] http://en.wikipedia.org/wiki.

[54] http://en.wikipedia.org/wiki.

[116] The pretrial minute also records as an issue in dispute the following:

> '3.3 Whether or not the applicant is entitled to any or all the damages as claimed in his statement of claim.'

[117] Read together, these clauses imply that the parties agreed that Jafta had to prove that Wildlife caused the damages he claimed under the various headings, without having to prove the quantum on which he based the calculation of each amount he claimed. Contrary to attorney Mr *Jafta's* submission, the pretrial minute did not release Jafta from his onus of proving the amount of his damages under each heading.

[118] Jafta retained his job with the ECPB, thereby mitigating his damages. He claimed the following as damages from Wildlife:

(i) reimbursement of the rental of R2,500 he paid for his flat in East London for February and March 2007;
(ii) reimbursement of the salary of R800 he paid to a domestic worker to clean his flat in East London in February and March 2007;
(iii) reimbursement of R8,244.82 being the travelling expenses incurred to visit his family twice a month in KwaZulu-Natal in February and March 2007;
(iv) reimbursement of R4,122.41 being the travelling expenses incurred to attend the interview in KwaZulu-Natal;
(v) loss of earnings of R4,418.42 per month for February and March 2007;
(vi) future damages calculated at the rate of R15,963.24 for 168 months from February 2007 to Jafta's retirement in April 2021, amounting to R2,681,824.32. Attorney Mr *Jafta* amended the loss of earnings of R4,418.42 to R3,180.66 per month.

[119] The court has only Jafta's evidence that Wildlife undertook to reimburse him for travelling to the interview. None of Wildlife's witnesses refuted this undertaking. The other amounts for which Jafta claimed reimbursement were expenses he would not have incurred if Wildlife had accepted the contract. He contended that as he would have been based in KwaZulu-Natal, he would not have had to incur the twice monthly travelling expenses to visit his family.

[120] The general principle is that a party who unlawfully repudiates a contract is liable for general and special damages, if the innocent party proves such damages. General damages are those that flow naturally or 'intrinsically' from the repudiation.[55] Special damages or damages 'extrinsic' to the contract are those damages that are within the contemplation of the parties. Damages are within the

[55] Christie R H at 606–7.

contemplation of the parties if the special circumstances are known to both parties at the time of contracting[56] or if the parties concluded the contract 'in view of' the special circumstances.[57]

[121] The difference between the higher remuneration and benefits Jafta would have earned if Wildlife did not repudiate the contract and the lower amount he continues to earn in his current job, is the natural consequence of the repudiation. On his evidence, Wildlife agreed in principle to pay his travelling expenses incurred if Wildlife appointed him. The claims under these two headings are for Wildlife's account, subject to the court's assessment of the amount of damages.

[122] Wildlife was aware that Jafta had a home in KwaZulu-Natal because it served a letter there. If he informed Wildlife that he was travelling twice a month to see his family, maintaining a flat and employing his domestic worker, all at his own expense and inconvenience, he did not give that evidence in court. Wildlife might have been aware that Jafta was commuting and would have had to have a place to stay in East London; however whether Jafta disclosed to Wildlife what these expenses amounted to and whether he paid them personally or was sponsored, say by ECPB, is not clear.

[123] Furthermore, Jafta had made these lifestyle choices long before Wildlife entered the scene. Wildlife did not cause him to incur these expenses. If Wildlife had decided not to offer him a job, it would not be liable for these expenses. The court must find, therefore, that the first three expenses listed above were not in the contemplation of both parties when the contract was concluded.

[124] Under the common law, a contract of employment may be terminated on notice. Section 37 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) prescribes the period of notice. However, the Labour Relations Act 66 of 1995 (LRA) trumps the common law by prescribing that an employer may only terminate an employment contract for a valid reason. In other words, the notice provisions of the BCEA are triggered only if the employer has a valid reason for termination. Read together, the BCEA and the LRA permit an employer to terminate the contract only on the grounds of misconduct, incapacity, operational requirements or to comply with some other law.

[125] Thus, whereas an employer's liability for breach of an indefinite duration contract is limited to paying the employee up to the end of the notice period, that is, when the contract may be terminated lawfully under the common law, that option is no longer available under the LRA. As there was no suggestion that Wildlife would have had a valid reason to terminate Jafta's employment before retirement, it follows that Jafta's damages must exceed one month's notice pay.

[126] Counter-balancing his claim for damages up to retirement is the probability that Jafta may not remain employed at the ECPB or at

[56] Christie R H at 608.

[57] Christie R H at 608.

the same level until his retirement. Although he has secure lifetime employment with the ECPB, as a senior executive, he is unlikely to remain in his old job for long. Furthermore, rejoining his family in KwaZulu-Natal is important to him. With his experience and skills, Jafta should have little difficulty finding another job in KwaZulu-Natal. Another factor to take into account when assessing damages is that Jafta will receive upfront a lump sum which he can invest.

[127] To assess Jafta's damages to date is easy as the parties agreed the quantum of the difference between the job with ECPB and Wildlife. To assess his future damages is hard in the absence of an actuarial report, any information about his career path and his qualifications. Without better information, the court exercises its discretion mainly by balancing the interests of both parties. As a senior executive the court assumes that Jafta will progress from his current position in about three years. His future damages should therefore be pegged at 36 months.

Order

[128] The court declares that:

(i) The applicant and respondent concluded a contract of employment on 29 December 2006.

(ii) The respondent's repudiation of the contract of employment was unlawful.

[129] The respondent is ordered to pay the applicant the following:

(i) R4,122.41 for travelling to the interview.

(ii) R47,709.90 (R3,180.66 x 15 months) for past loss of earnings from February 2007 to May 2008.

(iii) R114,503.76 (R3,180.66 x 36 months) for further loss of earnings.

(iv) Costs.

Applicant's Attorneys: *Jafta Incorporated.*

Respondent's Attorneys: *A P Shangase & Associates.*