Introduction to South African e-consumer law, and the law of contract

1 Introduction

In the bricks-and-mortar commercial environment, consumers have the opportunity of inspecting the goods and/or services that they are about to purchase, in order to make a sound judgment as to whether ‘one is convinced that the product they are buying is what it purports to be in the advertisement’ (R Buys ‘Online consumer protection and spam’ in F Cronje & Reinhardt Buys (eds) Cyberlaw @ SA II: The Law of the Internet in South Africa 2 ed (2004) 138). Unfortunately, though, these ‘inspections’ are not possible in cyberspace. So it became imperative to develop e-consumer law in order to afford the e-consumer more consumer protection rights when contracting with e-vendors online, because consumers are clearly more vulnerable to puffing and misrepresentation by the e-vendor (J Forder & P Quirk Electronic Commerce and the Law (2001) 237). Here I shall focus on the basic principles of e-contract law and how they interact with e-consumer law with special regard to the obligations imposed on e-vendors in order to comply with the Electronic Communications and Transactions Act 25 of 2002 (‘ECTA’), the ECT e-vendors website, and e-consumer protections.

2 The sources of South African e-consumer law

e-Consumer law is a branch of the lex informatica, otherwise referred to as cyberlaw, which is ‘not a traditional source of law but rather is a new hybrid-law encompassing various pieces of telecommunications legislation as well as the common law’. One must also note the supremacy of the Constitution of the Republic of South Africa 1996. In addition, the Constitution states that international law must be considered and foreign law may be considered in the interpretation of South African law.

When dealing with the sources of South African e-consumer law, the general principles of the South African common law are important and binding — specifically, the law of contract. The ECTA generally governs all data communication, online transactions on Web-based shopping malls, and cellphone Value Added Services (‘VAS’). Other relevant statutes are as follows:
• the Promotion of Access to Information Act 2 of 2002;
• the Trade Marks Act 194 of 1993;
• the Regulation of Interception of Communications and Provisions of Communication Related Act 70 of 2002;
• the National Credit Act 34 of 2005 (which has now repealed the old Credit Agreements Act 75 of 1980, only to the extent that it is not provided for in the ECTA);
• the Business Names Act 29 of 1960;
• the Draft National Consumer Bill; and
• the Companies Act 61 of 1973.

In interpreting these provisions, one may make comparisons with the European Union Commission Directive on the Protection of Consumers In Respect of Distance Contracts (Directive 97/7) as well as the United Nations Convention on Contracts for the International Sale of Goods.

3 The scope of e-consumer legislation

Chapter VII of the ECTA deals specifically with consumer protection. It only applies to electronic transactions to give effect to the objectives of the Act with specific reference to consumer protection. These objectives are to ‘promote legal certainty and confidence in respect of electronic communications and transactions’ and to ‘develop a safe, secure and effective environment for the consumer, business and the Government to conduct and use electronic transactions’ (s 2). There are in principle four different ways of e-contracting (electronic transacting):

• The first method of contracting on the Internet is similar to a negotiation of one or more infrequent transactions by the exchange of letters and documents. This is known as an e-mail contract.
• The second method is known as contracting on the World Wide Web (www). This method is similar to a mail order. In this method, one party maintains the website on which he advertises his goods and services. The prospective buyer accesses the website and services on the website and then completes an electronic form, by which he orders goods or services from the seller (T Pistorius ‘Formation of Internet contracts: An analysis of the contractual and security issues’ (1999) 11 SA Merc LJ 282 at 286).

• The third manner is where the parties trade under the framework of an Electronic Data Interchange Agreement (EDI '').

• Natural persons, while chatting online in a virtual chat room, can make legally relevant agreements that are valid and binding. This is the fourth and final method of contracting electronically (DJ Lötz & C du Plessis ‘Elektroniese koopkontrakte: ’n tegnologiese hemel of hel (deel 1) 2004 De Jure 1 at 4).

For the purposes of this discussion it will be important to look at the second method of contracting, because this method falls within the ambit of e-consumer law (Buys op cit at 140).

Section 42(1) of the ECTA states that the provisions of its Chapter VII shall apply ‘only to electronic transactions’. Buys submits that electronic transactions between an e-consumer and an e-vendor are all commercial transactions which are wholly and/or partly electronically concluded, and for which the services or goods are either paid for in cash or electronic form (op cit at 143).

4 Overview of this article

The use of electronic data messages, both in the business and personal environment, has increased steadily over the years through the invention and evolution of various data communications services. Electronic commerce is no longer a prediction but an economically significant reality. The Internet is the world’s fastest growing commercial marketplace (Lötz & Du Plessis op cit at 1).

I shall focus mainly on the law regulating the interaction and legal relationship between electronic consumers (e-consumers) and electronic merchants (e-merchants) and electronic vendors (e-vendors), and/or electronic suppliers of goods and services (e-vendors of goods and
services). To lay a basis for the discussion, I shall briefly investigate the enforceability and validity of electronic contracts (e-contracts). Despite the recognition of different forms of expressing one's intent to be contractually bound by electronic means, there is still uncertainty whether a click on an icon on a website of a vendor would constitute a legally recognizable act signifying one's intent to be contractually bound as such where the terms were unilaterally imposed (Pistorius op cit at 293).

It has been explained that 'the absence of face-to-face negotiations in a number of significant electronic transactions, including click-wrap and web-wrap agreements for the sale/licensing of software and other goods, and website terms and conditions (the electronic agreement between website owners and users of a website), necessarily means that the terms of the transaction are unilaterally imposed by the owner of the goods or website in question, and will not be signed by the other party' (Werksmans Inc Business guide to electronic commerce and the law, accessed at <http://www.werksmans.co.za> on 22 September 2006).

After setting the scene I shall explain the relevant requirements of ECTA website compliance and their operation within the legal framework. Furthermore, I shall define an e-consumer, as defined in the ECTA. I shall also look into the provisions pertaining to the e-consumer's rights and obligations with special regard to consumer law as well as the general principles of the law of contract. In this regard, two questions may be asked: what are the e-consumer's rights and obligations when purchasing goods and/or services on the Internet? And what are the practical implications of the consumer protection provisions in the ECTA? The absence of regulatory provisions on jurisdiction still makes the legal problems surrounding regulation and jurisdiction in the case of internationally concluded contracts a vexed legal issue. Finally, I shall investigate the different dispute resolution mechanisms as well as possible solutions to current gaps in the law.

5 The law of contract: the common-law position

5.1 An overview of the common-law position

A contract has been defined as 'an agreement (arising from either true or quasi-mutual assent) which is, or is intended to be, enforceable at law' (RH Christie The Law of Contract in South Africa 5 ed (2006) 2; see also Wilken v Kohler 1913 AD 135 at 140, where Innes J referred to the use of the word contract 'in its strict sense as meaning a concluded agreement legally enforceable'). The South African law of contract requires that the following elements of a contract be present for it to be a legally binding agreement between any parties: the capacity to act, consensus, lawfulness, and physical possibility. Formalities may be included but are usually not mandatory.

Accordingly, if any electronic communication between two or more parties (for example, e-mail or SMS) can be interpreted as having complied with the formal constitutive requirements of a contract, as stated above, it could be inferred without any reference to the ECTA that a valid contract has been concluded. If any of the above requirements are not present, however, or doubt exists as to their genuineness, the contract may be declared void or voidable by a court of law.

5.2 The valid offer

The first question that one needs to ask when examining the validity of an electronic contract is whether the contents of a website can constitute a valid offer (Pistorius op cit at 286). The offer must embody or contain sufficient information to enable the person to whom it is addressed to form a clear idea of exactly what the offeror has in mind (Humphreys v Cassels 1933 TPD 280). In other words, the offer must therefore set out the exact essential and material terms of the agreement in order to be unequivocally accepted by the offeree. Our courts have been extremely reluctant to declare agreements to be enforceable that are either
vague or incomplete (*Kantor v Kantor* 1962 (3) SA 207 (T); *Murray v Murray & another* 1959 (3) SA 84 (W)).

In addition, the offer must be a firm offer; a tentative statement with possible agreement in mind is not sufficient (see *Efroiken v Simon* 1921 CPD 367 for a good illustration of this principle). It should also be noted that an advertisement does not generally constitute an offer; it merely amounts to an invitation to do business (*Crawley v Rex* 1909 TS 1105).

Note, however, that an advertisement may, depending on its wording, qualify as an offer (*Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 (CA)); this might be a grey area, especially when dealing with website-based advertisements and/or advertisements by electronic mail. In *Bloom v The American Swiss Watch Company* 1915 AD 100, the court made it clear that an offeree could only accept an offer that he had knowledge of. A person cannot accept an offer made by an offeror if he or she does not understand the terms and/or the circumstances of the offer, because this would lack the necessary intention to be bound contractually (at 103).

### 5.3 The acceptance

A binding contract is created when there is an acceptance of an offer. The acceptance manifested must be indicated by some form of unequivocal act, from which the inference of acceptance can logically be drawn (*Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241; *Collen v Riefontein Engineering Works* 1948 (1) SA 413 (A) at 429-430). It stands to reason that consent is possible only where the whole offer and nothing more or less is accepted. When the acceptance is coupled with reservation, it is not an acceptance but is in fact a counteroffer, which the offeror may accept. In a nutshell, the requirements for valid acceptance are as follows: the acceptance must be unconditional or unequivocal; the offer must be accepted by the person to whom it was addressed; acceptance must be in response to an offer, and acceptance must comply with any relevant formalities (*Brand v Spies* 1960 (4) SA 14 (E), where a contract of the sale of land that failed to satisfy statutory requirements under section 1(1) of the General Law Amendment Act 68 of 1957 was deemed invalid).

### 5.4 e-Contracts in the context of the ECTA

#### 5.4.1 Legal recognition of data messages

After many years of legal uncertainty, Parliament passed the ECTA, which came into force on 30 August 2002. Before this Act, Parliament had not enacted any exclusive Internet legislation that comprehensively defined the legal definitions of the terms 'writing', 'signature' and 'originals' in their application to electronic transacting (*A Stavrou Mission Impossible?: e-Security in South Africa’s Commercial and Financial Sectors* (2002) at 54).

**Data messages are now a legally recognized form of conducting legally relevant acts**

Before the enactment of the ECTA, there was legal uncertainty whether a data message was a valid form of contract negotiation, and whether the performance of juristic acts could impose legal obligations on the person using the data message. (For a view affirming the recognition of data messages prior to enactment of the ECTA, see *Council for Scientific and Industrial Research v Fijen* 1996 (2) SA 1 (A).) The recognition of data messages for the purposes of conducting legally relevant acts has now been confirmed in our law by section 11 of the ECTA. Data messages are now a legally recognized form of conducting legally relevant acts, and they cannot be invalid because of their immaterial nature. Section 11(2) and (3) of the ECTA allow for incorporation by reference of terms that are not contained in the data message. An example would be where an originator of an e-mail attaches or links an e-mail disclaimer.
5.4.2 Writing and signature requirements

Where data messages are used to communicate messages or documentation, the question arises whether these messages have legal validity equal to agreements written on paper. Is the e-consumer effectively bound by his or her genuine electronic communications with e-vendors? What is the status of electronic writing and electronic signatures, such as e-mail or Blackberry?

Section 12 of the ECTA recognizes data as the functional equivalent of writing or evidence in writing. The simple wording of this provision indicates the intentions of Parliament. In addition, section 22(1) of the ECTA guarantees the validity of agreements concluded either partly or wholly by a data message. In a nutshell, the new ECTA has entrenched in our law the recognition of data messages as a functional equivalent to paper. In answering the question of whether a signature that was created by means of an electronic data message is valid, we should look at section 13 of the ECTA, which ensures that data messages can satisfy the signature requirement. Section 13(1) provides:

‘Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used’.

However, section 13(2) states that an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form. It does not necessarily preclude signatures that are not electronic advanced signatures. What does this confusing and ambiguous wording by Parliament mean?

This means that three different contractual situations arise, depending on the type of electronic signature. In the first instance, as described by section 13(2), any electronic signature or a distinct electronic mark could be sufficient for the existence of a digital contract. Second, as prescribed by section 13(1), the electronic signature would have to be an advanced electronic signature and would have to be provided by the South African Department of Communications (the identified accreditation authority as required by section 34(4) of the ECTA).

The third and last instance as provided for by section 13(3) is where an electronic signature has not been used at all but the intent to be contractually bound has been expressed. This is akin to the popular click-wrap and shrink-wrap agreements which allow online users to express their intent to contract and allow them to enter into valid purchase and sale agreements with vendors from the Internet by clicking a mouse on a specific area of the screen.

However, the ECTA specifically lists four instances in which the use of electronic writing or signature would not be valid. The four excluded acts are as follows:

- concluding an agreement for the alienation (the disposal) of immovable property as provided for in the Alienation of Land Act 68 of 1981;
- an agreement for a long-term lease of immovable property in excess of 20 years, as provided for in the Alienation of Land Act;
- the execution of a bill of exchange as defined in the Bills of Exchange Act 7 of 1953; and
- the execution, retention and presentation of a will or codicil as defined in the Wills Act 34 of 1964.

(Compare MacDonald & others v The Master & others 2002 (5) SA 64 (O), where the court used its power to condone a document intended to be a will in terms of section 2(3) of the Wills Act to allow a computer printout as an indication of the testator’s last wishes. I submit that Parliament ought to reconsider the law relating to the above excluded acts every five years, as is done in German law, so as to accommodate changing times (see HJ Vogel ‘e-Commerce: Directives of the European Union and implementation in German Law’ in D Campbell & S Woodley (eds) E-Commerce: Law and Jurisdiction (2003) 29 at 53.)
5.4.3 Time when and place where the contract enters into effect

Our South African law provides for different methods of contract and acceptance that could vary and affect the time and place of the conclusion of the contract. For our purposes, it is only important to look at both the information theory and the expedition theory, as explained in the case of a contract concluded by letter and/or telephone or fax, as these are akin to e-mail. The place where a contract is formed is very important in the case of a contract between parties who are in different jurisdictions or international contracts in which one may suffer prejudice due to conflicting legal rules. The moment and place of the conclusion of electronic contracts are now regulated by section 22(2) of the ECTA, which states: ‘An agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror.’ So the contract is concluded where and when the originator receives the addressee’s message. One must also note that the provisions of section 22(2) are applicable only where the parties have not by express agreement varied the rules stated by the ECTA by means of contractual determination (s 21 of the ECTA).

Since the transmission of data messages usually occurs in the sender’s computer sending small data packets that eventually arrived at the recipient's computer in order to form the original message, it could sometimes be quite technical to establish the exact time at which the messages are deemed to have been received.

Section 23 suggests two different scenarios. Section 23(a) deals with the status of electronic data messages that are sent, with specific attention to the receipt of messages by people on a local intranet via a server or Ethernet network connection (computers connected locally together). Section 23(b) deals with electronic data messages that are sent by people via the Internet or via other long-distance communication platforms. In the former scenario, the letter is deemed to be accessible by the recipient once the intra-mail is sent.

The ECTA thus clearly deviates from our two traditional common-law theories of information and acceptance with regard to the use of electronic data messages. It appears to follow a modified version of the reception theory (W Jacobs ‘Sale of medicine over the Internet: European guidance for the South African pharmaceutical industry’ (2005) 11 SA Merc LJ 241).

5.4.4 Shrink-wrap, click-wrap, and Web-wrap agreements

Over the years, traders and consumers have exploited the possibilities of e-commerce. Before the ECTA there was much uncertainty about the validity and enforceability of shrink-wrap, click-wrap and Web-wrap agreements. These uncertainties are due mainly to the shift from paper-based trading to the practical, paperless conclusion of contracts. The law has evolved certain principles concerning the so-called ticket cases to dispense with the requirement of obtaining signatures to signify consent (T Pistorius ‘Click-wrap and Web-wrap agreements’ (2004) 16 SA Mercantile LJ 568).

These contracts are by nature defined as contracts of adhesion. Contract negotiation is excluded as one simply and unilaterally declares his or her acceptance or else goes without (ibid). A shrink-wrap agreement is one form of a contract of adhesion. Other terms used for this type of agreement are ‘box top’, ‘tear me open’ or ‘blister pack’ agreements. The terms of the agreement become valid and enforceable when the plastic shrink-wrap is broken and/or the software package is installed. However, the retailer's failure to draw the buyer’s attention, specifically to the terms and conditions contained in the shrink-wrap agreement, may amount to a misrepresentation by silence (Pistorius ‘Formation of Internet contracts’ op cit at 292), rendering the contract
voidable (Kempstone Hire (Pty) Ltd v Snyman 1988 (4) SA 465 (T) at 468).

Akin to the concept of shrink-wrap agreements are the ‘click-wrap’ agreements, also known as ‘Web-wrap’ agreements, that have been developed in e-commerce (Pistorius ‘Formation of Internet contracts’ op cit at 292). If the online consumer wishes to purchase products offered through an e-shop, he or she will be instructed to ‘click’ on certain icons indicating his or her acceptance to the terms. Although no common law exists confirming the validity and enforceability of these agreements, section 22(1) of the ECTA states that ‘[a]n agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages’. Section 24 of the ECTA provides for the valid expression of intent to make an offer or acceptance by means of a data message and is not without legal force merely because it is in the form of a data message or it is not evidenced by an electronic signature (see R Meiring ‘Electronic Transactions’ in Buys op cit at 99). Section 24 of the ECTA thus strengthens the provisions of sections 11 and 22, and solidifies the legal effectiveness of data messages used in transactional communication (ibid). Validity is also provided for unilateral ‘statements’ by means of data messages (s 24(1) of the ECTA).

Courts in the United States have ruled on the enforceability of shrink-wrap and Web-wrap agreements on the basis of the facts of each case (Pistorius ‘Click-wrap and Web-wrap agreements’ op cit at 571). In Hotmail Corporation v Van Money Pie Inc C 98-20064 (ND Cal, 20 April 1998), where the court hinted at the probability of such contracts being valid and enforceable, Judge Ware of the United States District Court for the Northern District of California granted the plaintiff’s motion for an injunction in a trade-mark infringement and breach of contract suit involving a click-wrap agreement on the basis that the defendant had breached one of the ‘Terms of Service’ not to use the Hotmail e-mail account to facilitate the transmission of unsolicited commercial e-mail, otherwise known as spam. One must, however, note that the courts’ approach towards these forms of agreement is extremely cautious. The defendants usually raise the defence that they ‘did not know or did not see’ the online agreement (see Ticketmaster Corp v Tickets.Com Inc 2000 WL 525390 (CD Cal, 2000); Specht v Netscape Communications Corp 150 F Supp 2d 585 (SDNY 2001)).

As Pistorius states (‘Formation of Internet contracts’ op cit at 292):

‘Although these “click-wrap” agreements have not yet been tested in [our South African courts] there would appear to be no reason why they should not be enforceable. Compared to shrink-wrap agreements, where the contract terms are unread until the purchaser has unwrapped the software, with click-wrap agreements the customer is aware of the contractual terms before a commitment is made to acquire the goods or services’.

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