

SHORT MESSAGE SERVICES AND E-CONTRACTING

**Jafta v Ezemvelo KZN Wildlife
[2008] 10 BLLR 954 (LC)***

1 Introduction

With the emergence of internet-based e-commerce in the last decade of the 20th century, commercial activity entered into a new era (Fitzgerald B, Fitzgerald A, Middleton, Lim and Beale *Internet and E-Commerce Law. Technology, Law and Policy* (2007) 485) and it has been said that modern society is now past the point where we can treat the Internet and indeed all things electronic as if they were part of some kind of fictional or fantasy realm that is only tangentially connected to the real world (Grossman "The Off-Line American" 25 August 2008 *Time Magazine* 35).

This was brought into clear focus with a recent decision handed down by the Durban Labour Court, where they also warned that, even though e-mails and SMS's and the language that these text messages carry seem informal, treating them as having no legal effect would be a mistake (*Jafta v Ezemvelo KZN Wildlife* [2008] 10 BLLR 954 969F).

2 Background

The decision in *Jafta v Ezemvelo KZN Wildlife* focused on the interpretation of the contracting provisions of the Electronic Communications and Transactions Act 25 of 2002 (hereinafter "ECTA") and determined that a valid employment contract had been concluded between the parties through the use of a short message service "SMS", and that the defendants had in fact unlawfully repudiated the contract of employment thus concluded (*Jafta v Ezemvelo KZN Wildlife* (*supra* 978G).

According to Yourdictionary.com (<http://www.yourdictionary.com/sms> (accessed 2009-07-31)) an SMS or Short Message Service is a text messaging service initially defined in the standards for Global System for Mobile Communications ("GSM") and now available on most digital cellular telephone networks and some paging systems. SMS was originally designed to support one-way information transfer for applications such as weather reports, sports scores, traffic reports and stock quotes, as well as short e-mail-like messages, which may be entered through the service provider's website. Most service providers also allow cellular users to receive and re-

* This case note is an adaptation of a paper delivered by the author at the Australasian Law Teachers Conference held at the University of Western Sydney, Australia on 5-8 July 2009.

spond to e-mail messages, using the cell phone keypad for message input. SMS is a store-and-forward messaging technology. SMS messages use the same Simple Mail Transfer Protocol (SMTP) specified in the TCP/IP protocol suite for Internet e-mail (*Cf Jafta v Ezemvelo KZN Wildlife (supra 975F-H)*).

3 Electronic transacting legislation

3 1 A South African overview

The ECTA took effect in South Africa (Proc R68 in GG 7449 of 2002-08-30). One of its aims is to provide for the facilitation and regulation of electronic communications and transactions. In particular chapter three of the ECTA addresses aspects of online communications and online contracting. This chapter is divided into two parts, the first dealing with the legal requirements for data messages and the second to the communication of data messages. The distinction is important because part one of this chapter creates obligatory provisions, that is sections 11 through to 20, while part two provides a default position in law that parties to an agreement are free to vary and includes sections 21-26 (Buys *Cyberlaw@SA II* (2004) 83).

In the formation and validity of an agreement, section 11 of the ECTA pertinently gives legal recognition to data messages and stipulates that a data message is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message. Working in tandem with this is section 22(1) of the ECTA which confirms that legal effect will be given to a contract concluded by means of data messages.

Section 22(2) of the ECTA states that 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, thereby adopting the reception theory (for criticism of this determination see Lötze and Du Plessis "Elektroniese Koopkontrakte: 'n Tegnologiese Hemel of Hel? (Deel 1)" 2004 *De Jure* 1 15). The offeror must be regarded as having received the data message when the data message enters the information system designated or used by the addressee and is capable of being retrieved and processed (s 23(b) of the ECTA), whereas section 23(a) determines that a data message – 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. An information system is defined in section 1 of the ECTA as a system for generating, sending, receiving, storing, displaying or otherwise processing data messages, and includes the Internet. In turn the Internet is defined as the interconnected system of networks that connects computers around the world using TCP/IP and includes future versions thereof). Receipt is also regarded as being at the offeror's (addressee's) usual place of business or residence (s 23(c) of the ECTA).

As with the position in Australian law discussed below in paragraph 3 2, the validity of a contract in South Africa is still largely governed by principles established in the common law and the same general principles apply whether the contract is formed online or through traditional methods. It is therefore still necessary to satisfy all the usual requirements for contract formation (Christie *The Law of Contract in South Africa* 2ed (1991) 78; cf Fitzgerald *et al* 486).

Under the South African common law a contract can only be concluded where it is based on consensus, either real or ostensible, between the parties. Furthermore the parties must have the capacity to contract; the contract must be lawful and it must be physically possible to complete or adhere to (Christie 28-29; Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract General Principles* (1993) 54-55; Nagel, Boraïne, Delpont, Lötze, Olivier, Otto, Prozesky-Kuschke, Roestoff, Van Eck and Van Jaarsveld *Commercial Law* 3ed (2006) 37; and Pistorius "Formation of Internet Contracts: An Analysis of the Contractual and Security Issues" 1999 *SA Merc LJ* 285-287).

A universal technique for determining whether or not there is consensus is to look at the process of offer and acceptance (Christie 28). An offer's function is to declare the intent of a prospective contracting party and therefore in order for it to be valid it has to be complete, include all the *essentialia* of the proposed contract, it must be clear, certain and unambiguous, it must be brought to the attention or communicated to the offeree and it must be made with the real intention of creating a legal obligation. (Nagel *et al* 43, where it is stated that an offer is a declaration of intent made by the prospective contracting party that contains all the propositions in respect of the contract, which is of such a nature that mere acceptance thereof by the offeree brings the contract to life. An offer does not as a general rule have to comply with formalities. Cf Christie 28-29).

The acceptance on the other hand indicates assent to the proposal contained in the offer. For an acceptance to be valid the following requirements need to be met, that is, it must be an unqualified declaration of intent, made by the offeree, approving the offer without reservation. In order for an acceptance to be effective it must be made by the offeree who is aware of the offer, the offeree must have a serious intention to be bound to his acceptance, his acceptance must be clear, unequivocal and unambiguous, the contents of the acceptance must correspond with the contents of the offer, it should follow the mode of acceptance set by the offeror, within the time stipulated; and be communicated to the offeror (Van der Merwe *et al* (1993) 47; Nagel *et al* 46; and Christie 57-65).

3 2 An Australian overview

In contrast to South African law the Australian electronic transaction enactments do not include a specific "contracts clause" confirming that a valid and enforceable contract may be formed by means of electronic communications (Fitzgerald *et al* 513-514). The inclusion of such a clause

was recommended by the United Nations Commission for International Trade Law (UNCITRAL) in its Model Law on Electronic Commerce (www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 2009-08-28)) and was in fact adopted by the South African ECTA in section 22(1). However, the Queensland Supreme Court acknowledged that a valid contract may be formed by electronic communications in the form of e-mails in *Ford v La Forrest* ([2001] QSC 261), which was also confirmed on appeal in the Queensland Court of Appeal in *La Forrest v Ford* ([2002] 2 Qd R 44), where it was noted that the question of whether acceptance by e-mail was capable of creating contractual relations had been adequately dealt with in the Supreme Court (*Cf Fitzgerald et al* 514).

The electronic transactions legislation enacted by the Australian Commonwealth, States and Territories adopted a light-handed approach to the development of a regulatory framework for electronic transactions as it provides no legislative guidance on how and when the requisite elements of a valid contract are established in the electronic environment and differs from the South African enactment in that it does not address the issue of time and place of contract formation. It does, however, equate with South Africa in that the legislation sets out rules governing the time and place of receipt and the place of dispatch of electronic communications (*Fitzgerald et al* 509).

Within this context we now turn our attention to the Labour Court's decision.

4 *Jafta v Ezemvelo KZN Wildlife*

4.1 *Facts*

Ezemvelo KZN Wildlife e-mailed an offer of employment to Jafta. While trying to send an e-mail, accepting the offer, Jafta's computer malfunctioned and with the time limit on the offer about to expire he went instead to an Internet café and sent an e-mail containing his acceptance from his Gmail account (according to expert testimony Gmail (or Google Mail) is a world-wide web-based e-mail (or web-mail)). A web-mail is an e-mail service accessed *via* a web browser and is distinguishable from e-mail services using licensed software such as Microsoft Outlook. The e-mail is sent to the server for the gmail.com domain and then the gmail server would forward the e-mail to the next Simple Transfer Protocol (SMTP) server. The SMTP server transfers the e-mail to the server defined in the e-mail, in *casu* kznwildlife.com, that is, the Ezemvelo KZN Wildlife's server.) This e-mail, however, did not reach Ezemvelo KZN Wildlife, and having received no response, the outgoing human resources manager of Ezemvelo KZN Wildlife sent Jafta an SMS urging him to respond or lose the position to the next suitable candidate. Jafta replied *via* SMS that he had already sent confirmation of his acceptance of the offer by e-mail earlier that day. The outgoing HR manager of Ezemvelo KZN Wildlife then left the employ of Ezemvelo KZN Wildlife apparently without divulging the content of Jafta's SMS with Ezemvelo KZN Wildlife who subsequently employed the next

suitable candidate. The applicant (plaintiff) then instituted an action for damages based on the unlawful repudiation of the employment contract against Ezemvelo KZN Wildlife, the respondents (defendants).

4 2 *Judgment and evaluation*

In deciding whether or not the e-mail or SMS resulted in a valid contract, the court had to make a determination on a number of issues, among them was whether or not the content of the SMS constituted an acceptance that met the general common-law requirements for valid contract formation. The court held that the SMS was an unequivocal acceptance of the starting date which was also implicitly acceptance of the offer. It held that this acceptance corresponded with the original offer and that it was in fact communicated to the offeror (*Jafta v Ezemvelo KZN Wildlife supra* 956C-957D, 959I-962C and 963C-H)).

After determining that the SMS met the common-law requirements for a valid acceptance, it is the author's opinion that there were three main issues that still had to be resolved. These were whether or not the SMS was an appropriate mode of acceptance, was an SMS a data message (electronic communication) within the meaning of the ECTA and finally when was the acceptance of the offer was received? (*Jafta v Ezemvelo KZN Wildlife supra* 963I-964A.)

4 2 1 Was the SMS an appropriate mode of acceptance?

The offer was silent as to the mode of acceptance but the parties were in agreement that an e-mail would have been an appropriate mode for acceptance of the offer.

The court reasoned that because Ezemvelo KZN Wildlife initiated communication by an SMS which asked for an immediate response, and that because Jafta reciprocated in the same manner that Ezemvelo KZN Wildlife had tacitly agreed, the SMS was a proper mode of accepting its offer (*Jafta v Ezemvelo KZN Wildlife supra* 962I-963B).

This line of reasoning is not unique in South African law, where a mode of acceptance has been inferred by our courts, from the fact that the offeror resorted to a particular channel of communication and from the fact that an offeror contemplated immediate performance from the offeree in a number of cases (*Mckenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16; *R v Nel* 1921 AD 339; and in *Volmer v Rees* 1935 TPD 319, Greenberg J (324) held that, "In my opinion, when a person makes an offer over the telephone he authorises the use of the instrument for an acceptance ..." and in *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 597, Van Blerck JA held that "It is trite that an offeror can indicate the mode of acceptance whereby a *vinculum juris* will be created, and he can do so expressly or impliedly".) Van der Merwe also points out that the intention to accept an offer may be manifested in any form, either expressly or tacitly by conduct, which permits an unequivocal inference of assent to the offer (Van

der Merwe, Van Huyssteen, Reinecke, Lubbe *Contract General Principles* 3ed (2007) 66-67; *Cf Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 241; *Simpson v Selfmed Medical Scheme* 1992 1 SA 855 (C); *Bloom v The American Swiss Watch Company* 1915 AD 100; *Cape Explosives Works Ltd v South African Oil & Fat Industries Ltd* 1921 CPD 244 262; Turpin "Acceptance of Offer: Instantaneous Communications" 1956 SALJ 77; Kahn "Some Mysteries of Offer and Acceptance" 1955 SALJ 257; the anonymous notes in "Offers and Options" 1955 SALJ 306 and 308; and *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 573).

4 2 2 Is an SMS a data message (electronic communication) within the meaning of the ECTA?

The second point for the court to determine was whether or not the SMS was a data message that could be given legal force under sections 11 and 22 of the ECTA.

In terms of the definitions given in section 1 of the ECTA an electronic communication is a communication by means of data messages, and in turn a data message is defined as data that is generated, sent, received or stored by electronic means. Ezemvelo KZN Wildlife also eventually conceded that an SMS is a data message (*Jaffa v Ezemvelo KZN Wildlife supra* 975F-G).

In discussing the fact that communication *via* data messages has been given full legal recognition under the ECTA, various South African academics automatically assumed that the definition of data messages in section 1 of the ECTA included an SMS because these forms of communication have become the norm rather than the exception (Nagel *et al* 49; and Christie 78). Eiselen ("E-Commerce" in Van der Merwe, Roos, Pistorius, Eiselen (eds) *Information and Communications Technology Law* (2008) 150) states that "[t]elephones, faxes, SMSs, e-mails and interaction with websites are all forms of communication that fall within the definition of 'data messages' in Act 25 of 2002". This statement is based on the definition of "data message" in article 2 of the UNCITRAL Model Law, on which the ECTA's definitions are based (*Cf* UNCITRAL "Guide to enactment of the Model Law" par 30-32 www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 2009-08-28)).

The court, however, chose a more scientific route and identified the common elements in the definitions of "data message" and "electronic communications". These common elements were described as the capabilities of being generated or created, sent, received or transmitted and stored. These elements were then compared to an SMS message and the court came to the conclusion that an SMS is a data message and that it has legal force under the ECTA, thereby confirming that it is a valid and effective means of concluding a contract (975F).

4 2 3 When is an acceptance of an offer sent by e-mail or SMS received?

A decision on the time of receipt of an acceptance normally depends on the theory for contract formation that is applicable to the transaction (Coetzee "The Electronic Communications and Transactions Act 25 of 2002: Facilitating Electronic Commerce" 2004 *Stell LR* 3, 501, 517).

In general the information theory seems to be a widely applied theory and in terms of this theory a contract is concluded once the offeror has knowledge of the acceptance (Kahn 1955 *SALJ* 246 and 255; Coetzee 2004 *Stell LR* 517; Christie 69-70; and Van der Merwe *et al* (2007) 68). It is a well entrenched theory in South African law (*Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A); and *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 4 SA 296 (T); it is similarly applied as the instantaneous communications rule set out in the well known cases of *Brinkibon Ltd v Stahag Stuhl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34; and *Entores Ltd v Miles Far Eastern Corp* [1955] 2 QB 327 (the *Entores* case is cited as the basis for the same rule in Australian law in *Tallerman & Co (Pty) Ltd v Nathan's Merchandise (Victoria) (Pty) Ltd* (1957) 98 CLR 93 112)). South African law also recognises the expedition theory for postal contracts, where a contract is concluded once the acceptance has been dispatched (introduced into South African law by *Cape Explosive Works Ltd v South African Oil and Fat Industries Ltd* 1921 CPD 244 due to its practical convenience and confirmed in *Kerguelen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487), which is similarly applied in various jurisdictions for non-instantaneous communications (Fitzgerald *et al* 489).

However, when it came to electronic contracting the South African legislature opted to adopt the reception theory in the ECTA which states that when an agreement is concluded between parties by means of data messages it is concluded at the time when and place where the acceptance of the offer was received by the offeror irrespective of whether or not the offeror was aware of the receipt or even reads it (s 22(2); and Eiselen 152).

According to evidence submitted in this case, any e-mail sent to Ezemvelo KZN Wildlife's GroupWise server (kznwildlife.com) underwent several checks before the addressee received a message in his or her mailbox. The first of these was a filtering system referred to as Postfix that bounced e-mails back that were addressed to persons who did not hold e-mail accounts at Wildlife. As Postfix did not store messages, Wildlife was unable to check whether Jafta's e-mail reached the Postfix stage.

Even if the e-mail had passed the Postfix stage, it would still have to pass through a second check point, the Antivirus programme that would scan e-mails for viruses. The Antivirus programme would delete spam and contaminated attachments, but would forward the e-mail accompanying the attachment to the third check point, namely the Mail Sweeper. The Mail Sweeper would store an e-mail if it was regarded as possible spam and the

system administrator would then at a later stage sort through these messages and either reject or accept the messages stored (959B-H). Therefore, even if Jafta's e-mail was contaminated with a virus or classified as spam, his e-mail would have been forwarded without the attachment if it had reached the antivirus stage.

Wildlife also extracted e-mail logs and it was accepted that even if e-mails were downloaded or deleted they would nevertheless remain on the server. Wildlife's extract from its log did not show any e-mails sent from a Gmail address to Wildlife on the date Jafta had sent the letter of acceptance (959B-H).

The court decided that Jafta's e-mailed letter of acceptance neither entered Ezemvelo KZN Wildlife's information system nor was it capable of being retrieved and processed and therefore Ezemvelo KZN Wildlife could not be regarded as having received the e-mail acceptance under section 23(b) of the ECTA (974G).

5 The vexing question of malfunctioning information systems

The workings of the Internet can and do, pose many problems when looking at contract formation, and two of these were pertinently highlighted in this decision.

The first problem is the substantive issue of determining the point at which an offer is accepted and a contract comes into being.

Electronic transaction legislation in Australia has not addressed this issue and it has to date not been judicially considered but there are a number of different views on whether the instantaneous communication rule or the postal rule applies to contracts formed through acceptances sent by e-mail (Fitzgerald *et al* 490-491). However, there seems to be considerable support in Australian law for the use of the information theory developed in relation to the formation of contracts by instantaneous communications using earlier technologies such as the telephone and telexes (*Brinkibon Ltd v Stuhl und Stahlwarehandels-gesellschaft mbH* [1983] 2 AC 34, whereby the contract is formed at the time when and place where the offeror received the acceptance).

Under the South African legal system, the offeror is regarded as having received the data message, irrespective of whether or not the offeror actually receives the message at his workstation, in his electronic mailbox or on his telephone, or takes cognizance of its contents, when the data message enters an information system and it is available for retrieval and processing within that information system. *In casu* the author assumes that means that if Jafta's e-mail had reached the Mail Sweeper stage that the court might have accepted that it had been received within the ambit of the provisions of section 23(b) of the ECTA.

Once a legal system has established itself on the issue of when a contract comes into being it faces a second problem. How does it deal with a malfunctioning or manipulated information system?

The Labour Court pointed out that, after a cursory search through the international law and the ECTA, none of the instruments referred to in the judgment cater for the situations in which communication systems malfunction and that the courts therefore determine matters in ways that do not resolve the question as to when the e-mail was received (975A-B).

In fact, if one looks at the UNCITRAL Guide to Enactment of the Model Law (103-104), it is pertinently stated that:

“Attention is drawn to the notion of ‘entry’ into an information system, which is used for both the definition of dispatch and that of receipt of a data message. A data message enters an information system at the time when it becomes available for processing within that information system. *Whether a data message, which enters an information system, is intelligible or usable by the addressee is outside the purview of the Model Law.* The Model Law does not intend to overrule provisions of national law under which receipt of a message may occur at the time when the message enters the sphere of the addressee, irrespective of whether the message is intelligible or usable by the addressee. Nor is the Model Law intended to run counter to trade usages, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee. It was felt that the Model Law should not create a more stringent requirement than currently exists in a paper-based environment, where a message can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (eg, where encrypted data is transmitted to a depository for the sole purpose of retention in the context of intellectual property rights protection).

A data message should not be considered to be dispatched if it merely reached the information system of the addressee but failed to enter it. It may be noted that the Model Law does not expressly address the question of possible malfunctioning of information systems as a basis for liability. In particular, where the information system of the addressee does not function at all or functions improperly or, while functioning properly, cannot be entered into by the data message (eg, in the case of a telecopier that is constantly occupied), dispatch under the Model Law does not occur. It was felt during the preparation of the Model Law that the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times by way of a general provision” (author’s own emphasis).

Van der Merwe states that “[t]o the extent that electronic media permit instantaneous communication, there may arguably be grounds to treat contracts so concluded on a par with telephonic contracts. The possibility of electronic declarations of will being truncated, lost or delayed by intermediaries, or simply the failure of an addressee to retrieve an electronic message, nevertheless militate against the retention of the information theory in this context” (Van der Merwe *et al* (2007) 74).

Eiselen on the other hand argues that the reception theory (as applied *in casu* and s 22(2)) provides for a fairer and more balanced approach to the validity and risk of loss of communications. He argues that determining the moment of receipt of a data message is an objective fact that can be determined more easily than subjective notice, and the reception of a data message cannot be manipulated by the recipient as it can in the information theory (Eiselen 151).

Christie raises the point that, these sections assume, when the message reaches the designated information system of the recipient that it will remain

there, but as technology advances, the sender may be able to change his mind and remove his message from the addressee's information system (without leaving a trace) thereby neutralizing *ex post facto* the operation of the theory (Christie 78; Van der Merwe *et al* (2007) 56; and *cf A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 3 SA 468 (A) 476).

In addition with the increasing use of security filters and technologies restricting the receipt of unwanted or potentially harmful communications there is an inherent risk that data messages (such as that of Jafta's) could be denied entry into an information system.

It begs the question how the court would have dealt with the determination of receipt if Jafta had been able to produce evidence that his e-mail had reached the information system, but that it had been rejected by one of the filtering systems (such as Postfix) therefore not actually entering the system. Objectively speaking this message has not entered the information system and is not capable of being retrieved or processed.

There is also the possibility of the anti-virus programme deleting an attachment to a message (which in fact contained the actual acceptance) and which was thereafter forwarded as a completely blank e-mail to the relevant person, that is, it was only a completely blank e-mail that was allowed entry into the information system. It cannot by any stretch of the imagination be said that a blank e-mail meets the common-law requirements for a valid acceptance.

5.1 An allocation of risk?

Authors such as Van der Merwe and Van Jaarsveld seem to favour the view that the allocation of communication risks, should rather be on the party who initiates communication by means of a particular medium. They argue that this sort of approach could serve as an incentive to the offeror to ensure legal certainty by prescribing a mode of acceptance and the allocation of the risks (Van der Merwe *et al* (2007) 75-76; De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg & Handelsreg Vol 1* 5ed (1978) 41; and Van Jaarsveld and Oosthuizen *Suid-Afrikaanse Handelsreg I* (1990) 36). A similar line of reasoning (albeit in respect of the expedition theory), was used by Van Jaarsveld when he argued that if a communication is addressed according to the specifications of the offeror, in accordance with the expedition theory the risk of loss/delay lies with the offeror. The reason for this is that the offeror had the opportunity to prescribe the rules for acceptance but if he did not, he therefore was satisfied with the arrangement that the acceptance be sent *via post* and that posting would bring about the conclusion of a contract and that he carried the risk in this instance (Van Jaarsveld and Oosthuizen 36; and *Cf Schlechtriem Commentary on the United Nations Convention on the International Sale of Goods (CISG)* (1998) 165). In a discussion of the theoretical basis for the application of the expedition theory these authors also point out that this argument has been criticized as entailing a fiction (*Cf* Anonymous 1955 *SALJ* 306, Anonymous 1955 *SALJ* 309, Kahn 1955 *SALJ* 17; and Olmesdahl "Unheralded Demise of Womer *versus* Rees" 1984 *SALJ* 545).

In contrast Meiring holds the view that the relevant sections in the ECTA should not be interpreted as apportioning risk between originators and addressees of data messages resulting from a loss of or damage to data messages in transit, but rather as creating a rebuttable presupposition regarding a legal fact (Buys 99).

Pillay J disagreed and held that section 23 of the ECTA stopped short of creating a presumption; it in fact set a lower standard of proof than a presumption or deeming provision and the offeror or addressee who denied receipt has to adduce evidence of a sufficient quantity and quality to shift its evidential burden. This, according to the court, would have to be determined on the facts and circumstances of each case, taking into account the broader objectives of the ECTA (971C-D).

As Pillay J correctly points out, the practical effect of adopting this interpretation is that it is easier for an offeror to impugn an allegation that it received acceptance of an offer than if section 23 created a presumption or deeming provision.

5.2 *Fictional fulfilment?*

Furthermore, with the increased use of anti-virus and filters, it is not difficult to set Internet or e-mail filters to block or prevent from entering certain messages that originate from particular senders. It would not be inconceivable for a recipient to prevent a message from entering an information system if they decided that they no longer wanted to contract with the offeree. This cannot be equated with the withdrawal of an offer because it is not communicated to the offeree and, unlike a facsimile machine that is switched off there is no “engaged” signal, some authors also assume that all e-mails, if they remain undelivered, will eventually bounce back to the sender but as this case aptly demonstrated this is not always the case (*Cf* Kahn 1955 SALJ 246 and 271, for a detailed discussion on the problems surrounding the revocation of an offer).

Christie states that an offeror who changes his address or absents himself or otherwise makes it impossible for the offeree to give notice of acceptance before the expiration date can therefore hardly complain that he has not received such notice (Christie 70; *Naudé v Malcolm* 1902 19 SC 482, 487; *Baker v Marshall and Edwards* 1913 WLD 156, 160-162; and *Smeiman v Volkersz* 1954 4 SA 170 (C) 177C; and for a discussion of these cases *cf* Anonymous comments 1955 SALJ 306 and 309). An offeree who, in such circumstances, does his best to communicate his acceptance to the offeror is therefore considered to have done everything necessary to conclude the contract. De Wet and van Wyk follow a similar argument and state that fault on the side of either of the parties can also be taken into account. If it is the offeror’s fault that the acceptance was not received or not received on time the offeree could rely on the doctrine of fictional fulfilment. On the other hand if it is the offeree’s fault that the acceptance did not reach its destination then the offeror can adopt the stance that there was no acceptance (De Wet and Van Wyk *Die Suid Afrikaanse Kontraktereg & Handelsreg Vol 1* 5ed (1992) 41), where they state that “Origens en in ieder geval moet daar rekening

gehou word met die moontlikheid dat die een of die ander skuld het daaraan dat die brief sy bestemming te laat of glad nie bereik nie. Is dit die aanbieder se skuld dat die brief hom nie bereik nie of nie betyds bereik nie, kan die aanemer hom op die standpunt stel dat die aanbieder gebonde is asof die brief sy bestemming werklik en betyds bereik het, en is dit die aanemer se skuld kan die aanbieder weer die standpunt inneem dat die posisie beoordeel moet word asof die brief nooit geskryf is nie” (author’s own translation) (*Cf Naudé v Malcolm* 1902 19 SC 482, 487; *Baker v Marshall and Edwards* 1913 WLD 156, 160-162; and *Smeiman v Volkersz* 1954 4 SA 170 (C) 177C; and 1955 SALJ 306 and 309).

6 The CUECIC proposal

It may be useful to take note of the fact that at the time that UNCITRAL adopted the Model Law on Electronic Commerce in 1996, the Internet was only just beginning to emerge as a significant, new commercial arena (Fitzgerald *et al* 530). Although the E-commerce Model Law has provided a basis for Chapter III of the South African ECTA and indeed for many countries worldwide, divergences have developed among domestic laws relating to e-commerce (Eiselen 145). In order to remove the obstacles to electronic commerce in existing conventions, in order to enhance legal certainty and commercial predictability where electronic communications are used by private parties engaging in international e-commerce, the United Nations Convention on the Use of Electronic Communications in International Contracts (CUECIC) was adopted in 2005 and is now open for signature and ratification by all countries (www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (accessed 2009-08-28)). To date eighteen countries have signed this convention including countries such as China and the Russian Federation. (The UNCITRAL Secretariat also prepares yearly a document containing the Status of Conventions and Enactments of UNCITRAL Model Laws (<http://www.uncitral.org/uncitral/en/commission/sessions/42nd.html>, A/CN.9/ 674-Status of Conventions and Model Laws (accessed 2009-11-18)).

Article 10 of CUECIC adopts a new default rule for the time of dispatch and receipt of electronic communications and this is considered to be better suited to the realities of e-commerce. It states that:

“The *time of dispatch* of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator, or if an electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the communication is received is taken as the *time of dispatch*.

The *time of receipt* of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. (*Eg*, an e-mail address, IP number or some other location where a computer can access information.) If an electronic address has not been designated, the *time of receipt* of an electronic communication is when it becomes capable of being retrieved and the addressee becomes aware that the electronic communication has been sent to that address. *An electronic communication is presumed to be capable*

of being retrieved by the addressee when it reaches the addressee's electronic address" (author's own emphasis).

The CUECIC explanatory memorandum (par 180-187 www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (accessed 2009-08-28)) takes note of the increased use of security filters and other technologies limiting the receipt of unwanted or potentially harmful communications and they therefore included the presumption that an electronic communication becomes capable of being retrieved by the addressee when it reached the addressee's electronic address (not information system) that may be rebutted by evidence showing that the addressee had in fact no means of retrieving the communication. This, they argue, takes into account the need to offer the originator an objective default rule to establish whether a message is seen as having been received or not and is aimed at attaining an equitable allocation of the risk of loss of electronic communications.

7 Conclusions and lessons to be learnt

This case is a good example of how common-law contracting principles and electronic contracting under the ECTA operate in harmony in order to ensure that electronic contracting is treated as functionally equivalent to paper-based transactions and so that a contract has the same effect irrespective of whether it is entered into electronically or in the physical environment.

It was only a matter of time until a case such as this reached the courts and alerted the general populace to the fact that we cannot treat all things electronic as if they were part of some kind of fictional or fantasy realm that is only tangentially connected to the real world and that, despite the casualness of these messages, we cannot treat them as if they have no legal effect.

In order to counter the unintended consequences of electronic contracting under the ECTA parties should make use of the relief granted in section 21, that is, that the parties involved in generating, sending, receiving, storing or otherwise processing data messages agree on the substantive contracting issues they wish to exclude.

It is also clear that on the issue of receipt and malfunctioning systems there may be substance in considering calls for reform, so that the courts do not have to determine matters in ways that do not resolve the question, as to when the e-mail was received, and in line with the CUECIC recommendations it is submitted that a presumption that the data message has reached an information system or address seems to better the address the realities of electronic contracting.

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