

CONSULTANT: MYCOMAX MICROFINANCE SOLUTIONS (PTY) LTD

**IN RE: THE VALIDITY OF A ONE-TIME PIN AS A METHOD
FOR ENTERING INTO CREDIT AGREEMENTS**

OPINION

THE CONSULTANT

1. My Consultant is Mycomax Microfinance Solutions (Pty) Ltd., a service provider to the credit industry mainly providing its services to the microfinance sector of the credit market. Its services consist of “software-as-a-service” solutions aimed at creating and managing loans, related documents and accounting functionality to track the receipt of payments, also known as a “loan management system”.

THE MANDATE

2. I have been mandated to deliver an opinion on the validity of a One-Time-Pin (“OTP”) as a method of signing or accepting a credit agreement instead of a traditional signature.
3. My Consultant has approached me to deliver this opinion as a result of a guidance note that came to its attention from an industry representative body, wherein a contributor advised that an OTP is not a valid signature. From what I have been able to gather, the contributor has based this opinion solely on the fact that an “OTP” is not defined as a ‘signature’ and the National Credit Act, 34 of 2005, requires a ‘signature’.
4. Although reference will be made to the opinion held by the contributor, this opinion will deal with the issue in its entirety, in order to avoid any doubt and comprehensively address the issue.

EXTRACTS

5. Before contemplating the issue on which I have been mandated to deliver an opinion, I will outline some relevant legislative quotes that will form my opinion's basis. The reasons for including such quotes will become relevant in the latter portions hereof.

6. **Section 2(3) of the National Credit Act, 34 of 2005 (“the NCA”):**

“(3) If a provision of this Act requirements a document to be signed or initialled by a party to a credit agreement, that signing or initialling may be effected by use of: -

(a) An advanced electronic signature, as defined in the Electronic Communications Act, 2002 (Act No. 25 of 2002); or

(b) an electronic signature as defined in the Electronic Communications Act, 2002 (Act No. 25 of 2002), provided that-

(i) the electronic signature is applied by each party in the physical presence of the other party or an agent of that party; and

(ii) the credit provider must take reasonable measures to prevent the use of the consumer's electronic signature for any purpose other than the signing or initialing of the particular document that the consumer intended to sign or initial.”

7. **The Definition of “advanced electronic signature” in the Electronic Communications and Transactions Act, 25 of 2002 (“ECTA”):**

“ “advanced electronic signature” means an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37”

8. **The Definition of “data” in ECTA:**

“ “data” means electronic representations of information in any form;”

9. **The Definition of “electronic signature” in ECTA:**

*“ **“electronic signature”** means data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature;”*

10. Section 11(1) of ECTA:

“Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.”

11. Section 13 of ECTA:

“(1) 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 signature is used.

(2) Subject to subsection (1), an electronic signature is not without force and effect merely on the grounds that it is in electronic form.

...

(5) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effected merely on the grounds that-

(a) it is in the form of a data message; or

(b) it is not evidenced by an electronic signature but is evidenced by other means from which such person’s intent or other statement can be inferred.”

12. Section 22 of ECTA:

“(1) An agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages.

(2) 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.”

THE NCA

13. The extracts from the NCA quoted above, clearly provides that the signing or initialling of a document does not necessarily need to be executed in the traditional ink-on-paper method. Section 2(3) clearly provides that electronic means may be utilized.
14. However, there are limitations to this allowance. For the sake of clarity, the NCA provides that an ordinary electronic signature can only be used if it is being applied in the presence of the other party. In other words, if a consumer attends a branch and affixes an electronic signature to an agreement. One can only assume the reasoning behind this provision is that the consumer is present and identified and, therefore, the risk of fraud is minimal.
15. In instances where the party affixing an electronic signature is not in the presence of the other party, an advanced electronic signature is required. The nature and requirements of an advanced signature contemplated in ECTA will be dealt with in the relevant portions of this opinion.
16. The NCA does not, in any manner, dictate what an electronic signature should look like or consist of. Instead, reference is made to the provisions and definitions of ECTA.

ECTA

17. A good point of departure in the contemplation of ECTA would be the nature and requirements of advanced signatures. Sections 37 and 38 of ECTA comprehensively detail the requirements of an advanced signature. In order not to overburden this opinion, I shall not quote the provisions of the aforementioned sections. The main characteristic of an advanced electronic signature is that it has been accredited by the South African Accreditation Authority (“SAAA”). Obtaining the aforementioned accreditation requires the applicant to comply with substantial requirements including, amongst others: -
 - 17.1. The signature must be uniquely linked to the user;
 - 17.2. The signature must be capable of identifying the user;

- 17.3. The signature must be created using means that can be maintained under the sole control of that user;
 - 17.4. The signature must be linked to the date or data message to which it relates in such a manner that any subsequent change of the data or data message is detectable;
 - 17.5. The applicant must satisfy the SAAA that it has the necessary financial and human resources and assets;
 - 17.6. The applicant must satisfy the SAAA in relation to the quality of its hardware & software, its processing procedures, the availability of third parties relying on authentication, regularity and extent of audits and any other factors which may be prescribed;
 - 17.7. The creation of the signature must be based on face-to-face identification of the user.
18. As a result of the requirements, there are only two accredited advance signatures currently available in South Africa. These are the National Post Office and LawTrust. Considering the fact that issuing an advanced signature requires face-to-face interaction with the consumer, it is not reasonable to use either of the aforementioned signatures, nor would the cost be justified.
19. An ordinary electronic signature, however, need only be data related to other data and be intended by the user to serve as a signature. There can be no doubt that an OTP is data. It is related to other data (cellphone number) and, by providing the OTP to the credit provider, the consumer clearly wishes to use the OTP as a signature.
20. Section 11, as quoted in the relevant portion above, clearly provides that information is not without legal force and effect merely on the grounds that it is wholly or partially in the form of a data message.
21. It should, however, be specifically noted that Section 13, in subsections (1) and (2), provides limitations to electronic and advanced electronic signatures. Subsection (1) requires an advanced signature, if the law requiring a signature does not specify what signature to use. The NCA does indeed prescribe the type of signature to be used. When

the parties to the agreement are in the presence of the other, an ordinary electronic signature suffices. If they are not, an advanced electronic signature is required.

22. However, the same section provides in subsection (5) that the intent of the consumer to enter into the agreement is of legal force and effect if the intent is contained in the form of a data message.
23. Despite the provisions of the NCA, ECTA further provides, at Section 22, that an *agreement* is not without legal force or effect merely because it was concluded in whole or in part by means of data messages. Thereby providing protection for agreements entered into by electronic means. For the sake of clarity, this does not necessarily mean that any agreement entered into electronically is valid and enforceable. It simply means that neither party can claim the agreement to be without force and effect, based only on the fact that it was entered into electronically. The wishing to invalidate the agreement would need to prove additional reasons why the agreement is invalid. The aforementioned sections even provide for the place and time during which such an agreement would be considered to have been concluded.

CASE LAW

24. The preceding portions which deal with the legislative provisions of the acts applicable to the content of this opinion, seem to illustrate that Section 2(3) of the NCA summarises the position related to the use of electronic signatures. However, during my research, I have come across various judgments that illustrate that the courts do not hold the same view with respect to the difference between electronic and advanced electronic signatures. The added advantage is that all the cases which I will refer to in this portion of my opinion, contemplate the use of an OTP for the online conclusion of loan agreements.
25. Without delivering much detail, Jordaan AJ contemplated the requirements of electronic signatures in the NCA, as well as ECTA, and still found an agreement, entered into between a credit provider and a consumer online, using an OTP and thereafter generating a watermark across each page of the agreement to be the electronic signature of the defendant, thereby disallowing the defendant's plea that it had not

entered into the agreement with the credit provider, due to the agreement not being signed.¹

26. In *Wesbank v Molamuagae*², Senyatsi AJ heard a similar matter, which relates to Wesbank's i-contract method of concluding credit agreements. In the aforementioned judgment, it is confirmed that the agreement is created and opened online, and utilized a PIN number which is sent to his cellphone. In this judgment, the defendant claimed that the electronic signature utilized was not in compliance with NCA and ECTA. The most pertinent paragraphs of the judgment are as follows:

"43. *The NCA does not provide for the form that the signature to the instalment sale agreement needs to take. As a result, it is quite possible to sign the agreement electronically and in compliance with the ECTA.*

44. *In the modern society of high technology, **agreements are in fact concluded without the parties physically being in the presence of each other.** Mathivha explained in this testimony that in the instant matter, the agreement become only valid once the terms and conditions of the agreement were accepted by the defendant using a mobile phone device. He explained that the safety mechanism to ensure that the correct client was accepting the terms and conditions of the agreement was to use his or her mobile number. ..."*

[MY EMPHASIS]

27. Another case that contemplated OTP's is *Wesbank v Govender*³. In the aforementioned judgment by Molahehi J, it is pertinently stated, at paragraph 11 that the Wesbank i-contract agreements are entered into utilizing an OTP to access and sign the agreement. The aforementioned Honourable Judge had the following to say in respect of electronic signatures:

"[26] *The effect of the provisions of the ECTA is that data messages or electronic signatures are now recognized in our law as equivalent to a proper basis upon which a written contract can be concluded. Thus, a valid written contract can be concluded electronically.*

¹ Firststrand Bank Limited t/a Wesbank and Suzuki Mobility Finance v Farrar (19950/2022) [2023] ZAGPJHC 954 (25 August 2023)

² Firststrand Bank LTD t/a Wesbank v Molamuagae (24558/2016) [2018] ZAGPPHC 762 (26 February 2018)

³ Firststrand Bank Limited t/a Wesbank vs Leon Gregory Govendor (Case Number: 2021/25131) [2023] ZAGPJHC 610 (1 June 2023)

[27] *The same requirements as those applicable for a valid contract under the common law apply to contracts entered into online or those concluded through data messages. The requirements are, among others:*

- (a) an offer and acceptance.*
- (b) the agreement must be legal.*
- (c) the terms of the agreement must be clearly spelt out.”*

28. The Honourable Judge further referred to Sections 11 and 13 of ECTA and still found the agreement to have been validly concluded.
29. In contrast to the legislative provisions, it appears that the courts are satisfied with the conclusion of agreements with ordinary electronic signatures (i.e. signatures that are not accredited as advanced electronic signatures).
30. This may be as a result of the fact that the world is evolving into a fully digital era and the provisions of the NCA relating to the requirement of an advanced electronic signature (which requires face-to-face verification of the user) simply do not accord with the digital conduction of business and the minimization of physical interaction amongst people.
31. The aforementioned judgments also note that the NCA does not prescribe any specific form for electronic signatures and thus the possibility of concluding the agreement in compliance with the requirements of ECTA is indeed possible.

PRECAUTION

32. This opinion would not be complete without the requisite warnings and cautionary advice.
33. The NCR is, as has repeatedly been illustrated in the market, in the habit of adopting singular issues to focus on and taking enforcement action in all instances where such issues occur. The guidance note (having been made public) having detailed the position concerning ordinary electronic signatures vs advanced electronic signatures may inspire the NCR enforcement team to investigate the issue, something which they haven't done to date. We therefore advise caution. However, it would not be wise for the NCR to attempt enforcement of the issues as the NCA does not specify that the electronic

signature must be applied correctly for the agreement to be valid in terms of the NCA. Therefore, the NCR has no real basis upon which to institute enforcement in this regard.

34. I further caution that, despite the case law referenced herein, each matter before a court must be decided on its own merits. A similar judgment is not guaranteed purely due to previous findings if the material facts and merits of the case differ.

CONCLUSION

35. **Advanced Signature:** As advised, an advanced signature requires accreditation and the application for accreditation is extremely stringent. The only two advanced signatures that exist in South Africa are the South African Post Office and LAWTrust. In terms of the NCA, an advanced signature should be used when the consumer is not physically in the presence of the credit provider. This is contradicted by recent case law, where it appears that ordinary electronic signatures, applied in compliance with ECTA, may be used for online agreements.
36. **Electronic Signature:** In terms of the NCA, an electronic signature is valid for the conclusion of a credit agreement, when the consumer is physically present. I reiterate the sentiments of the preceding paragraph as it relates to online loans.
37. **OTP as a signature:** There can be no doubt that an OTP is an electronic signature. Firstly, it accords with the definitions contained in ECTA. Secondly, an OTP has been contemplated as a conclusion method in the case law referenced herein, and those agreements were found to be valid.

ARNO PIERRE BOSCH
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