

## UNDERSTANDING THE ELECTRONIC COMMUNICATIONS ACT PART 2 – *Moemedi Tafa (Partner)*

The place where a contract is formed is very important where contracting parties are in different jurisdictions or international contracts in which one party may suffer prejudice owing to conflicting legal rules. Section 16 (3) of the ECTA states the following:

*'The acceptance of an offer by means of an electronic communication becomes effective at the time and place that the electronic communication is received by the offeror'.*

The above, however, is not applicable where a party has specifically excluded a form of acceptance that is covered under the ECTA.

In the leading South African case regarding, the import of such a determination becomes clearer. Some of the issues the court had to determine were:

- Was the content of an e-mail sent an acceptance of an offer of employment?
- Was the content of an SMS sent an acceptance of offer of employment?
- Did the offeror receive e-mail? ,and
- Is an SMS a proper mode of communicating acceptance of an offer?

The Court held, in summary that:

*"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."*

The court's finding gave effect to a comparative law approach. The Court considered the ECTA and also gave due cognisance to United Nations Commission for International Trade Law (UNCITRAL) Model Law on Electronic Commerce.

Article 10 of that Convention on the use of Electronic Communications in International Contracts lays down slightly different principles regarding the time and place of sending and receipt. Article 10 of the UNECIC deals with the time and place of communications. It is important for a number of reasons, including the time and formation of the agreement, the lapsing of an offer or other time limits such as performance.

The Convention provides at clause 10:

*"1. 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 the 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 electronic communication is received."*

Section 22 of the ECTA provides, in respect of when electronic communications are deemed to have been received by the addressee:

*"(1) If the addressee has designated an information system for the purpose of receiving electronic communications, the time of receipt of an electronic communication shall be determined as follows –*

- (a) at the time when the electronic communication enters the designated information system of the addressee; or*
- (b) when the electronic communication is sent to an information system of the addressee that is not the designated information system, at the time when –*
  - (i) the addressee becomes aware that the electronic communication has been sent to that information system, and;*

*(ii) the electronic communication is capable of being retrieved by the addressee.*

*(2) An electronic communication is deemed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.*

*(3) If the addressee has not designated an information system, receipt occurs when the electronic communication is retrieved by the addressee, or should reasonably have been retrieved by the addressee"*

At common law, the contract is concluded at the place where the last act necessary to constitute the agreement was performed. The ECTA regarding receipt or delivery of data messages has deviated from the common law position in that regard.