ELECTRONIC SIGNATURES

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Contents

1 ELECTRONIC SIGNATURES

1.1 INTRODUCTION

One of the major changes in the new company's act is the ability to do various things electronically. Valid meetings can be held by electronic methods. E.g. Skype Gotowebinar etc. Resolutions and special resolutions can now be taken in writing without it being necessary to actually have a physical meeting. This means that the resolutions can be taken by electronic means. Directors can send out all the documentation and the shareholders can vote on this on an electronic basis provided the requirements of the relevant laws are adhered to.

With an understanding of the requirements of the companies act 2008 and the Electronic Communications and Transaction Act 2002 (ECTA) one can convert many manual procedures to an electronic format.

1.2 THE LEGAL POSITION

It's important to understand how the Companies Act 2008 opens the door to do things electronically by referring to the ECTA.

1.3 DIGITAL SIGNATURES

Accfin is very proud and excited to introduced digital signatures into its back-office applications. In order to do this, we have partnered with SigniFlow and we are in fact using their SigniFlow product. We have detailed below how this is going to work with our products. SKY will be able to use these products.

1. Description

Signiflow is an electronic signature solution made up of two components:

Hardware (server): A secure and certified network-attached appliance that provides electronic signature services to the SigniFlow client software. It stores ***encrypted private keys***, ***certificates*** and other ***signing credentials*** belonging to specific users.

Software (client): A computer program that uses the ***electronic signature services*** provided by the SigniFlow server to enable users to electronically sign documents. It can only be used by authorised signers together with the private keys that are securely stored in the server.

In order to send signing requests from the SigniFlow Client to the SigniFlow server, authorised users create a ***default signature*** in the form of their name or a ***graphical image***.

The first time that an Accfin user sends out an e mail to one of their clients with a request to dedicatedly sign a letter approving a tax return or a provisional tax return, or a company secretarial document they will have the opportunity of creating a signature which could be a *font signature* or a *graphical image* of their signature which will be registered against an email address with their own unique password. Once this signature record has been setup by the user it will be available from thereon each time they are requested to sign or approve a document.

After users apply their signature to a document using the SigniFlow client, their signing request is sent to the SigniFlow Server. This request includes a *document hash*, which is a *cryptographic function* that produces a unique string of characters from the document data. This string of characters protects the document from being altered once it has been signed because the string will change if the document data is modified, and if changed the change can be detected.

2. Benefits

SkySign which is used Sky in partnership with SigniFlow is an electronic signature solution that helps the users of our back-office products complete the automation of approvals for various actions like tax return approvals moving these approvals to a completely paper-free working environment. It eliminates the need to print, sign and scan documents, as they are signed and transferred electronically from the back-office system to the client and then back to the back-office system after approval has taken place.

This innovative solution offers a unique centralized approach to managing electronic signatures, signatories and private keys. This approach allows you to easily install your own private keys, which is important in the context of South African law.

This unique system enables your organization to:

1. Accelerate signature-dependent processes

Allows your user clients to sign documents remotely at any time, in any location, from any computer or mobile device without printing them first.

Requires no changes to your existing processes, workflows, governance policies and standard operating procedures.

Works with the content authoring applications and file types that you are already using, i.e. your letters converted to PDF files.

Integrates digital signatures into the document sent to your client.

2. Reduce operating costs

Puts you on the path to a rapid ROI by significantly reducing paper-related costs, decreasing document turnaround times, and improving efficiency. Major reduction in follow up calls to your clients.

Installs quickly and easily with minimal operational impact, as its been tightly integrated in the Accfin back office products.

Offers multiple options and flexible licensing based on the number of users who wish to use this option.

3. **Improve security, control and trust**;

Keeps your sensitive documents within the protected boundaries of your enterprise domain so that they never have to be saved on third-party servers.

Integrates with your enrollment/provisioning methods, leveraging existing user management systems, such as Microsoft Active Directory and other LDAP systems, for control over signer authorizations.

Stores the signing keys in a centralized and secure hardware device, ensuring that any tampering attempt will be immediately detectable.

4. **Comply with the relevant laws and regulations**

Any time, in any location, from any computer or mobile device. Adheres to industry and governmental regulations including South African common law, the ECT Act, POPI, ESIGN, UETA, EU regulations and VAT law, FDA 21 CFR Part 11, USDA, SOX, and many more.

1.4 Common law

The South African common law is made up of Roman-Dutch law and past court decisions.

Definition

The common law definition of a word or term is its plain English meaning. Courts generally use dictionary definitions to determine the plain English meaning of a word or term.

"Signature" means ***"the name of a person written with his or her own hand as an authentication of some document or writing"*** (Shorter Oxford English dictionary).

The important aspects of this definition are that:

- it must be the **name or mark** of the person signing;
- the person signing must have **applied it themselves**; and
- the person signing must have **intended** it to **authenticate** them.

Our courts used to follow a formalistic approach to signatures where they focused on whether specific factual circumstances existed to decide whether something counted as a signature. Now they follow a functional approach where they focus on the intention

behind the factual circumstances to decide whether the person signing intended something to be their signature.

Applies

South African lawmakers are presumed not to have changed the common law unless they do so explicitly.

Our lawmakers haven't explicitly excluded electronic signatures from the common law of signatures. This means that the common law applies to electronic signatures.

Court decisions

Unfortunately, there are no court decisions about electronic signatures in South Africa. No one has brought a matter involving an electronic signature before a South African judge and had a binding decision made on it, but there are many cases about what form a signature can take. This is useful when considering new forms of signature, like electronic signatures.

SigniFlow

SigniFlow can be used to create electronic signatures that are valid in terms of South African common law.

The electronic signature it creates meets the common law definition of a 'signature', because:

- the person signing's default signature contains their **name**;
- the person signing **applies it themselves** by choosing to apply it to a document; and
- the person signing **intended** it to **authenticate** them because they log into the system using their credentials to authenticate themselves.

The electronic signatures it creates would also be considered signatures in terms of the functional approach, because our courts would focus on the intention behind using SigniFlow to create an electronic signature on a document to decide that the person signing using the electronic signature intended it to be their signature.

ECT Act

The ECT Act (Electronic Communications and Transactions Act 25 of 2002) became law in South Africa on Friday 30 August 2002.

Section 2 of the ECT Act says that "***The objects of this Act are to enable and facilitate electronic communications and transactions in the public interest [...]***'

SigniFlow electronic signatures are an effective way of facilitating electronic communications and transactions.

Confirms common law

The ECT Act confirms the common law rules regarding signatures.

Section 13(2) of the ECT Act says that "***Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.***"

The important aspects of this provision are that:

- electronic signatures are **valid** signatures;
- despite being in **electronic form**.

This provision enables the use of electronic signatures without forcing it.
Therefore:

- Signiflow electronic signatures are **valid** signatures;
- despite being in the **electronic form** of electronic signature data associated with an electronic document;

in terms of section 13(2) of the ECT Act.

Minimalist approach

The ECT Act takes a minimalist approach to electronic signatures. This means that it provides a definition consisting of certain requirements and anything that meets those requirements is an electronic signature. The most important thing about this approach is that it is technology neutral. The ECT Act doesn't contain a list of technologies that count as electronic signatures – it only contains a list of requirements. This is good because it means new electronic signature technologies will automatically become electronic signatures in terms of the ECT Act without the lawmakers having to update the legislation.

Therefore, SigniFlows electronic signatures are electronic signatures in terms of the ECT Act because they meet the requirements in the definition of an electronic signature as we will explain below.

Signature definition requirements

The ECT Act sets out the requirements for an electronic signature in its definitions.

Section 1 of the ECT Act says that "***"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;***"

The important aspects of this definition are that:

- an electronic signature must involve **two sets of data**;

- the two sets of data must have a **relationship** where they are "attached to, incorporated in, or logically associated" with each other; and

- the person signing must have had the **intention** that one of the sets of data be their signature.

Section 1 of the ECT Act says that "***"data" means electronic representations of information in any form;***" Therefore, SigniFlow's signatures are electronic signatures in terms of the ECT Act because:

- they involve **electronic signature data** and **electronic document data**;

- the electronic signature data has a **relationship** with the electronic document data because it is incorporated in it when the person signing applies their signature to the electronic document; and

- there is a strong argument that the person signing had the **intention** that the electronic signature data be their signature, because they logged in with their credentials to authenticate themselves, created their default signature, and chose to apply it to the electronic document.

Data message restrictions

The ECT Act has certain restrictions that a data message must comply with to be an electronic signature.

Section 13(3) of the ECT Act says that "***Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if— (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.***"

The important aspects of this provision are that:

- you cannot use an electronic signature if you have **agreed to use another type** of signature, for example in a contract;

- the electronic signature technology must somehow **authenticate** the signatory and show that they **approved** the signature; and

- this method must be **sufficiently reliable** in the circumstances.

Section 1 of the ECT Act says that "***"data message" means data generated, sent, received or stored by electronic means [...]***"

This definition applies to almost all forms of electronic signature, because they all involve electronic communication of data.

All electronic signatures must comply with these restrictions.

Therefore, SigniFlow electronic signatures comply with the ECT Act's restrictions for data messages to be electronic signatures, because:

- most of the time, the parties will **not have agreed to use** another type of signature;

- SigniFlow makes the person signing log in with their credentials to **authenticate** themselves and shows that they **approved** their signature by recording all the data of how they applied it; and

- this method is **sufficiently reliable** for most circumstances in our opinion, although a court may decide that a more reliable method is required in certain circumstances – but no South African court has made such a decision at this time.

Signify agreement

Section 13(5) of the ECT Act says that "***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 effect 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.***"

The important aspects of this provision are that:

- where the parties to an electronic transaction have **not agreed** to use an electronic signature;

- an **electronic expression of intention** is valid;

- despite **not being an electronic signature**.

Therefore, SigniFlow's electronic signatures are also **electronic expressions of intention** as well as being electronic signatures, which means that a person can also use them when an expression of intention is sufficient and a signature is not required.

Advanced electronic signatures

Advanced electronic signatures are legally different from ordinary electronic signatures. They were created by the ECT Act and do not exist in common law.

Section 1 of the ECT Act says that "***"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;***"

The important aspects of this definition are that:

an advanced electronic signature must meet the signature definition requirements of an ordinary electronic signature; and

it must be from a process accredited by the Department of Communications (who is the relevant Authority).

Section 37(1) of the ECT Act says that "***The Accreditation Authority may accredit authentication products and services in support of advanced electronic signatures.***"

The Department of Communications has accredited certain organisations to provide advanced electronic signatures in the form of a digital certificate provider based on a face-to-face authentication service of the person wishing to get the advanced electronic signature.

Section 38(1)(e) of the ECT Act says that "***The Accreditation Authority may not accredit authentication products or services unless the Accreditation Authority is satisfied that an electronic signature to which such authentication products or services relate— [...] is based on the face-to-face identification of the user. [...]***"

These organisations were accredited on the basis of the ECT Act (Electronic Communications and Transactions Act 25 of 2002) Accreditation Regulations, which became law on Wednesday 20 June 2007 in terms of sections 41 and 94 of the ECT Act. (Available at: http://www.saaa.gov.za/index.php/2013-11-26-14-32-21/2013-12-04-09-54-50/finish/1-policy-and-legislations/7-accreditation-regulation.html)

Both sections 41 and 94 of the ECT Act empower the Minister of Communications to make these regulations.

Regulation 13 of the ECT Act Accreditation Regulations contains the technical requirements for the certificate service provider to issue a digital certificate that can be used for advanced electronic signatures.

Therefore, SigniFlow lets users install their own private keys in the form of a digital certificate provided by an accredited Certificate Authority, which can then be used to create advanced electronic signatures. This means that a person signing a document could easily get a digital certificate provided by an accredited Certification Authority, install it on the CoSign server, and use it to apply a valid advanced electronic signature.

Law requires signature

You must use an advanced electronic signature when a law requires a signature.

Section 13(1) of the ECT Act says that "***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.***"

The important aspects of this provision are that:

- when a **law requires a signature**; and
- a law **doesn't specify** a particular type of signature;
- then you **must use** an advanced electronic signature.

This means that:

- you **need not** use an advanced electronic signature;
- when a **law doesn't require** signature; or
- a law **specifies** a particular type of signature.

Therefore, you can use SigniFlow as an ordinary electronic signature where an ordinary electronic signature is sufficient or as an advanced electronic signature where an advanced electronic signature is required by law. It provides ordinary electronic signatures as is and provides advanced electronic signatures when used together with a digital certificate from an accredited certificate authority.

Law specifies type

The Income Tax Act 58 of 1962 is an example of where a South African law specifies the type of electronic signature you must use.

Section 66(7B) of the Income Tax Act says that "***The Minister may make rules and regulations prescribing the procedures for submitting any return in electronic format and the requirements for an electronic or digital signature contemplated in subsection (7A).***"

The Minister made a rule in terms of this provision that a taxpayer's userID is deemed their electronic signature for the purposes of eFiling. This overrules the provision enabling advanced electronic signatures in terms of the ECT Act and requires a specific type of signature.

Therefore, you cannot use SigniFlow or any other electronic signature solution to sign a document in a scenario like this where the law specifies the type of signature.

Counts as law

The Interpretation Act 33 of 1957 is very old legislation that helps us work out whether something counts as law. We need to work out whether something counts as law to decide whether it is a law that requires signature.

Section 18 of the Interpretation Act says that "***In the interpretation of any Act of Parliament, government notice, government advertisement, ordinance, placaat, proclamation, regulation or by-law made under the authority of any law, rule of court, or any enactment having the force of law, which came into operation in the colony of the Cape of Good Hope prior to the thirty-first day of May, 1910, the following expressions shall [...] have the meanings hereby assigned to them [...]***"

We can work out from this very broad provision that law includes both:

- **primary legislation** – like proclamations, ordinances, and Acts; and
- **delegated legislation** – like regulations in terms of promulgated law and forms in regulations.

Therefore, you will need to use SigniFlow with an advanced electronic signature in the form of a digital certificate from an accredited certificate provider when primary or delegated legislation requires a signature.

Advanced electronic signature presumption

The major difference between the legal effect of an advanced electronic signature and an ordinary electronic signature is that there is an evidentiary presumption that applies to advanced electronic signatures and not to ordinary electronic signatures.

Section 13(4) of the ECT Act says that "***Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.***"

The important aspects of this provision are that:

- where a person **signs** something with an **advanced electronic signature**;
- it is deemed to be a **valid electronic signature**; and
- it is deemed to have been **applied properly**;
- unless someone **proves otherwise**.

This is in contrast with where a person signs something with an ordinary electronic signature, because it:

- is **not necessarily** a **valid** electronic signature; and
- has **not necessarily** been **applied properly**;
- but someone can **prove otherwise**.

Therefore, you can choose to use SigniFlow with an advanced electronic signature in the form of a digital certificate from an accredited certificate provider if you want to take advantage of this presumption. Otherwise, you can choose to use SigniFlow as is if you don't want to take advantage of this presumption.

Transaction types

Company administration

Company administration involves directors and shareholders signing documents necessary to run companies, including board resolutions, shareholders agreements, and share certificates.

Section 6(12)(a) of the Companies Act says that "***If a provision of this Act requires a document to be signed or initialed- [...] by or on behalf of a person, that signing or initialing may be effected in any manner provided for in the Electronic Communications and Transactions Act; [...]***'

This provision means that you can use an ordinary electronic signature or electronic consent to validly sign any of the documents regulated by the Companies Act.

Therefore, you can use SigniFlow for any company administration documents in South Africa.

Other transactions

SigniFlow can be used as an ordinary electronic signature whenever an ordinary electronic signature is sufficient in terms of South African law. It must be used together with a digital certificate provided by an accredited certification authority to create an advanced electronic signature whenever an advanced electronic signature is required in terms of South African law.

Suppliers easily verifiable proof of sign-a-identity, signer intent, and document integrity, which can be validated by anyone using widely available application such as any PDF Reader.

1.5 ELECTRONIC RESOLUTIONS

Section 60 refers to the shareholders having an ability to take various resolutions in writing. The section does not specifically talk about electronic or digital signatures it basically says that a resolution to be taken could be sent to all the shareholders who are entitled to vote and the shareholders have to exercise their vote within 20 business days. If there is sufficient support for the resolution then this resolution will be adopted either as an ordinarily resolution or as a special resolution.

It should be born in mind that resolution processed electronically will require a higher vote to pass.

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60. Shareholders acting other than at meeting.—(1) A resolution that could be voted on at a shareholders meeting may instead be—

      (*a*) submitted for consideration to the shareholders entitled to exercise voting rights in relation
      to the resolution; and

      (*b*) voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution within 20 business days after the resolution was submitted to them.

(2) A resolution contemplated in subsection (1)—

      (*a*) will have been adopted if it is supported by persons entitled to exercise sufficient voting
      rights for it to have been adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholders meeting; and

      (*b*) if adopted, has the same effect as if it had been approved by voting at a meeting.

(3) An election of a director that could be conducted at a shareholders meeting may instead be conducted by written polling of all of the shareholders entitled to exercise voting rights in relation to the election of that director.

(4) Within 10 business days after adopting a resolution, or conducting an election of directors, in terms of this section, the company must deliver a statement describing the results of the vote, consent
process, or election to every shareholder who was entitled to vote on or consent to the resolution, or vote in the election of the director, as the case may be.

(5) For greater certainty, any business of a company that is required by this Act or the company's Memorandum of Incorporation to be conducted at an annual general meeting of the company, may not be conducted in the manner contemplated in this section.