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# CORPORATE & COMMERCIAL ALERT

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### Latest episodes on electronic signatures and the risk associated therewith

Very often, the go-ahead on a transaction is dependent upon the provision of security by one of the parties, in favour of the other. One of the most common forms of security for the payment of monies is a suretyship granted by, for example, the shareholder of the paying party in favour of the receiving party.

## Latest episodes on electronic signatures and the risk associated therewith

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Now more than ever, parties are finding themselves negotiating and concluding transactions online. This includes the signing of the agreements governing these transactions, as well as the security documents ancillary, but pivotal, thereto: but are electronic signatures enough? The Supreme Court of Appeals cases of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA) and *Global & Local Investments Advisors (Pty) Ltd v Fouche* (71/2019) [2020] ZASCA 8 (18 March 2020) are important recent decisions with regard to the use of electronic signatures where the agreement provides for something, such as an amendment or notice, to be “in writing and signed” (and the old adage “context is everything” emerges when reading those cases together), however additional considerations apply when the law, as opposed to merely the agreement, requires a document to be in writing and signed.

When it comes to suretyships specifically, section 6 of the General Law of Amendment Act 50 of 1956, requires that for a suretyship to be valid, it must be (i) in writing and (ii) signed by, or on behalf of, the surety.

In *Massbuild Pty Ltd t/a Builders Express, Builders Warehouse and Builders Trade Depot v Tikon Construction CC and another* [2020] JOL 48548 (GJ) (unreported case number 6986/2017) (14 September 2020), the High Court considered whether a suretyship, which had been electronically signed, met the requirements for a valid suretyship.

Massbuild sold and delivered goods to Tikon on credit. Mr Robbertze, being the sole member of Tikon, allegedly stood surety for certain of the amounts owing by Tikon in respect thereof. Due to Tikon being in liquidation at the time of the trial, Massbuild pursued a claim against Mr Robbertze for the outstanding balance owing by Tikon.

Tikon’s financial manager and office administrator, Ms R, was responsible for, inter alia, completing forms on behalf of Tikon for purposes of having trading accounts opened with suppliers. Upon receipt of the credit application and suretyship from Massbuild in electronic form (PDF), Ms R claimed that she

## Latest episodes on electronic signatures and the risk associated therewith...continued

The suretyship in question was consequently held as invalid and unenforceable and the court dismissed Massbuild's claim against Mr Robbertze, with costs.

completed the form electronically, printed it and physically signed the form as witness, after which she scanned the form in and appended an electronically scanned copy of Mr Robbertze's signature thereto. Ms R had a standing authority to append Mr Robbertze's signature on behalf of Tikon as required in the ordinary course of business.

Mr Robbertze denied liability in respect of the suretyship on the basis that it had not met the requirements of a valid suretyship on account of it not having been signed with an advanced electronic signature in terms of section 13 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), as required in respect of data messages.

Section 13 of the ECTA provides that where a signature is required by law (as with suretyships) and such law does not specify the type of signature, such signature requirement, in respect of a data message, is only met if an "advanced electronic signature" is used. It therefore follows that where a suretyship is embodied in a data message, the signature must meet the requirements for an advanced electronic signature.

An advanced electronic signature is defined in the ECTA as an electronic signature which results from a process (or use of a product) which has been accredited, after meeting the prescribed requirements, by the Accreditation Authority as provided for in sections 37 and 38.

While Massbuild agreed that the suretyship lacked an advance electronic signature, it disputed whether the suretyship constituted a data message and therefore, the requirement for an advance electronic signature was irrelevant.

A data message is defined in the ECTA as data generated, sent, received or stored by electronic means.

The court held that, despite the fact that Ms R printed the electronic form suretyship and signed it in manuscript, creating an original, physical document, her signature was applied as witness only (to the fact that Mr Robbertze's signature was appended to the suretyship) and not on behalf of Mr Robbertze. Mr Robbertze's signature was appended to the scanned suretyship electronically, whereafter the suretyship was electronically transmitted to Massbuild. As such, it was held that Massbuild's argument that an original, physical version of the suretyship was created by Ms R's signature must fail and that the suretyship indeed constituted a data message, subject to the requirements of an advance electronic signature.

The suretyship in question was consequently held as invalid and unenforceable and the court dismissed Massbuild's claim against Mr Robbertze, with costs.

## Latest episodes on electronic signatures and the risk associated therewith...continued

It is vital to ensure that, when receiving security documents and other agreements which are required to be signed by law, such as suretyships, these documents, if signed electronically, are signed in the prescribed manner with an advance electronic signature, failing which, the rights granted thereunder will be invalid and unenforceable.

Along similar lines, in a judgment handed down a week later, *Aarifah Security Services CC v Jakoita Properties (Pty) Ltd and Others* (12994/18) [2020] ZAGPJHC 222 (21 September 2020), the above principle was confirmed in the context of an offer made by the beneficiary/grantee of a pre-emptive right in respect of immovable property, in exercising that pre-emptive right. Such an offer must comply with the formalities as laid down in the Alienation of Land Act 68 of 1981, and accordingly a special designated electronic signature is required in terms of the ECTA. It was held that a "normal" signature, such as one finds at

the foot of an email, whilst it might suffice for a formality requiring a signature laid down in contract (per *Spring Forest*), cannot suffice if the signature is required by statute.

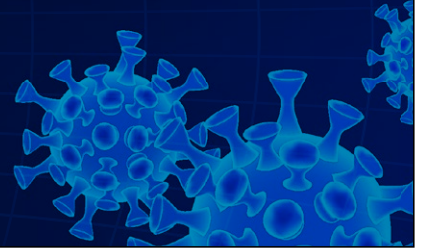
In conclusion, it is vital to ensure that, when receiving security documents and other agreements which are required to be signed by law, such as suretyships, these documents, if signed electronically, are signed in the prescribed manner with an advance electronic signature, failing which, the rights granted thereunder will be invalid and unenforceable.

*Antonia Pereira and Yaniv Kleitman*



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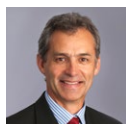
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## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Mmatiki Aphiri**  
Director  
T +27 (0)11 562 1087  
M +27 (0)83 497 3718  
E mmatiki.aphiri@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Vivien Chaplin**  
Director  
T +27 (0)11 562 1556  
M +27 (0)82 411 1305  
E vivien.chaplin@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Sector head  
Director  
Agriculture  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
M +27 (0)82 466 4443  
E werner.dewaal@cdhlegal.com

**Emma Dempster**  
Director  
T +27 (0)11 562 1194  
M +27 (0)79 491 7683  
E emma.dempster@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Sector head  
Director  
Private Equity  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Jay Govender**  
Sector Head  
Director  
Projects & Energy  
T +27 (0)11 562 1387  
M +27 (0)82 467 7981  
E jay.govender@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Peter Hesselting**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesselting@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Kendall Keanly**  
Director  
T +27 (0)21 481 6411  
M +27 (0)83 645 5044  
E kendall.keanly@cdhlegal.com

**Rachel Kelly**  
Director  
T +27 (0)11 562 1165  
M +27 (0)82 788 0367  
E rachel.kelly@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Justine Krige**  
Director  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E justine.krige@cdhlegal.com

**Johan Latsky**  
Executive Consultant  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E johan.latsky@cdhlegal.com

**Giada Masina**  
Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E giada.masina@cdhlegal.com

**Nkcubeko Mbambisa**  
Director  
T +27 (0)21 481 6352  
M +27 (0)82 058 4268  
E nkcubeko.mbambisa@cdhlegal.com

**Nonhla Mchunu**  
Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E nonhla.mchunu@cdhlegal.com

**Ayanda Mhlongo**  
Director  
T +27 (0)21 481 6436  
M +27 (0)82 787 9543  
E ayanda.mhlongo@cdhlegal.com

**William Midgley**  
Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E william.midgley@cdhlegal.com

**Tessmerica Moodley**  
Director  
T +27 (0)21 481 6397  
M +27 (0)73 401 2488  
E tessmerica.moodley@cdhlegal.com

**Anita Moolman**  
Director  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E anita.moolman@cdhlegal.com

**Jerain Naidoo**  
Director  
T +27 (0)11 562 1214  
M +27 (0)82 788 5533  
E jerain.naidoo@cdhlegal.com



CLIFFE DEKKER HOFMEYR

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

### Francis Newham

Executive Consultant  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E francis.newham@cdhlegal.com

### Gasant Orrie

Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E gasant.orrie@cdhlegal.com

### Verushca Pillay

Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E verushca.pillay@cdhlegal.com

### David Pinnock

Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E david.pinnock@cdhlegal.com

### Allan Reid

Sector head  
Director  
Mining & Minerals  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E allan.reid@cdhlegal.com

### Megan Rodgers

Sector Head  
Director  
Oil & Gas  
T +27 (0)21 481 6429  
M +27 (0)79 877 8870  
E megan.rodgers@cdhlegal.com

### Ludwig Smith

Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E ludwig.smith@cdhlegal.com

### Ben Strauss

Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E ben.strauss@cdhlegal.com

### Tamarin Tosen

Director  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E tamarin.tosen@cdhlegal.com

### Roxanna Valayathum

Director  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E roxanna.valayathum@cdhlegal.com

### Roux van der Merwe

Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E roux.vandermerwe@cdhlegal.com

### Chart Williams

Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E chart.williams@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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