

# Lockdown shows e-signature laws are out of date

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If there is one thing that the national lockdown has highlighted, it is the need for South African law to recognise electronic signatures to authenticate important legal documents such as last wills and testaments.



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With millions of South Africans stuck indoors and encouraged to practise social distancing to help flatten the curve of the coronavirus contagion by staying at home for the foreseeable future, the rigidity of our laws around e-signatures has come into sharp focus.

What happens if someone passes away during the next few weeks without a valid and up-to-date will purely because of physical restrictions? Death doesn't wait for a pandemic to pass, on the contrary it highlights our limited time.

E-signatures offer an advanced technical solution to many of these challenges as they are made with particular digital software and provide a date and time stamp to enable advisors, fiduciary services companies, regulators or the courts to verify their authenticity.

Yet, while e-signatures are recognised by the Electronic Communications and Transactions Act (ECTA) instituted in 2002 as verification of a range of legal documents, such as employment contracts, short-term real estate documents, personal and commercial agreements, last wills and testaments are excluded and may not be verified using an e-signature under this

law.

At face value, this may seem as a way to protect the testator or testatrix from potential fraud. The argument goes that disgruntled family members may change a will to benefit themselves, without the testator's knowledge, for example, and simply attach an electronic signature to a fraudulently amended document. For this reason, wills must contain wet signatures, not only of the testator or testatrix, but also of two independent witnesses.

In the age of coronavirus, however, this is an outdated approach. Fraud still happens when using a paper-based approach with a wet signature – as the high number of contested wills that end up in court show.

## **Advanced technology**

In addition, technology has become so advanced that it is possible to add additional layers of accreditation to ensure the validity of an e-signature. For example, advanced electronic signatures (AES) are standard e-signatures that have been verified by an accredited authority. These include digital identification software to protect the signature from any change in the data or the data message in the document. An AES is also based on the face-to-face identification of the signatory and can be created under their sole control.

With only 25% of South Africans having a valid will in place, shouldn't we be trying to make the process of drafting, updating and verifying a will simpler and easier?

Instead, they need to try to find new ways of putting physical pen to paper under extremely difficult circumstances. Of course, there are ways around it – but it seems ludicrous, for example, to ask clients to seek out two shop tellers at their local grocery store to witness their wills and request a courier to deliver an original signed copy.

We are appealing to institutes and regulators in the fiduciary industry to address the rigidity of the laws governing e-signatures on last wills and testaments. This could be easily accomplished through a national order allowing for the digital signatures during Covid-19 lockdown and the period directly afterwards. This should be something to consider for the long-term too.

By harnessing technology and legally recognising e-signatures as a way to validate last wills and testaments, regulators could make it easier for more South Africans to provide financial security to their families, protect their legacies and plan for their futures in a very uncertain time.

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