

REPUBLIC OF SOUTH AFRICA

**PORTFOLIO COMMITTEE AMENDMENTS
TO
ELECTRONIC COMMUNICATIONS
AND TRANSACTIONS BILL**

[B 8—2002]

*(As agreed to by the Portfolio Committee on Communications
(National Assembly))*

[B 8A—2002]

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AMENDMENTS AGREED TO**ELECTRONIC COMMUNICATIONS AND TRANSACTIONS BILL
[B 8—2002]**

CLAUSE 1

1. On page 6, in line 23, after “the” to insert “Accreditation”.
2. On page 6, from line 25, to omit the definition of “Authority” and to substitute:

“Authority” means the .za Domain Name Authority;
3. On page 6, in line 38, to omit “top level domain in” and to insert “domain at”.
4. On page 6, in line 38, to omit “global” and to insert “Internet’s”.
5. On page 6, in line 55, to omit “retracted” and to insert “extracted”.
6. On page 7, in line 29, to omit paragraph (b).
7. On page 7, in line 37, after “address” to insert “or other resource”.
8. On page 7, in line 39, after “addresses” to insert “or other information”.
9. On page 7, in line 42, to omit the definition of “electronic”.
10. On page 7, in line 58, after “California” to insert “in the United States of America”.
11. On page 7, from line 60, to omit “and WAP communications”.
12. On page 8, in line 7, to omit “an” and to substitute “the”.
13. On page 8, in line 8, to omit “via” and to substitute “using the”.
14. On page 8, from line 9, to omit the definition of “IP address” and to substitute:

“IP address” means the number identifying the point of connection of a computer or other device to the Internet;
15. On page 9, in line 3, to omit “or subdomains”.
16. On page 9, in line 4, to omit “signifying a category or type of domain name”.
17. On page 9, in line 11, to omit “the” and to substitute “a”.
18. On page 9, in line 24, to omit “computer” and to substitute “location”.
19. On page 9, from line 26, to omit the definition of “World Wide Web” and to substitute:

“World Wide Web” means an information browsing framework that allows a user to locate and access information stored on a remote computer and to follow references from one computer to related information on another computer;

CLAUSE 2

1. On page 9, in line 32, after “electronic” to insert “communications and”.
2. On page 9, in line 34, to omit “to” and to substitute “for”.
3. On page 9, in line 34, to omit “future”.
4. On page 9, in line 36, after “access” to insert “primarily in underserved areas”.
5. On page 9, in line 39, after “electronic” to insert “communications and”.
6. On page 9, in line 40, after “electronic” to insert “communications and”.
7. On page 9, in line 41, after “electronic” to insert “communications and”.
8. On page 9, in line 43, after “electronic” to insert “communications and”.
9. On page 9, in line 44, to omit “and”.
10. On page 9, in line 44, after “institutions” to insert “and citizens”.
11. On page 9, in line 56, after “accepted” to insert “International”.
12. On page 9, in line 57, after “electronic” to insert “communications and”.

CLAUSE 4

1. On page 10, after line 20, to add:

(5) This Act does not limit the operation of any law that expressly authorises, prohibits or regulates the use of data messages, including any requirement by or under a law for information to be posted or displayed in a specified manner, or for any information or document to be transmitted by a specified method.

CLAUSE 5

1. On page 10, in line 27, to omit “five” and to substitute “three”.
2. On page 10, in line 35, to omit “and obligations”.
3. On page 11, after line 40, to add:

(11) The Minister must table an annual report in Parliament regarding the progress made in the implementation of the national e-strategy.

CLAUSE 10

1. On page 13, after line 5, to omit subsection (4) and to substitute:

(4) In implementing this Chapter, the Minister must encourage the development of innovative information systems and the growth of related industry.

CLAUSE 13

1. On page 13, in line 32, after “law” to insert:

and such law does not specify the type of signature
2. On page 13, in line 47, to omit subsection (5) and to substitute:

(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 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.

CLAUSE 15

1. On page 14, after line 28, to add:

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

CLAUSE 18

1. On page 15, after line 10, to add:

(3) Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of an advanced electronic signature.

CLAUSE 19

1. On page 15, after line 19, to add:

(3) Where a seal is required by law to be affixed to a document and such law does not prescribe the method or form by which such document may be sealed by electronic means, that requirement is met if the document indicates that it is required to be under seal and it includes the advanced electronic signature of the person by whom it is required to be sealed.

(4) Where any law requires or permits a person to send a document or information by registered or certified post or similar service, that requirement is met if an electronic copy of the document or information is sent to the South African Post Office Limited, is registered by the said Post Office and sent by that Post Office to the electronic address provided by the sender.

CLAUSE 20

Clause rejected.

CLAUSE 21

1. On page 15, in line 32, after “(d)” to insert “presumed to be”.
2. On page 15, from line 34, to omit paragraph (d) and to substitute:
 - (d) A party interacting with an electronic agent to form an agreement is not bound by the terms of the agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation.

CLAUSE 24

1. On page 16, in line 24, after “business” to insert “or residence”.
2. On page 16, in line 25, after “business” to insert “or residence”.

CLAUSE 26

1. On page 16, in line 39, after “automatically” to insert:

unless it is proved that the information system did not properly execute such programming

CLAUSE 29

1. On page 17, in line 24, after “message” to add:

or that such authentication service provider must be a preferred authentication service provider
2. On page 17, after line 27, to add:
 - (2) For the purposes of subsection (1)(d) the South African Post Office Limited is a preferred authentication service provider and the Minister may designate any other authentication service provider as a preferred authentication service provider based on such authentication service provider’s obligations in respect of the provision of universal access.

CLAUSE 34

1. On page 18, in line 32, before “Authority” to insert “Accreditation”.

CLAUSE 35

1. On page 18, in line 33, in the heading, after “of” to insert “Accreditation”.
2. On page 18, in line 35, before “Authority” to insert “Accreditation”.
3. On page 18, in line 36, after “The” to insert “Accreditation”.
4. On page 18, in line 37, after “Deputy” to insert “Accreditation”.

CLAUSE 37

1. On page 18, in line 41, in the heading, after “of” to insert “Accreditation”.

2. On page 18, in line 42, after “The” to insert “Accreditation”.
3. On page 19, in line 4, after “The” to insert “Accreditation”.

CLAUSE 38

1. On page 19, in line 12, after “The” to insert “Accreditation”.
2. On page 19, in line 15, before “Authority” to insert “Accreditation”.
3. On page 19, in line 18, after “the” to insert “Accreditation”.

CLAUSE 39

1. On page 19, in line 21, after “The” to insert “Accreditation”.
2. On page 19, in line 22, before “Authority” to insert “Accreditation”.
3. On page 19, after line 29, to insert:

(e) is based on the face-to-face identification of the user.
4. On page 19, in line 30, before “Authority” to insert “Accreditation”.
5. On page 19, in line 49, after “the” to insert “Accreditation”.
6. On page 20, in line 5, after “The” to insert “Accreditation”.

CLAUSE 40

1. On page 20, in line 8, after “The” to insert “Accreditation”.
2. On page 20, in line 12, before “Authority” to insert “Accreditation”.
3. On page 20, in line 21, after “The” to insert “Accreditation”.

CLAUSE 42

1. On page 20, in line 41, after “the” to insert “Accreditation”.

CLAUSE 43

1. On page 21, in line 19, to omit “and magazines” and to substitute “, magazines and books”.
2. On page 21, after line 23, to add:

(3) This Chapter does not apply to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions in respect of electronic transactions.

CLAUSE 46

1. On page 22, after line 37, to add:

(3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

(4) Any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

CLAUSE 55

1. On page 24, in line 20, after “database” to insert:
excluding the contents of such critical database

CHAPTER X

Chapter rejected.

NEW CHAPTER

1. That the following be a new Chapter X:

CHAPTER X

DOMAIN NAME AUTHORITY AND ADMINISTRATION

Part 1

Establishment and incorporation of .za domain name authority

Establishment of Authority

59. A juristic person to be known as the .za Domain Name Authority is hereby established for the purpose of assuming responsibility for the .za domain name space as from a date determined by the Minister by notice in the *Gazette* and by notifying all relevant authorities.

Incorporation of Authority

60. (1) The Minister must, within 12 months of the date of commencement of this Act, take all steps necessary for the incorporation of the Authority as a company contemplated in section 21(1) of the Companies Act, 1973 (Act No. 61 of 1973).

(2) All citizens and permanent residents of the Republic are eligible for membership of the Authority and must be registered as members upon application and on payment of a nominal fee to cover the cost of registration of membership and without having to comply with any formality.

(3) For the purpose of the incorporation of the Authority a person representing the Minister and the members of Namespace ZA as at the date of application for incorporation must be deemed to be members of the Authority.

Authority’s memorandum and articles of association

61. (1) The memorandum of association and articles of association of the Authority must be consistent with this Chapter and, except

where this Chapter provides to the contrary, also with the Companies Act, 1973 (Act No. 61 of 1973).

(2) Notwithstanding the Companies Act, 1973, an amendment to the memorandum of association or articles of association affecting any arrangement made by any provision of this Chapter, does not have any legal force and effect unless the Minister has consented in writing to such an amendment, which consent may not be withheld unreasonably.

(3) No fee is payable in terms of the Companies Act, 1973, in respect of the reservation of the name of the company, the registration of the said memorandum and articles and the issue of the certificate to commence business.

(4) The memorandum and articles of association of the Authority must, amongst others, provide for—

- (a) the rules for the convening and conducting of meetings of the Board, including the quorum required for and the minutes to be kept of those meetings;
- (b) the manner in which decisions are to be made;
- (c) the establishment of any division of the Authority to perform specialised functions;
- (d) the establishment and functioning of committees, including a management committee;
- (e) the co-opting by the Board or a committee of any person to assist the Authority or committee in the consideration of any particular matter;
- (f) the preparation by the Board of an annual business plan in terms of which the activities of the Authority are planned annually;
- (g) the banking and investment of funds by the Board;
- (h) provisions to regulate the manner in which, and procedures whereby, expertise from any person is obtained in order to further the objects of the Authority;
- (i) the determination through arbitration of any dispute concerning the interpretation of the memorandum and articles of association of the Authority;
- (j) the delegation of powers and assignment of duties to directors, committees and employees: Provided that the Board may—
 - (i) not be divested of any power or duty by virtue of the delegation or assignment; and
 - (ii) vary or set aside any decision made under any delegation or in terms of any assignment;
- (k) the procedures and criteria for the establishment and disestablishment of second level domains and for delegations to such domains;
- (l) appeal mechanisms;
- (m) the tenure of directors;
- (n) the circumstances under and the manner in which a directorship is terminated;
- (o) criteria for the disqualification of directors;
- (p) the method of determining the allowances to be paid to directors for attending meetings; and
- (q) the powers and duties of directors.

Part 2

Governance and staffing of Authority

Board of directors of Authority

62. (1) The Authority is managed and controlled by a Board of Directors consisting of nine directors, one of whom is the chairperson.

- (2) The process of appointment is the following:
- (a) The Minister must appoint an independent selection panel consisting of five persons, who command public respect for their fair-mindedness, wisdom and understanding of issues concerning the Internet, culture, language, academia and business, the names of whom must be placed in a notice in the *Gazette*;
 - (b) the Minister must invite nominations for members of the Board from the public through newspapers which have general circulation throughout the Republic, on-line news services, radio and by notice in the *Gazette*;
 - (c) nominations must be made to the panel established in terms of paragraph (a);
 - (d) the panel must recommend to the Minister names of nine persons to be appointed to the Board taking into account the sectors of stakeholders listed in subsection (3)(b);
 - (e) if the Minister is not satisfied that the recommendations of the panel comply with subsection (3) the Minister may request the panel to review its recommendations and make new ones;
 - (f) the Minister must appoint the members of the Board, and publish the names of those appointed in the *Gazette*;
 - (g) the Minister must appoint the Chairperson of the Board from among the names recommended by the panel.
- (3) (a) The Board, when viewed collectively, must be broadly representative of the demographics of the country, including having regard to gender and disability.
- (b) Sectors of stakeholders contemplated in subsection (2)(d) are—
- (i) The existing Domain Name community;
 - (ii) Academic and legal sectors;
 - (iii) Science, technology and engineering sectors;
 - (iv) Labour;
 - (v) Business and the private sector;
 - (vi) Culture and language;
 - (vii) Public sector;
 - (viii) Internet user community.
- (4) Directors must be persons who are committed to fairness, openness and accountability and to the objects of this Act.
- (5) All directors serve in a part-time and non-executive capacity.
- (6) Any vacancy on the Board must be filled in accordance with subsections (2) and (3).

Staff of Authority

- 63.** (1) The chief executive officer of the Authority appointed by the Board must perform any work incidental to the functions of the Authority.
- (2) The chief executive officer must be assisted by staff appointed by the Board.
- (3) The Board must determine the conditions of service, remuneration and service benefits of the chief executive officer and the staff.
- (4) If the chief executive officer is for any reason unable to perform his or her functions, the Board may designate a person in the service of the Authority to act as the acting chief executive officer until the chief executive officer is able to resume office.

Part 3

Functions of Authority

Licensing of registrars and registries

64. (1) No person may update a repository or administer a second level domain unless such person is licensed to do so by the Authority.

(2) An application to be licensed as a registrar or registry must be made in the prescribed manner and subject to the prescribed fees.

(3) The Authority must apply the prescribed conditions and criteria when evaluating an application referred to in subsection (2).

Functions of Authority

65. (1) The Authority must—

- (a) administer and manage the .za domain name space;
- (b) comply with international best practice in the administration of the .za domain name space;
- (c) license and regulate registries;
- (d) license and regulate registrars for the respective registries; and
- (e) publish guidelines on—
 - (i) the general administration and management of the .za domain name space;
 - (ii) the requirements and procedures for domain name registration; and
 - (iii) the maintenance of and public access to a repository, with due regard to the policy directives which the Minister may make from time to time by notice in the *Gazette*.

(2) The Authority must enhance public awareness on the economic and commercial benefits of domain name registration.

(3) The Authority—

- (a) may conduct such investigations as it may consider necessary;
- (b) must conduct research into and keep abreast of developments in the Republic and elsewhere on the domain name system;
- (c) must continually survey and evaluate the extent to which the .za domain name space meets the needs of the citizens of the Republic; and
- (d) may, from time to time, issue information on the registration of domain names in the Republic.

(4) The Authority may, and must when so requested by the Minister, make recommendations to the Minister in relation to policy on any matter relating to the .za domain name space.

(5) The Authority must continually evaluate the effectiveness of this Act and things done in terms thereof towards the management of the .za domain name space.

(6) The Authority may—

- (a) liaise, consult and co-operate with any person or other authority; and
- (b) appoint experts and other consultants on such conditions as the Authority may determine.

(7) The Authority must respect and uphold the vested rights and interests of parties that were actively involved in the management and administration of the .za domain name space at the date of its establishment: Provided that—

- (a) such parties must be granted a period of six months during which they may continue to operate in respect of their existing delegated sub-domains; and
- (b) after the expiry of the six-month period, such parties must duly apply to be licensed registrars and registries as provided for in this Part.

Part 4

Finances and reporting

Finances of Authority

66. (1) All money received by the Authority must be deposited in a banking account in the name of the Authority with a bank established under the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank established under the Mutual Banks Act, 1993 (Act No. 124 of 1993).

(2) The chief executive officer is the accounting officer of the Authority and must ensure that—

- (a) proper record of all the financial transactions, assets and liabilities of the Authority are kept; and
- (b) as soon as possible, but not later than three months after the end of a financial year, accounts reflecting the income and expenditure of the Authority and a balance sheet of the assets and liabilities of the Authority as at the end of that financial year are prepared and submitted to the Board and Minister.

(3) The Authority is funded from—

- (a) the capital invested in or lent to the Authority;
- (b) money appropriated by Parliament for that purpose;
- (c) income derived from the sale or other commercial exploitation of its licenses, approvals, products, technology, services or expertise in terms of this Act;
- (d) loans raised by the Authority;
- (e) the proceeds of any sale of assets;
- (f) income or interest earned on the Authority's cash balances or on money invested by it; and
- (g) money received by way of grant, contribution, donation or inheritance from any source inside or outside the Republic.

(4) The funds of the Authority must be utilised to meet the expenditure incurred by the Authority in connection with its functioning, business and operations in terms of this Act.

(5) (a) The money may be so utilised only as provided for in a statement of the Authority's estimated income and expenditure, that has been approved by the Minister.

(b) Money received by way of grant, contribution, donation or inheritance in terms of subsection (3)(g), must be utilised in accordance with any conditions imposed by the grantor, contributor, donor or testator concerned.

(6) (a) The Board must in each financial year, at a time determined by the Minister, submit to the Minister for approval a statement of the Authority's estimated income and expenditure for the next financial year.

(b) The Board may at any time during the course of a financial year, submit a supplementary statement of estimated income and expenditure of the Authority for that financial year, to the Minister for approval.

(c) The Minister may grant the approval of the statement referred to in paragraph (a), with the agreement of the Minister of Finance.

(d) The Authority may not incur any expenditure in excess of the total amount approved under paragraph (c).

(7) The Board may establish a reserve fund for any purpose that is connected with the Authority's functions under this Act and has been approved by the Minister, and may allocate to the reserve fund the money that may be made available for the purposes in the statement of estimated income and expenditure or supplementary statement contemplated in subsection (6).

(8) To the extent that the Authority is provided with start-up capital by the State, the Authority may, at the election of the Minister of Finance, be made subject to the Public Finance Management Act,

(Act No. 1 of 1999), until such time as the Authority, to the satisfaction of the Minister of Finance, becomes self-sustaining through the alternative sources of revenue provided for in subsection (3).

Reports

67. As soon as practicable after the end of every financial year, the Board must submit a report on its activities during that year to the Minister who must table that report in Parliament.

Part 5

Regulations

Regulations regarding Authority

68. The Authority may, with the approval of the Minister, make regulations regarding—

- (a) the requirements which registries and registrars must meet in order to be licensed, including objective standards relating to operational accuracy, stability, robustness and efficiency;
- (b) the circumstances and manner in which registrations may be assigned, registered, renewed, refused, or revoked by the registries with due regard to the express recognition of the right of groups and members of groups within the Republic to identify with, use or communicate cultural, linguistic, geographical, indigenous or any other expressions of heritage including any visual or audible elements or attributes thereof;
- (c) pricing policy;
- (d) provisions for the restoration of a domain name registration and penalties for late payments;
- (e) the terms of the domain name registration agreement which registries and registrars must adopt and use in registering domain names, including issues in respect of privacy, consumer protection and alternative dispute resolution;
- (f) processes and procedures to avoid unfair and anti-competitive practices, including bias to, or preferential treatment of actual or prospective registrants, registries or registrars, protocols or products;
- (g) requirements to ensure that each domain name contains an administrative and technical contact;
- (h) the creation of new sub-domains;
- (i) procedures for ensuring monitoring of compliance with the provisions of this Act and the regulations provided for in this Chapter, including regular .za domain name space technical audits;
- (j) such other matters relating to the .za domain name space as it may be necessary to prescribe to achieve the objectives of this Chapter; and
- (k) policy to be applied by the Authority.

Part 6

Alternative dispute resolution

Alternative dispute resolution

69. (1) The Minister, in consultation with the Minister of Trade and Industry, must make regulations for an alternative mechanism

for the resolution of disputes in respect of the .za domain name space.

(2) The regulations must be made with due regard to existing international precedent.

(3) The regulations may prescribe—

- (a) procedures for the resolution of certain types of disputes determined in the regulations and which relate to a domain name registration;
- (b) the role which the Authority must fulfil in administering the dispute resolution procedure;
- (c) the appointment, role and function of dispute resolution adjudicators;
- (d) the procedure and rules which must be followed in adjudicating disputes;
- (e) unlawful actions or activities in respect of domain names, distinguishing between criminal and civil liability;
- (f) measures to prevent unlawful actions or activities with respect to domain names;
- (g) the manner, costs of and time within which a determination must be made;
- (h) the implementation of determinations made in terms of the dispute resolution procedure;
- (i) the limitation of liability of registrars and registries for implementing a determination; and
- (j) the enforcement and publication of determinations.

CLAUSE 81

1. On page 32, after line 33, to omit paragraph (i) and to substitute:

(2) Any person who lodges a notification of unlawful activity with a service provider knowing that it materially misrepresents the facts is liable for damages for wrongful take-down.

(3) A service provider is not liable for wrongful take-down in response to a notification.

CLAUSE 82

1. On page 32, in line 38, to omit “a”.

CLAUSE 83

1. On page 32, after line 54, to insert:

(d) any right to limitation of liability based on the common law or the Constitution.

CLAUSE 87

1. On page 34, in line 33, to omit “court” and to substitute “magistrate or judge”.
2. On page 34, in line 36, to omit “court” and to substitute “magistrate or judge”.

CLAUSE 90

1. On page 35, in line 20, after “program” to insert “or a component”.

CLAUSE 93

1. On page 35, in line 47, to omit “33(2)” and to substitute “37(3)”.

NEW CLAUSE

1. That the following be a new Clause:

Repeal of Act 57 of 1983

- 92.** The Computer Evidence Act, 1983, is hereby repealed.

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