

ARTICLE:

THE MOVING FINGER: SMS, ON-LINE COMMUNICATION AND ON-LINE DISINHIBITION

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*The Moving Finger writes; and, having writ,
Moves on: nor all thy Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all thy Tears wash out a Word of it.¹*

An SMS (Short Message Service) is a data message and, where legislation allows a data message to qualify as writing, an SMS will usually satisfy this requirement. Those who send SMSs and use other forms of on-line communication may, however, suffer from what psychologists refer to as on-line disinhibition – a state in which they behave impulsively with a diminished appreciation of the consequences of their behaviour. This paper looks at SMSs and on-line disinhibition and at how the law governing on-line transactions can protect those subject to on-line disinhibition. It points out that no similar protection is available to those who send defamatory or criminal messages. In these cases the only protection is to ensure users are aware of the dangers of on-line disinhibition.

SMS is a convenient and affordable way to communicate. Any modern mobile telephone can send and receive an SMS and, while the cost of sending an SMS varies from country to country, there is usually a fixed charge per SMS which makes it easier to keep

track of the cost. Smartphones allow for more sophisticated forms of text-based communication but, for ordinary users, SMS is the norm and likely to become even more popular.²

According to the definition in article 2 of the UNCITRAL Model Law on Electronic Commerce (the Model Law),³ an SMS is a data message and so, according to article 6 of the Model Law, it will satisfy a legal requirement of writing in the law of the many countries that have based their legislation on the Model Law.⁴ It may be asked, however, whether a means of communication limited to 140 8-bit characters (including spaces) and, for that reason, often relying on abbreviations and emoticons to convey its meaning, is suited to take the place of a written document when legislation requires one.

In 2010 Van Niekerk J dealt with this question in *Sihlali v South African Broadcasting Corporation Ltd*, a case that came before the South African Labour Court.⁵ The facts of the case give an insight into the way many, including lawyers, use SMS. The applicant, Mafika Sihlali, had been a legal practitioner and, at the time he sent the SMS in question, was legal adviser to the South African Broadcasting Corporation. Sihlali had been looking into possible breaches of their statutory duties by senior officials of the Corporation when the Corporation's internal audit department questioned the legality of some of his own conduct. This led to a series of events, including a story in a national newspaper that culminated in Sihlali being suspended so that a disciplinary enquiry

1 *Rubāiyāt of Omar Khayyām (1048–1131)*, translated by Edward FitzGerald (1809–1883).

2 'Short messages, big profits' *digital.life ITU Internet Report (International Telecommunications Union, 2006)*, Box 3.2, 71, available at <http://www.itu.int/osg/spu/publications/digitalife/>

<docs/digital-life-web.pdf>.

3 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998.

4 For a list of these countries, see http://www.uncitral.org/uncitral/en/uncitral_texts/

electronic_commerce/1996Model_status.html.

5 *Sihlali v South African Broadcasting Corporation Ltd (1700/08)* [2010] ZALC 1; (2010) 31 ILJ 1477 (LC); [2010] 5 BLLR 542 (LC) (14 January 2010).

could be held. The Corporation issued a press statement announcing the suspension, and broadcast the news on national radio. When he heard the announcement, Sihlali sent an SMS to Dali Mpfu, the Director General of the Corporation, stating that he 'quit with immediate effect'. Mpfu replied to this SMS with a letter accepting Sihlali's resignation and wishing him 'luck in your future endeavours'. This letter did not reach Sihlali until after he had attempted to revoke his resignation.

Six weeks after he had sent the SMS, Sihlali decided that to clear his name he should, rather than resign, remain in his post and allow the disciplinary inquiry to go ahead. He sent an e-mail to Mpfu writing: '(M)y contract still subsists. You should proceed with your disciplinary charges within the next 14 days. Otherwise I will take it as repudiated.' In reply the Corporation forwarded Sihlali the letter from Mpfu accepting his resignation.

Asked whether, after he had sent the e-mail withdrawing his SMS resignation, Sihlali was still employed by the Corporation, Van Niekerk J decided the resignation stood. He held that resigning from a job by sending an SMS was resignation in writing for the purposes of the Basic Conditions of Employment Act, Act 75 of 1997. Section 37(4)(a) of that Act requires that '(n)otice of termination of a contract of employment must be given in writing, except when it is given by an illiterate employee.' In coming to this decision Van Niekerk J relied on section 12 of the Electronic Communications and Transactions Act, Act 25 of 2002 (the ECT Act) which provides: 'A requirement in law that a document or information must be in writing is met if the document or information is (a) in the form of a data message; and (b) accessible in a manner usable for subsequent reference.' Section 12 is based on article 6(1) of the Model Law, so the decision by Van Niekerk J will be of interest to lawyers in other countries that have followed the Model Law. Of interest to labour lawyers was the decision by Van Niekerk J that for an employee's resignation to be effective, it is not necessary for an employer to notify the employee that the resignation has been accepted.

An interesting part of the judgment is Van Niekerk J's analysis of whether Sihlali had the capacity to

resign, at paragraph 15:

'To the extent that the applicant testified that he made the decision to terminate his employment in stressful circumstances and in an angry response to his suspension, the applicant did not claim that he was incapable of appreciating what he was doing, or the consequences of his actions. On the contrary, his testimony was that when he sent the sms, he intended to resign but that some six weeks later he regretted the decision. In the e-mail subsequently addressed to Mpfu, the applicant contended that his contract remained in existence not on account of any diminished capacity at the time he sent the sms, but because after a lengthy period of reflection he considered his continued employment a means to the end of his restored reputation. However noble this motive may be, it cannot in law serve as a basis to resurrect the applicant's contract of employment some six weeks after its termination in circumstances where the demise of the contract was brought about by his applicant's voluntary and deliberate conduct.'

Without wanting to challenge Van Niekerk J's finding that Sihlali did have the necessary capacity, the case does raise the general question of the legal status of SMSs. There are two grounds for questioning whether an SMS should satisfy the legal requirement of writing. One, already mentioned, is the abbreviated nature of an SMS. The other is that an SMS is a form of communication in which a sender may be acting with diminished capacity as a result of what psychologists refer to as on-line disinhibition.

Disinhibition is a term psychologists use to describe a condition in which someone behaves impulsively with a diminished appreciation of the consequences of his or her behaviour. Disinhibition is associated with certain forms of brain damage and borderline personality and conduct disorders.⁶

On-line disinhibition is a form of disinhibition not caused by drugs or alcohol or personality disorder but by the peculiar features of on-line communication. The most important of these features is the way on-line communication isolates the individual who is communicating and cuts him or her off from the

⁶ Robert F. Leeman, Ph.D., Jon E. Grant, J.D., M.D., M.P.H., and Marc N. Potenza, M.D., Ph.D., 'Behavioral and Neurological Foundations for the Moral and Legal Implications of Intoxication, Addictive Behaviors and Disinhibition' 27(2) *Behavioral Sciences & the Law*, (2009), 237-259.

⁷ John Suler, 'The on-line disinhibition effect', *CyberPsychology & Behavior*, June 2004, 7(3): 321-326; John R. Suler, 'The on-line clinical case study group: an e-mail model', *CyberPsychology & Behavior*, December 2001, 4(6): 711-722.

reactions of the person or group to whom the communication is directed. John Suler distinguished six characteristics of on-line communication which, he argues, lead to on-line disinhibition.⁷ These characteristics are that it gives someone who sends messages a sense of being anonymous and invisible, that the intermittent nature of on-line communication cuts the sender off from feedback, that the receiver of a message is likely to interpret it in the context of his or her own imaginary and invisible world and, finally, that the apparently private nature of on-line communication creates the impression that no sanction will attach to sending a message. This would explain why, while people usually react cautiously when asked to write a letter or sign a document, they often behave differently when they send an e-mail or post a message on an internet forum or chat group.

It took time before there was formal recognition of this sort of behaviour. As early as 1984 Kiesler and others published a paper looking into the peculiar features of simultaneous computer-linked communication and e-mail and called for more research in this area.⁸ Some years later, Adam Joinson drew attention to what he called disinhibition on the internet.⁹ More recently, as already mentioned,¹⁰ John Suler called this form of behaviour on-line disinhibition. Suler has published his work in a hypertext book 'The Psychology of Cyberspace'¹¹ and his ideas about on-line disinhibition are now widespread.¹²

The academic discussion of on-line disinhibition refers to e-mail and internet posting. SMS differs from these in that it uses telecommunications protocols rather than internet protocols (although there is technology that allows messages to pass between the two). The similarities between SMS and internet communication, however, are more important than the differences. As with e-mail and internet posting, an SMS sender uses a keyboard or keypad to communicate. There is no direct contact between the sender and the recipient of an SMS and this opens the

door to on-line disinhibition.

When dealing with contractual capacity and consent, a person who consents either has or does not have capacity and, depending on this, a contract to which that person consents will be valid or void. There are also situations where a contract is voidable because consent was obtained by duress or undue influence.¹³ On-line disinhibition, as described by Joinson and Suler, will rarely be sufficient to deprive a person of contractual capacity or satisfy the requirements for a voidable contract. It may, however, lead to individuals making commitments they subsequently regret. The question is whether it is possible to prevent a person being prejudiced by a decision made when he or she is subject to on-line disinhibition.

The Model Law makes no direct reference to the possibility of on-line disinhibition. Paragraph 48 of the Guide to Enactment of the Model Law (the Guide) does, however, note that one of the purposes of a legal requirement of writing is 'to help the parties be aware of the consequences of their entering into a contract' and it is a failure to appreciate the consequences of sending a data message that is an important characteristic of on-line disinhibition. To allow for cases where a data message does not adequately satisfy all the purposes of writing, article 6(3) of the Model Law envisages domestic legislation making exceptions to the general rule that a data message satisfies the legal requirement of writing. There are different ways of doing this.

In South Africa, section 4 (read with Schedules 1 and 2) of the ECT Act says that the Act, including the provision that a data message satisfies the requirement of writing, does not apply to contracts for the sale of land, executing a bill of exchange and making a will.¹⁴ Section 4 (5) allows for other exceptions but only in cases where the law 'expressly authorises, prohibits or regulates the use of data messages'. The strict wording of section 4(5) would have precluded Van Niekerk J from holding that an

8 S. Kiesler, J. Siegel and T. W. McGuire, 'Social psychological aspects of computer-mediated communication', 39 (1984) *American Psychologist*, 1123-1134.

9 Adam Joinson, 'Causes and Implications of Disinhibited Behaviour on the Internet' in Jayne Gackenback, editor, *Psychology and the Internet: Intrapersonal, Interpersonal, and Transpersonal Implications* (Academic Press, 1998) 43-60. Adam Joinson included a new chapter entitled 'Disinhibition and the Internet' in the second edition of the book (*Academic Press, 2nd edn, 2006*).

10 John Suler, 'The on-line disinhibition effect',

CyberPsychology & Behavior, June 2004, 7(3): 321-326; John R. Suler, 'The on-line clinical case study group: an e-mail model', *CyberPsychology & Behavior*, December 2001, 4(6): 711-722.

11 Available at <http://users.rider.edu/~suler/psycyber/psycyber.html>.

12 See, for example, 'Email's Dark Side: 10 Psychology Studies: Six Causes of On-line Disinhibition' in *Psyblog* at <http://www.spring.org.uk/2010/09/emails-dark-side-10-psychology-studies.php>. On-line disinhibition entered popular culture in 2004 as John Garbiel's *Greater Internet Fuckwad Theory*

(GIFT). John Gabriel is a character in a webcomic, *Penny Arcade*, written by Jerry Holkins and illustrated by Mike Krahulik.

13 A. D. J. Van Rensburg and others 'Contract' 5(1) *Law of South Africa* (2nd Replacement edition, 2010), paras 397-402.

14 This seems to be the meaning of the provisions. See Julien Hofman 'The meaning of the exclusions in s 4(3) and (4) of the Electronic Communications and Transactions Act 25 of 2002' 124 (2007) *South African Law Journal*, 262-268.

Another form of legislation that protects individuals from the effects of on-line disinhibition is the cooling-off period available to consumers who contract on-line

SMS did not satisfy the requirement of writing in section 37(4(a) of the Basic Conditions of Employment Act, even had he thought it more appropriate to require a written document for a valid resignation.

Those responsible for drafting the South African ECT Act clearly wanted to embrace the new technology and were following the advice in paragraph 52 of the Guide in allowing only a few exceptions. In the United Kingdom, the drafters of Electronic Communications Act 2000 took a different approach. Section 8(1) of that Act authorises ‘the appropriate Minister’ to make an order ‘for the purpose of authorising or facilitating the use of electronic communications or electronic storage (instead of other forms of communication or storage) for any purpose mentioned in subsection (2)’. Among the purposes subsection (2) mentions is ‘the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument’. What this means is that the appropriate Minister (as defined in sections 9 and 10 of the Electronic Communications Act) has the discretion to decide when and in what situations a data message, including an SMS, will satisfy the legal requirement of a written document.

Devolving to ministers the power to decide when a data message satisfies the legal requirement of writing allows a minister responsible for an area of law to decide if and when it is appropriate to allow a data message to satisfy the legal requirement of writing. The Electronic Communications Act also allows a minister to do this by statutory instrument without having to ask Parliament to amend the Act. (Section 9 does, however, require that an order be laid before Parliament.) Section 8 also, presumably, allows the appropriate Minister to make an order withdrawing recognition in cases where recognition had led to difficulties. Such an approach might make

it more difficult to know when a data message satisfies the legal requirement of writing but it does give government ministers more control over areas of law where on-line disinhibition might lead to difficulties.

Another form of legislation that protects individuals from the effects of on-line disinhibition is the cooling-off period available to consumers who contract on-line. This would apply to consumers who enter into contracts by SMS. In the United Kingdom the cooling-off period is provided by regulation 10 of the Consumer Protection (Distance Selling) Regulations 2000 (2000 SI 2334)). These regulations were made to give effect to the EU Distance Selling Directive 97/7/EC (OJ L144, 4.6.97, p.19) and they apply to all forms of distance selling. In South Africa section 44 of the ECT Act allows a consumer who buys on-line a cooling-off period of seven days. There was no equivalent protection for other South African consumers until section 16 of the Consumer Protection Act, Act 68 of 2008 allowed a consumer five business days to cancel a transaction entered into as a result of direct marketing. Section 44 of the ECT Act with its seven day cooling off period still applies to on-line consumers.

To return to *Sihlali’s* case and the status of an SMS, it must be asked whether, in the light of the evidence about on-line disinhibition and the reckless behaviour that can be associated with electronic communication, the framers of the South African ECT Act were not over-enthusiastic in their haste to extend the legal effectiveness of data messages.¹⁵ For many, resigning from a job calls for just as much consideration as buying a house or flat where the contracts still have to be in writing. Similarly, it seems curious that a consumer who buys on-line has time to reconsider while a person who sends a SMS resigning from a job is immediately bound.

¹⁵ Although see the translation of *Yang Chunning v Han Ying* (2005) *hai min chu zi* NO.4670, Beijing Hai Dian District People’s Court with a

commentary by Chen Jihong, *Digital Evidence and Electronic Signature Law Review*, 5 (2008) 103 – 105, in which an exchange of text messages over

mobile telephones was held to constitute a valid contract and included electronic signatures.

This is not to suggest that awareness of on-line disinhibition should lead to any general withdrawal of legal recognition for data messages as a whole or even for SMSs as satisfying the legal requirement of writing. It may be, however, that government departments responsible for legislation requiring writing should look at that legislation and ask whether it is appropriate in every case for a data message to satisfy the legal requirement of writing.

This paper has dealt mainly with the risks that on-line disinhibition brings to on-line contracting and how the law can minimise these risks. There is little that the law can do to protect users from themselves when they post defamatory comments on bulletin boards or send messages to web sites like that run by Twitter that could result in criminal liability. At most, a court could take on-line disinhibition into account in sentencing or as a form of diminished responsibility. In an action for defamation it could be argued that anyone who joins in any form of on-line discussion agrees the tone of the exchanges in that group. This defence, of course, would not be available against an

action brought by someone who was not part of the group.

On-line communication has brought many benefits. There are, however, risks in on-line communication that many do not appreciate. Some of these risks are already being addressed in campaigns about the dangers of infringing intellectual property, downloading computer malware or being taken in by a phishing scam. It should be possible for educators, employers and those who do business on-line to alert on-line communicators to the dangers of on-line disinhibition for contracting on-line and for any form of on-line communication.

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