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**KAAPSTAD KANTOOR | CAPE TOWN OFFICE**

Golden Mile Gebou | Golden Mile Building  
2de Vloer | 2<sup>nd</sup> Floor  
Durbanweg 265 | 265 Durban Road  
Bellville

PostNet Suite 229  
Privaatsak X7 | Private Bag X7  
Tygervalley  
7536

Tel: (021) 910-9400

Fax: (021) 919-4587

E-pos | E-mail: [cpadmin@seesa.co.za](mailto:cpadmin@seesa.co.za)

**AMENDMENTS DRAFTED IN ACCORDANCE WITH THE ELECTRONIC COMMUNICATION AND TRANSACTION ACT, NO 25 OF 2002**

FOR

**ERNIE ELS WINES (PTY) LTD**

A Company, duly registered in terms of the Companies Act

with registration number:

**2004/008991/07**

With main place of business:

**Annandale Road  
Stellenbosch  
7600**

## Introduction:

The purpose of this document is to suggest possible amendments to be made to current Consumer related transactions with regards to the Electronic Communication and Transaction Act.

## Objectives of the Electronic Communications and Transactions Act:

Objects of the Act are to enable and facilitate electronic communications and transactions in the public interest, and for that purpose to:

- **recognize the importance** of the information economy for the economic and social prosperity of the Republic;
- **promote universal access** primarily in underserviced areas;
- **promote the understanding** and, acceptance of and growth in the number of Electronic transactions in the Republic;
- **remove and prevent barriers** to electronic communications and transactions in the Republic;
- **promote legal certainty** and confidence in respect of electronic communications and transactions;
- **promote technology neutrality** in the application of legislation to electronic communications and transactions;
- **promote e-government services** and electronic communications and transactions with public and private bodies, institutions and citizens;
- ensure that electronic transactions in the Republic **conform to the highest international standards**;
- **encourage investment and innovation** in respect of electronic transactions in the Republic;
- **develop a safe**, secure and effective environment for the consumer, business and the Government to conduct and use electronic transactions;
- **promote the development of electronic transactions services** which are responsive to the needs of users and consumers;
- ensure that, in relation to the provision of electronic transactions services, **the special needs of particular communities** and areas and **the disabled** are duly taken into account;
- **ensure compliance with accepted International technical standards** in the provisions and development of electronic communications and transactions;
- **promote the stability** of electronic transactions in the Republic;
- **promote the development of human resources** in the electronic transactions environment;
- **promote SMMEs** within the electronic transactions environment;
- **ensure efficient use and management** of the .za domain name space; and
- **ensure that the national interest** of the Republic is not compromised through the use of electronic communications.

## **Application of the Electronic Communication and Transactions Act.**

- Subject to any contrary provision in this section, this Act applies in respect of any electronic transaction or data message.

## **Definitions applicable for the Electronic Communications and Transactions Act, No 25 of 2005**

In this Act –

**“Commission”** means The National Consumer Commission as amended by Schedule 1B of the Consumer Protection Act, 2008.

**“Addressee”** in respect of a Data Message, means a person who is intended by the originator to receive the data message, but not a person acting as an intermediary in respect of that data message.

**“Consumer”** means any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier.

**“Critical data”** means data that is declared by the Minister in terms of Section 53 to be of importance to the protection of the national security of the Republic or the economic and social wellbeing of its citizens.

**“Critical database”** means a collection of critical data in electronic form from where it may be accessed, reproduced or extracted.

**“Critical database administrator”** means the person responsible for the management and control of a critical database.

**“Automated Transaction”** means an electronic transaction conducted or performed, in whole or in part, by means of Data Messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment.

**“Data Message”** means data generated, sent, received or stored by Electronic means and includes:

- a) voice, where the voice is used in an automated transaction, and
- b) a stored record.

**“Electronic Communication”** means a communication by means of data messages.

**“Transaction”** means a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services.

## Areas of concern pertaining to

### Ernie Els Wines (Pty) Ltd

#### Consumer Protection Act (CPA) vs Electronic Communication and Transaction Act (ECTA)

##### 1) Disclosure of Price of goods or services – Section 23 CPA

- A retailer is **not required to display a price** for any goods that are displayed predominantly as a form of advertisement of the supplier, or of goods or services, in an area within the supplier's premises to which the public **does not ordinarily have access**.
- A price is adequately displayed to a consumer if, in relation to any particular goods, a written indication of the price, expressed in the currency of the republic, is:
  - a) **annexed or affixed to**, written, printed stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, label, package, reel, shelf or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale;
  - b) in any way represented in a manner from which it may **reasonably be inferred** that the price represented is a price applicable to the goods or services in question, or
  - c) **published in relation to the goods in a catalogue**, brochure, circular or similar form of publication available to that consumer, or to the public generally if –
    - **a time is specified** in the brochure, catalogue, circular or similar form of publication as the time after which the goods may not be sold at that price, and that time has not yet passed, or
    - **in any other case**, the catalogue brochure, circular or similar form of publication is dated, and in the circumstances may reasonably be regarded as not out of date.
    - the supplier must **not require** a consumer to **pay a price** for any goods or services that is **higher than the displayed price** for those goods or services or, **if more than one price is concurrently displayed**, higher than the lower or lowest of the prices so displayed.

**This section does not apply to a transaction if Section 43 of the Electronic Communications and Transactions Act applies to that transaction.**

##### Information to be provided – Section 43 of the Electronic Communications and Transactions Act

A supplier offering goods or services for sale, hire or for exchange by way of electronic transaction must disclose the following information to consumers on the website:

- its **full name** and **legal status**;
- its **physical address** and **telephone number**;
- its **web site address** and **e-mail address**;
- **membership** of any self-regulatory or accreditation bodies to which that supplier belongs or subscribes and the contact details of that body;
- **any code of conduct** to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;
- in the case of a legal person, its **registration number**, the names of its office bearers and its place of registration;
- the **physical address** where that supplier will receive legal service of documents;
- a sufficient description of the **main characteristics** of the **goods or services** offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;
- the **full price** of the goods or services, including **transport costs, taxes** and any other fees or costs;
- the **manner of payment**;

- any **terms of agreement**, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;
- the **time** within which the goods will be **dispatched or delivered** or within which the services will be rendered;
- the **manner** and **period** within which consumers can **access** and maintain a full record of the transaction;
- the **return, exchange** and **refund policy** of that supplier;
- any **alternative dispute resolution code** to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer;
- the **security procedures** and **privacy policy** of that supplier in respect of payment, payment information and personal information;

The supplier must provide a consumer with an opportunity-

- to **review** the entire electronic transaction;
- to **correct** any mistakes; and
- to **withdraw** from the transaction, before finally placing any order.

If a supplier fails to comply with the aforesaid provisions, the consumer may cancel the transaction within **14 days after receiving** the goods or services.

If a transaction is cancelled by a consumer within **14 days** after receiving the goods or services:

- the consumer must **return the performance** of the supplier or, where applicable, cease using the services performed; and
- the supplier must **refund all payments** made by the consumer minus the direct cost of returning the goods.

The supplier must utilize a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned.

The supplier is liable for any damage suffered by a consumer should the supplier fail to utilize a payment system that is sufficiently secure.

## 2) Sales Records – Section 26 CPA

- A supplier of goods or services must provide a written record of such transaction to the consumer to whom any goods or services are supplied.
- **This record must include at least the following information:**
  - a) the supplier's full name, or registered business name, and VAT registration number if any;
  - b) the address of the premises at which, or from which, the goods or services were supplied;
  - c) the date on which the transaction occurred;
  - d) a name or description of any goods or services supplied or to be supplied;
  - e) the unit price of any particular goods or services supplied or to be supplied;
  - f) the quantity of any particular goods or services supplied or to be supplied;
  - g) the total price of the transaction, before any applicable taxes;
  - h) the amount of any applicable taxes; and
  - i) the total price of the transaction including any applicable taxes.

**This section does not apply to a transaction if Section 43 of the Electronic Communications and Transactions Act applies to that transaction. Refer to Section 43 of the Electronic Communications and Transactions including Section 23 of the Consumer Protection Act.**

### 3) Right to restrict unwanted direct marketing – Section 11 CPA

The right of every person to privacy includes the right to—

- (a) **refuse to accept**;
- (b) require another person to **discontinue**; or
- (c) in the case of an approach other than in person, to **pre-emptively block**, any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.

To facilitate the realization of each consumer's right to privacy, and to enable consumers to efficiently protect themselves against the activities contemplated in subsection (1), a person who has been approached for the purpose of direct marketing may demand during or within a reasonable time after that communication that the person responsible for initiating the communication desist from initiating any further communication.

The Commission may establish, or recognize as authoritative, a registry in which any person may register a pre-emptive block, either generally or for specific purposes, against any communication that is primarily for the purpose of direct marketing.

A person authorizing, directing or conducting any direct marketing—

- (a) must implement appropriate procedures to facilitate the receipt of demands contemplated in subsection (2); and
- (b) must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to a person who has—
  - (i) made a demand contemplated in subsection (2); or
  - (ii) registered a relevant pre-emptive block as contemplated in subsection (3).

No person may charge a consumer a fee for making a demand in terms of subsection (2) or registering a pre-emptive block as contemplated in subsection (3).

The Minister may prescribe regulations for the operation of a registry contemplated in subsection (3).

### Unsolicited goods, services or communications – Section 45 of the Electronic Communications and Transactions Act

Any person who sends unsolicited commercial communications to consumers, must provide the consumer-

- with the **option to cancel** his or her subscription to the mailing list of that person; and
- with the **identifying particulars** of the **source** from which that person obtained the consumer's personal information, on request of the consumer.

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

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).

#### 4) Consumer's right to cooling-off period after direct marketing – Section 16 CPA

##### 1) This Section does not apply to a transaction if Section 44 of the Electronic Communications and Transactions Act applies to that transaction.

2) To the extent that this section applies to a transaction or agreement, it is in addition to and not in substitution for any right to rescind a transaction or a agreement that may otherwise exist in law between a supplier and a consumer.

3) A consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, or another recorded manner and form, within **five business days** after the later of the date on which –

- a) the transaction or agreement was **concluded**;
- b) the goods that were the subject of the transaction were **delivered** to the consumer.

4) A supplier must –

- a) return any payment received from the consumer in terms of the transaction within **15 business days** after –
  - (i) **receiving notice** of the recession, if no goods had been delivered to the consumer in terms of the transaction; or
  - (ii) receiving from the consumer **any goods** supplied in terms of the transaction; and
- b) **not attempt to collect any payment** in terms of a rescinded transaction, except as permitted in terms of Section 20(6).

#### Cooling-off period – Section 44 of the Electronic Communications and Transactions Act

A consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply-

- of goods **within seven days** after the date of the receipt of the goods; or
- of services **within seven days** after the date of the conclusion of the agreement.

The only charge that may be levied on the consumer is the direct cost of returning the goods.

The consumer is entitled to receive a **full refund** of monies paid **within 30 days** of the date of cancellation.

This section must not be construed as prejudicing the rights of a consumer provided or in any other law.

The cooling off period in terms of this Act **does not apply** to an electronic transaction -

- for **financial services**, including but not limited to, investment services, insurance and reinsurance operations, banking services and operations relating to dealings in securities;
- by way of **an auction**;
- for the supply of **foodstuffs**, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer;
- for services which began with the **consumer's consent** before the end of the seven-day "cooling-off" period;
- where the price for the supply of goods or services is dependent on **fluctuations in the financial markets** and which cannot be controlled by the supplier;
- where the goods-
  - are made to the **consumer's specifications**;
  - are clearly **personalized**;
  - by reason of their nature **cannot be returned**; or
  - are likely to **deteriorate or expire rapidly**;

- where **audio or video recordings** or computer software were unsealed by the consumer;
- for the **sale of newspapers**, periodicals, magazines and books;
- for the provision of **gaming and lottery** services; or
- for the **provision of accommodation**, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.

## 5) Consumer's rights with respect to delivery of goods or supply of services -Section 19 CPA

**Note:** Unless otherwise expressly provided or anticipated in an agreement, it is an **implied condition** of every transaction for the supply of goods or services that:

- a) the supplier is responsible to deliver the goods or perform the services –
  - (i) on the **agreed date** and at the **agreed time**, if any, or otherwise within a reasonable time after concluding the transaction or agreement;
  - (ii) at the **agreed place** of delivery or performance;
  - (iii) at the **cost of the supplier**, in the case of delivery of goods,
- b) the agreed place of delivery of goods or performance of services is the supplier's place of business, if the supplier has one, and if not, the supplier's residence,
- c) goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with what was stated previously.

**Note:** If an agreement does not provide a specific date or time for delivery of any goods or performance of any services, the supplier must not require that the consumer accept delivery or performance of the services at an unreasonable time.

**The consumer is regarded to have accepted delivery of any goods on the earliest of the following circumstances:**

- 1) when the consumer **expressly or implicitly communicates** to the supplier that the consumer has accepted delivery of such goods; or
  - 2) when the **goods have been delivered to the consumer** and the consumer does anything in relation to the goods that would be inconsistent with the supplier's ownership of them, or after a lapse of a reasonable time, the consumer retains the goods without intimating to the supplier that the consumer has rejected delivery of them.
- When a supplier **tenders delivery** to a consumer, of any goods, the supplier must, **on request**, allow the consumer a **reasonable opportunity** to **examine those goods** for the purpose of ascertaining whether the consumer is satisfied that the goods are of a **type** and **quality** reasonably **contemplated** in the **agreement**, and in the case of a **special –order** agreement, **reasonably conform** to the **material specifications** on the special order.
  - Should the supplier **fail** to supply the goods or services on a date, time or location other than as agreed with the consumer the consumer may do any of the following:
    - 1) **accept the delivery** or performance at that location, date and time;
    - 2) **require the delivery** or performance at the agreed location, date and time, if that date and time have not yet passed;
    - 3) **cancel the agreement** without penalty, treating any delivered goods or performed services as unsolicited goods or services.



**This section does not apply to a transaction if the performance of that transaction is governed by Section 46 of the Electronic Communications and Transactions Act**

**Performance – Section 46 of the Electronic Communications and Transactions Act**

The supplier must **execute the order within 30 days** after the day on which the supplier received the order, unless the parties have agreed otherwise.

Where a supplier has failed to execute the order within 30 days or within the agreed period the consumer may cancel the agreement with seven days' written notice.

If a supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable the supplier must immediately notify the consumer of this fact and **refund any payments within 30 days** after the date of such notification.

## GENERAL

The following provisions in terms of the Electronic Communications and Transaction Act will apply to  
Ernie Els Wines (Pty) Ltd

### Legal Recognition of data messages – Section 11 ECTA

Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a **data message**.

Information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message.

Information incorporated into an agreement and that is not in the public domain, is regarded as having been incorporated into a data message if such information is:

- a) **referred** to in a way in which a reasonable person would have **noticed** the reference there to and incorporation thereof, and
- b) **accessible** in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.

### Writing – Section 12 ECTA

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**.

### Signature – Section 13 ECTA

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.

Subject to the aforesaid, an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

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 method is used to **identify** the person and to indicate the person's **approval** of the information communicated, and
- 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.

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.

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:

- it is in the **form of a data message**, or
- 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.

#### **Original – Section 14 ECTA**

Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if:

1. the **integrity** of the information from the time when it was first generated in its final form as a data message, and
2. that information is capable of being **displayed** or **produced** to the person to whom it is to be presented.

For the purposes of point 1 above, the integrity must be assessed:

- by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display,
- in the light of the purpose for which the information was generated, and
- having regard to all other relevant circumstances.

#### **Admissibility and evidential weight of data messages – Section 15 ECTA**

In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence:

- on the mere grounds that it is constituted by a data message, or
- if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

Information in the form of a data message must be given **due evidential weight**.

In assessing the evidential weight of a data message, regard must be had to:

- the **reliability** of the manner in which the data message was generated, stored or communicated,
- the reliability of the manner in which the **integrity** of the data message was maintained,
- the manner in which its originator was **identified**, and
- any other relevant factor.

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 organization 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.

## Retention – Section 16 ECTA

Where a law requires information to be retained, that requirement is met by retaining such information in the form of a data message, if:

- the information contained in the data message is **accessible** so as to be usable for subsequent reference,
- the data message is in the format in which it was generated, sent or received, or in a format which can be **demonstrated** to represent accurately the information generated, sent or received, and
- the **origin** and **destination** of that data message and the date and time it was sent or received can be determined.

## Production of document or information – Section 17 ECTA

Where a law requires a person to produce a document or information, that requirement is met if the person produces, by means of a data message, an electronic form of that document or information, and if:

- considering all the relevant **circumstances** at the time that the data message was sent, the **method** of generating the electronic form of that document provided a reliable means of assuring the maintenance of the **integrity** of the information contained in that document, and
- at the time the data message was sent, it was reasonable to expect that the information contained therein would be **readily accessible** so as to be usable for subsequent reference.

The integrity of the information contained in a document is maintained if the information has remained complete and unaltered, except for:

- the addition of any **endorsement**: or
- any **immaterial change**, which arises in the normal course of communication, storage or display.

## Notarisation, acknowledgement and certification – Section 18 ECTA

Where a law requires a signature, statement or document to be notarized, acknowledged, verified or made under oath, that requirement is met if the **advanced electronic signature** of the person authorized to perform those acts is attached to, incorporated in or logically associated with the electronic signature or data message.

Where a law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, that requirement is met if the person provides a **print-out** certified to be a true reproduction of the document or information.

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**.

## Other Requirements – Section 19 ECTA

A requirement in a law for multiple copies of a document to be submitted to a single addressee at the same time is satisfied by the submission of a single data message that is capable of being reproduced by that addressee.

An expression in a law, whether used as a noun or verb, including the terms “**document**”, “**record**”, “**file**”, “**submit**”, “**lodge**”, “**deliver**”, “**issue**”, “**publish**”, “**write in**”, “**print**” or words or expressions of similar effect, must be interpreted so as to include or permit such form, format or action in relation to a data message unless otherwise provided for in this Act.

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.

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.

### **Automated transactions – Section 20 ECTA**

In an automated transaction:

- a) an agreement may be formed where an **electronic agent** performs an action required by law for agreement formation;
- b) an agreement may be formed where all parties to a transaction or either one of them uses an **electronic agent**;
- c) a party using an electronic agent to form an agreement is, subject to paragraph (d), presumed to be bound by the terms of that agreement irrespective of whether that person reviewed the actions of the electronic agent or the terms of the agreement;
- 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;
- e) no agreement is formed where a natural person interacts directly with the electronic agent of another person and has made a material error during the creation of a data message and-
  - i) the electronic agent did not provide that person with an opportunity to **prevent** or **correct** the error;
  - ii) that person **notifies** the other person of the error as soon as practicable after that person has learned of it;
  - iii) that person takes **reasonable steps**, including steps that conform to the other person's instructions to **return** any performance received, or, if instructed to do so, to destroy that performance; and
  - iv) that person has not used or received any material benefit or value from any performance received from the other person.

### **Non-exclusion – Section 48 ECTA**

Any provisions in an agreement which exclude consumers' rights as stipulated in Section 42 – 47, are null and void.

### **Complaints to Consumer Affairs Committee – Section 49 ECTA**

A consumer may lodge a complaint with the National Consumer Commission in respect of any non-compliance by a supplier in terms of this Act.

### Accreditation of authentication products and services – Section 37 ECTA

The Accreditation Authority may **accredit** authentication products and services in support of advanced electronic signatures.

A person falsely holding out its products or services to be accredited by the Accreditation Authority is guilty of an **offence**.

### Accreditation of foreign products and services – Section 40 ECTA

The Minister may recognize the accreditation or similar recognition granted to any authentication service provider or its authentication products or services in any foreign jurisdiction.

An authentication service provider falsely holding out its products or services to have been recognized by the Minister is guilty of an **offence**.

### Non-compliance with Chapter – Section 58(2) ECTA

A critical database administrator that fails to take the **remedial action** within the period stated in the notice is guilty of an offence.

### Appointment of cyber inspectors – Section 80(5) ECTA

A person who –

- **hinders** or **obstructs** a cyber inspector in the performance of his or her functions; or
  - **falsely** hold himself / herself out as a cyber inspector,
- is guilty of an **offence**.

### Power to inspect, search and seize – Section 82(2) ECTA

A person who **refuses** to co-operate or hinders a person conducting a lawful search and seizure in terms of this section is guilty of an offence.

### Unauthorized access to, interception of or interference with data – Section 86 ECTA

1. A person who **intentionally** accesses or intercepts any data without authority or permission to do so, is guilty of an offence.
2. A person who intentionally and **without authority** to do so, interferes with data in a way which causes such data to be modified, destroyed or otherwise rendered ineffective, is guilty of an offence.
3. A person who **unlawfully** produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilize such item to contravene this section, is guilty of an **offence**.
4. A person who **utilizes** any device or computer program mentioned in 3 above, in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.
5. A person who **commits** any act described in this section with the intent to interfere with access to an information system so as to constitute a denial, including a partial denial, of service to legitimate users is guilty of an **offence**.

## **Penalties – Section 89 ECTA**

A person convicted of an offence referred to in Sections 37(3), 40(2), 58(2), 80(5), 82(2) or 86(1), (2) or (3) is **liable to a fine or imprisonment for a period not exceeding 12 months.**

A person convicted of an offence referred to in Section 86(4) or (5) or Section 87 is **liable to a fine or imprisonment for a period not exceeding five years.**

## Areas of concern pertaining to

### Ernie Els Wines (Pty) Ltd

#### Application of the act to your WEBSITE:

The ECTA legislation applies to all websites, whether it is utilised for online shopping, catalogue marketing ordering of products /services or purposes or marketing your business

The website: [www.ernieelswines.com](http://www.ernieelswines.com) was visited and the following concerns were raised:

- On the “main page (home)” and under “contact us” please insert the following:
  - Full registered name of the business;
  - Registration number of the business;
  - Names of Director`s and Proprietor of the business.
- Under the “TAB”: “Buy our wine online”, the following requirements must be complied with:

#### Information to be provided – Section 43 of the Electronic Communications and Transactions Act

A supplier offering goods or services for sale, hire or for exchange by way of electronic transaction must disclose the following information to consumers on the website:

- its **full name** and **legal status**;
- its **physical address** and **telephone number**;
- its **web site address** and **e-mail address**;
- **membership** of any self-regulatory or accreditation bodies to which that supplier belongs or subscribes and the contact details of that body;
- **any code of conduct** to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;
- in the case of a legal person, its **registration number**, the names of its office bearers and its place of registration;
- the **physical address** where that supplier will receive legal service of documents;
- a sufficient description of the **main characteristics** of the **goods or services** offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;
- the **full price** of the goods or services, including **transport costs, taxes** and any other fees or costs;
- the **manner of payment**;
- any **terms of agreement**, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;
- the **time** within which the goods will be **dispatched or delivered** or within which the services will be rendered;
- the **manner** and **period** within which consumers can **access** and maintain a full record of the transaction;
- the **return, exchange** and **refund policy** of that supplier;
- any **alternative dispute resolution code** to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer;
- the **security procedures** and **privacy policy** of that supplier in respect of payment, payment information and personal information;



The supplier must provide a consumer with an opportunity-

- to **review** the entire electronic transaction;
- to **correct** any mistakes; and
- to **withdraw** from the transaction, before finally placing any order.

If a supplier fails to comply with the aforesaid provisions, the consumer may cancel the transaction within **14 days after receiving** the goods or services.

If a transaction is cancelled by a consumer within **14 days** after receiving the goods or services:

- the consumer must **return the performance** of the supplier or, where applicable, cease using the services performed; and
- the supplier must **refund all payments** made by the consumer minus the direct cost of returning the goods.

The supplier must utilize a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned.

The supplier is liable for any damage suffered by a consumer should the supplier fail to utilize a payment system that is sufficiently secure.

**Taking the above compliance criteria into consideration, we suggest that you incorporate the following terms and conditions under this tab:**

### **Delivery Policy**

**The Supplier** delivers free of charge within South Africa, either door-to-door or door-to-counter, depending on where you're located. If you reside outside of a main centre but would like door to door delivery – you can select that delivery option for a R\_\_\_\_\_ delivery fee.

During the purchase process, **The Supplier** will determine your delivery options based on your delivery address and postal code. For South African orders, irrespective of whether you select door to door delivery, or door to counter delivery, **The Supplier** will deliver within \_\_\_\_\_ working days depending on where you live.

### **Late Delivery**

The Electronic Communications and Transactions Act 25 of 2002 ("ECT Act") entitles you to cancel your purchase with 7 days' notice if the products you have purchased are not be delivered within the agreed delivery period as specified in the **The Supplier** terms and conditions. The product(s) in question must be returned to **The Supplier** in their original state, including all labels. Any such cancellation must be done by e-mail: \_\_\_\_\_ or fax \_\_\_\_\_ **The Supplier** will then refund you within 30 days after date of such notification.

## Stock shortages

Should a product you have ordered be:

1. temporarily unavailable, **The Supplier** will notify you thereof as well as the anticipated delay in delivery and, unless you agree to wait for such longer period for delivery, or accept delivery of another product instead.
2. permanently unavailable, **The Supplier** will notify you and, unless you agree to accept another product instead, **The Supplier** will issue a refund in respect of that product to you.

## Non-defective products (your right to return due to cooling-off right)

Save for certain exceptional cases (including purchases of made-to-order products, products likely to deteriorate, foodstuff, beverage, goods for everyday consumption, goods that the price depends on fluctuation, unsealed audio or video recordings, newspapers, magazines, books and periodicals, you are entitled to return any purchase concluded by **The Supplier** within 7 calendar days of the product(s) being delivered. In order to obtain a purchase price refund, the product(s) being returned must be sent back to **The Supplier** in accordance with the return procedure set out below.

Consequently, if upon receiving your purchase you are not satisfied with your choice of product(s) and wish to return it for a refund as aforesaid, please retain the product(s)' original packaging and do not use product.

If the incorrect product is delivered to you by mistake (i.e. it is not the product you purchased), please do not remove the product from its original packaging or try the product on at all. Please promptly contact **The Supplier** to notify **The Supplier** thereof, so that we can resolve the mistake by arranging to collect such product from you and deliver the correct product to you as quickly as possible.

## Defective products

### General warranty:

If, within 6 months after delivery of a product to you:

You find that the product(s) is defective/faulty, unsuitable for the purpose generally intended (or otherwise expressly indicated by **The Supplier** at time of purchase), or not legal or reasonably durable (based on the circumstances and product type) ("defective"); and –

you arrange to return such product to **The Supplier** for inspection in accordance with the returns procedure in below, and the product is subsequently found to indeed be defective, you are entitled to either –

(a) be fully refunded, or (b) have the product repaired or replaced at **The Supplier** expense.

If the product is found NOT to be defective, you will NOT be entitled to any repair, replacement or refund but will instead be liable for the costs incurred in having such product returned to **The Supplier** and then redelivered to you.

When is a product defective? Please note: the following are examples of things which will NOT be regarded as defects and will NOT entitle you to any repair, replacement or refund under the general warranty above: faults resulting from normal wear and tear; damage arising from incorrect usage of the product, misuse and abuse and not following instructions of the product.

### **Exclusions**

You may not under any circumstances return the following:

Non-defective products that have been "made to order". (You will be notified in the relevant Online Sale if the products are "made to order".)

For hygiene reasons, due to their nature.

Products that you or any other person has altered, repaired, incorporated or added to where such alteration, repair, incorporation or addition has not been authorised by **The Supplier**.

### **Return procedure to be followed**

Contact the supplier by e-mail \_\_\_\_\_ or fax \_\_\_\_\_ and specify the following:

- the reason for the return;

-the date the product(s) was bought and the date the product(s) was delivered including a reference number or proof of purchase;

-the banking details for the refund (if applicable)

-Do not return the product without written approval of **The Supplier**.

-The supplier will either arrange collection of the return product(s) or give you instructions of how the product(s) must be returned.

-If the return is accepted by **The Supplier** as a valid return, any refunds (depending on the circumstances as explained above) will be made by EFT into the bank account selected by you.

## **Website Terms and Conditions**

It is also recommended that a “**Terms and Conditions**” Tab must be included on the website that will have the following information:

### **Acceptance of Terms**

The Supplier permits the use of this Website subject to these terms and conditions ("the Terms and Conditions"). By using this Website in any way, you shall be deemed to have accepted all the Terms and Conditions unconditionally. You must not use this Website if you do not agree to the Terms and Conditions. Your use of any accommodation offered by us will also be subject to applicable provisions of the Terms and Conditions. In the event of any conflict between the Terms and Conditions and any other conditions stipulated elsewhere, including in one of our The Suppliers, the Terms and Conditions as contained herein will prevail.

### **Use of the Website**

The contents of this Website, including any content, information, software, icons, text, links, graphics, lay-outs, images, sound clips, trade names, logos, trademarks and service marks are protected by law, including but not limited to copyright and trade mark law, and are owned by or licensed to The Supplier. No license to or right in any of such contents is granted to or conferred upon you. Any unauthorized use, distribution or reproduction of the said contents is prohibited.

By entering this Website, you agree that you will not use any device, software or other instrumentality to interfere or attempt to interfere with the proper working of the Website and that you will not take any action that imposes an unreasonable or disproportionately large load on our infrastructure. In addition, you agree that you will not use any robot, spider, other automatic device, or manual process to monitor or copy the pages of the Website or the content contained herein, without the prior written consent from an authorized The Supplier representative (such consent is deemed given for standard search engine technology employed by Internet search websites to direct Internet users to this Website). You may not use the Website to distribute material which is defamatory, offensive, and unlawful or contains hate speech.

### **Disclaimer**

While The Supplier takes reasonable measures to ensure that the contents of this Website are accurate and complete, The Supplier makes no representations or warranties, whether express or implied, as to the quality, timeliness, operation, integrity, availability or functionality of this Website or as to the accuracy, completeness or reliability of any information on this Website.

The Supplier reserves the right to make changes, corrections and/or improvements to the information and to the products and programs described in such information, at any time without notice.

The Supplier will use reasonable endeavours to maintain the availability of the Website, except during scheduled maintenance periods, and reserves the right to discontinue providing the Website or the service or any part thereof with or without notice to you. Any person who accesses this Website or relies on this Website or on the information contained in this Website does so at his or her own risk.

In addition to the disclaimers contained elsewhere in these Terms and Conditions, The Supplier also makes no warranty or representation, whether express or implied, that the information or files available on this Website are free of viruses, spyware, malware, trojans, destructive materials or any other data or code which is able to corrupt, destroy, compromise or jeopardise the operation, stability, security functionality or content of your computer system, computer network, hardware or software in any way. The Supplier does not accept any responsibility for any errors or omissions on this Website.

### **Privacy Policy**

The Supplier has a strong commitment to providing excellent service to all of our customers and visitors of this Website, including respecting concerns about privacy. The Supplier will explicitly ask when we need information that personally identifies you or allows us to contact you ("personal information"). Generally this information is requested when making reservations; when requesting a particular service. You agree to provide accurate and current information, and not to impersonate or misrepresent any person or entity or falsely state or otherwise misrepresent your affiliation with anyone or anything.

The purposes for which The Supplier will use your personal information are as follows: to transact with you via the website or email regarding purchase and reservation, to provide services to you via our website; to inform you of new features, services, special offers and products (provided you have consented to receiving such marketing material); to enable us to process, validate and verify reservations and requests for services and for the purposes for which you specifically provided the information; to improve your experience on our website.

The Supplier shall be entitled to disclose personal information if required to do so (a) to comply with applicable law or with legal process served on The Supplier; (b) to protect and defend the rights or property of The Supplier, and (c) for the purposes of distributing same to various employees and/or third parties who assist The Supplier in providing services to you and thus need to know your personal information in order to render a proper and efficient service to you. We will ensure that all such employees and/or third party service providers having access to your personal information are bound by appropriate and legally binding confidentiality and non-use obligations in relation to your personal information.

You are aware that information and data is automatically collected through the standard operation of the Internet servers and through the use of "cookies." "Cookies" are small text files a website can use to recognise repeat users, facilitate the user's ongoing access to and use of the website and allow a website to track usage behaviour and compile aggregate data that will allow content improvements and targeted advertising. Cookies are not programs that come onto your system and damage files. Generally, cookies work by assigning a unique number to you that has no meaning outside the assigning site. If you do not want information collected through the use of cookies, there is a simple procedure in most browsers that allows you to deny or accept the cookie feature; however, you should note that cookies may be necessary to provide you with certain features (e.g., customized delivery of information) available on our Websites.

WHILST THE SUPPLIER IS OF INTENT TO TAKE REASONABLE MEASURES TO KEEP PERSONAL INFORMATION ABOUT YOU CONFIDENTIAL, IT SHALL HOWEVER NOT BE LIABLE FOR ANY LOSS OR DAMAGE, HOWSOEVER ARISING, SUFFERED AS A RESULT OF THE DISCLOSURE OF SUCH INFORMATION.

The Supplier will:

- treat your personal information as strictly confidential;
- take appropriate technical and organisational measures to ensure that your personal information is kept secure and is protected against unauthorised or unlawful processing, accidental loss, destruction or damage, alteration, disclosure or access;
- promptly notify you if we become aware of any unauthorised use, disclosure or processing of your personal information;
- provide you with reasonable evidence of our compliance with our obligations under this policy on reasonable request; and
- upon your request, promptly return or destroy any and all of your personal information in our possession or control.

We will not retain your personal information longer than the period for which it was originally needed, unless we are required by law to do so, or you consent to us retaining such information for a longer period.

### **Linked Third-Party Website and Third-Party Content**

This Website may contain links or references to other websites outside of our control, including those of advertisers. These Terms and Conditions do not apply to those websites and The Supplier is not responsible for the practices and/or privacy policies of those sites or the cookies those sites use. In addition, because The Supplier has no control over such external sites and resources, you acknowledge and agree that The Supplier is not responsible for ensuring the availability of such external websites or resources and does not endorse and is not responsible or liable for any content, advertising, products, or other materials on or available from such websites or resources.

Your use of such other websites is entirely at your own risk and we are not responsible for any loss, expense, claim or damage, whether direct, indirect or consequential, arising from your use of such other websites or your reliance on any information contained on those websites.

### **Permission for Hyperlinks, Deep Linking, Crawlers and Metatags**

Nobody may establish a hyperlink, frame, metatag or similar reference, whether electronically or otherwise (collectively referred to as linking), to this Website or any subsidiary pages before receiving the prior written approval of an authorised representative of The Supplier, which may be withheld or granted subject to such conditions The Supplier may specify from time to time. Furthermore, this Website or any part hereof may not be "framed" or "deep linked" in any way whatsoever. This Website may from time to time contain message boards which allow users to comment on their experience at The Supplier. At times those comments may contain references to matters not related to The Supplier. Those references do not necessarily represent the views of The Supplier.

### **Limitation of Liability**

THE SUPPLIER SHALL IN NO WAY BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL INJURY, LOSS OR DAMAGES WHICH MIGHT ARISE FROM YOUR USE OF, OR RELIANCE UPON, ANY MATERIAL OR CONTENT CONTAINED IN THE WEBSITE OR ANY LINKED WEBSITE, OR ANY INABILITY TO USE THE WEBSITE, OR ANY UNLAWFUL ACTIVITY ON THE WEBSITE CAUSED BEYOND THE REASONABLE CONTROL OF THE SUPPLIER.

YOU HEREBY INDEMNIFY THE SUPPLIER AGAINST ANY LOSS, CLAIM OR DAMAGE WHICH MAY BE SUFFERED BY YOURSELF OR ANY THIRD PARTY ARISING IN ANY WAY FROM YOUR USE OF THIS WEBSITE OR THE RECEIPT BY YOU OF AN ELECTRONIC MAIL FROM THE SUPPLIER OR ONE THAT PURPORTS TO EMANATE FROM THE SUPPLIER, UNLESS THE LOSS, CLAIM OR DAMAGE ARISES AS A RESULT OF THE GROSS NEGLIGENCE OF THE SUPPLIER.

### **Changes to these Terms and Conditions**

The Supplier reserves the right to update and/or amend the Terms and Conditions from time to time and without any notice, and you are accordingly encouraged to check the Website regularly. Any such change will only apply to your use of this Website after the change is displayed on this Website. If you use this Website after such updated or amended Terms and Conditions have been displayed on this Website, you will be deemed to have accepted such updates or amendments.

### **Termination**

The Supplier may in its sole discretion terminate, suspend and modify this Website and/or your use of this Website, with or without notice to you. You agree that The Supplier will not be liable to you in the event that it chooses to suspend, modify or terminate this Website or your use of this Website.

## **Governing Law**

The Terms and Conditions shall be governed and interpreted in accordance with the laws of the Republic of South Africa and application for any of the services offered on these pages or sites will constitute your consent and submission to the jurisdiction of the South African courts regarding all proceedings, transactions, applications or the like instituted by either party against the other, arising from any of the terms and conditions pertaining to such services.

**Furthermore, if any marketing emails or sms's are sent to consumers they must be given the opportunity to opt out or option to cancel and when sending these data messages, the identifying particulars of the source from which the consumers personal info was obtained, must be supplied.**

### **Application of the act to the manner in which you conduct transactions:**

**The following preventative measures must be implemented in your business in order to limit your risks in the event of a consumer declaring a dispute in terms of ECTA:**

#### **- TELEPHONIC ORDERS/PRICES ISSUED**

**It is advisable to minimize this manner of communication due to the fact that a UNRECORDED telephonic conversation will lead to HE SAID – SHE SAID situations. This will lead to complications with proving your case.**

**If the major part of your business is conducted telephonically, please consider the following in order to limit risks:**

**(a) Implementing a recording system whereby all telephonic conversations are recorded for ease of reference;**

**(b) If the above is not an option , each and every telephonic order, quotation and conversation needs to be followed up with an e mail/fax or some other written form whereby the contents of the conversation is confirmed.**

**Taking the above into account, it is therefore clear that this is not the ideal way of conducting business unless you have systems in place limiting your risks.**

#### **- QUOTATIONS**

**Regardless of the manner in which the quotations are sent, the TERMS AND CONDITIONS must always accompany same.**

**No quotation must be accepted unless the client has signed same with his full name, signature and contact details.**

**Example 1:**

**If a quotation is faxed, the client must sign same and return by hand or per fax.**



**Example 2:**

If a quotation is e-mailed – the client must reply on that e mail and specifically mention the fact that he accepts the quotation and terms and conditions.

The alternative to the above is to advise customers to sign the documents with an electronic signature, which is a very costly exercise.

**Conclusion**

The amendments have been compiled with the objective of guiding **Ernie Els Wines (Pty) Ltd** to become compliant with the stipulations of the Consumer Protection Act, No 68 of 2008.

**Resolution**

The amendments were accepted in terms of the status of *The Business* at a meeting of Shareholders on ..... (date of meeting).

**Date:** \_\_\_\_\_

**Signature:** \_\_\_\_\_

**Initials & Surname:** \_\_\_\_\_

**Designation:** \_\_\_\_\_